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STANFORD UNIVERSITY
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A TREATISE

ON THE LAW OF

INSTRUCTIONS TO JURIES

IN CIVIL AND CRIMINAL CASES

WITH FORMS OF INSTRUCTIONS APPROVED BY THE COURTS

BY THE
EDITORIAL STAFF OF THE WEST PUBLISHING COMPANY
UNDER THE SUPERVISION OF
HENRY E. RANDALL

VOLUME III

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INSTRUCTIONS TO JURIES

CHAPTER XCVIII

CRIMINAL LAW

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A. Elements of Crime and Defenses

§ 1930. Necessity of proof of motive

In prosecution for homicide, see post, § 2784.
Presumption from absence of evidence of motive, see post, § 1959.

§ 1930(1). Indiana

The jury are instructed that proof of a motive to commit the crime is not indispensable nor essential to conviction. While a motive may be shown as a circumstance to aid in fixing the crime on the defendant, yet the state is not required to prove a motive on the part of the defendant in order to convict; and the jury would be justified in inferring a motive from the commission of the crime itself, if the commission of the crime by the defendant

is proved beyond every reasonable doubt, as required by law, and you find that the defendant, at the time of the commission of said act, was sane, and there were no extenuating circumstances.[1]

§ 1930(2). Kansas

The jury are instructed that the presence or absence of a motive for the alleged commission of an alleged crime is always an important ingredient for the consideration of the jury in determining the guilt or the innocence of the person charged, yet when the accused is shown beyond a reasonable doubt, even if only by circumstantial evidence, to be the perpetrator of the alleged crime, it is not necessary that there be proof of motive, there is then no occasion for explaining the reason of his acts. Every man of sane mind is presumed to intend the reasonable and natural consequences of his own acts.[2]

§ 1930(3). Nebraska

You are further instructed that it is not indispensable that a motive be shown for the commission of a crime, but the existence or nonexistence of such motive is a question of fact, which must be determined by the jury from a consideration of all of the evidence in the case, and as a circumstance tending to show the guilt or innocence of the accused.[3]

§ 1930(4). North Carolina

With regard to the question of motive for the commission of crime, the court further instructs you that if the evidence in this case fails to show the prisoner's motive for killing the deceased, this is a circumstance in his favor which the jury should consider along with the other evidence, but if the jury finds from all the evidence, direct and circumstantial, that the prisoner committed the crime charged, the jury are at liberty to find the prisoner guilty, whether any motive was apparent or not, because, while motive in the commission of a crime is a material element for a jury in considering it, yet if it is shown beyond a reasonable doubt that the crime was committed, it is not indispensable that the motive should be apparent to sustain a conviction.[4]

§ 1931. Duress—Coercion of wife by husband

Justification of homicide on ground of duress, see post, § 3020.

§ 1931(1). Kansas

The jury are instructed that in the eye of the law a wife who voluntarily and knowingly aids and assists her husband in the

[1] Wheeler v. State, 63 N. E. 975, 158 Ind. 687. To same effect, see Morgan v. State (Ind.) 130 N. E. 528.

[2] State v. Dull, 74 P. 235, 67 Kan. 793.

[3] Lillie v. State, 100 N. W. 316, 72 Neb. 228.

[4] State v. Wiseman, 101 S. E. 629, 178 N. C. 784.

commission of a murder is equally guilty with him of the commission of the crime. A wife who kills another in the presence and under the constraint and coercion of her husband, the act of killing being the result of the husband's constraint and control of her will, and not the result of her own volition, is excusable for the act in the eye of the law, and cannot be punished therefor. If the killing, however, is voluntary upon her part, and the result of the independent action of her own will, although done in the presence or at the suggestion of her husband, she is held to the same measure of responsibility as any other person.[5]

§ 1931(2). Massachusetts

You are instructed that this case is like all others that you have had in this respect. The government is bound to prove beyond any reasonable doubt all the elements that are necessary to be proved in order to make out the guilt of the defendant upon each of these counts—all that that involves. The larceny of the property and the liability of the defendant, if she is a married woman, and if with her husband at the time of the larceny, if there was any, under the first count—the government has to prove that beyond a reasonable doubt. It is for you to say whether the evidence satisfies you beyond a reasonable doubt of the guilt of the defendant under the rules of law as I have stated them to you.[6]

§ 1931(3). North Carolina

The court instructs the jury that, if you find that the acts leading up to the abduction charged were committed in the presence of the husband of the defendant, and that the actual taking of ——— away from ——— was done by the defendant and her husband, the husband always being present, then the law presumes that the part taken by the defendant was under the coercion of her husband, and, unless the state has satisfied you that this presumption is not true, then you should find that the defendant is "not guilty." Should you find that the act was done under the coercion of the husband in this indictment against the wife, it is not necessary to show that the act was done literally in sight of the husband, but it is sufficient to raise the presumption it was done near enough to her husband to be under his immediate control or influence. If the jury find from the evidence that the defendant committed the act or acts for the commission of which she stands indicted, in the presence of her husband or near enough to him to be under his immediate control or influence, then the law raises the prima facie presumption that she acted under the coercion of her husband, and,

[5] State v. Hendricks, 4 P. 1050, 32 Kan. 559.

[6] Commonwealth v. Adams, 71 N. E 78, 186 Mass. 101.

if the jury further find that the state had not rebutted this prima facie presumption, the jury should find the defendant not guilty.[7]

§ 1932. Entrapment—Employment of decoy letters

The jury are instructed that if, at the time the said decoy letter or letters were mailed to the defendants, or one of the defendants, the said defendants were engaged in the criminal practice charged in the indictment, and the said defendants, in response to said alleged decoy letters, mailed one or both of the letters set forth in the indictment in answer to such decoy letters, or either of them, in order to execute or carry out such conspiracy, or in an attempt so to do, then the use of such decoy letters and the answers thereto can lawfully be received as evidence to prove said conspiracy. A government official cannot conspire with another person to violate the laws of the United States for the purpose of getting such person convicted of a crime. The conspiracy with which the defendants are charged must be proven to exist independently of any inducement to enter therein by any government official. In other words, if the conspiracy existed, it does not matter what the government officers did in order to procure evidence to prove it.

You are instructed that the fact that the letters alleged in the indictment were in reply to such decoy letters is no defense in this action. You are further instructed that a government officer, suspecting that a person or persons may be engaged in a business in violation of the laws of the United States, has a right to seek information under an assumed name, directly from such person or persons so suspected; that if such suspected person or persons respond to such inquiry for such information, and by so responding violates a law of the United States by using the mails to convey such information, which use of the mails is prohibited by law, then such person or persons so using the mails cannot, when indicted for that offense, set up that he would not have violated the law if the inquiry had not been made of him by the government official or through the procurement of the government official.[8]

§ 1933. Defense of alibi

Sufficiency of evidence on issue of defense of alibi, see post, § 2001.

§ 1933(1). Delaware

You are instructed that defendant denies that he had any part in the commission of the offense; and he has introduced evidence to establish an alibi, by which is meant that he was not present at the time and place of the commission of the offense. If he was not

[7] State v. Noell, 72 S. E. 590, 156 N. C. 648.

[8] Holsman v. United States (C. C. A. Cal.) 248 F. 193, 160 C. C. A. 271.

present and had no part in committing the offense, your verdict as to him should be not guilty.[9]

§ 1933(2). South Carolina

The jury are instructed that the defendant, by his plea, denies the charge in the indictment, and as an affirmative defense sets up the plea of an alibi, which is that he was at some other place than that at which the crime was committed at the time it was committed, and for that reason could not have committed the crime. For instance, if A. is charged here with having committed a crime in the city of ——— to-day, and he could show that he was in the city of ——— at the time of the commission of the crime by the preponderance of evidence, then that is held in law to be a good plea, for the reason that it is impossible for one man to be in two places at one and the same time, and, that being the case, he could not have committed the crime unless he was present.[10]

§ 1934. Same—Where conspiracy is alleged

One of the defenses claimed in this case is what is known in law as an alibi; that is, that the defendant was not present at the time of the commission of the offense charged in the first and second counts of the information, and had no personal participation therein. This is a good defense ordinarily, for, if the defendant, was absent from the scene of the perpetration of the crime, and had nothing whatever to do with it, this fact of itself would be a perfect defense; but the state alleges a conspiracy upon the part of the defendants, who were jointly charged, to do the crime of burglary and larceny, as charged in the first and second counts of the information, and if it has been made to appear from the evidence in this case, beyond a reasonable doubt, that the defendants B., M., or B., M., and others, had entered into an agreement or conspiracy the object of which was to enter the bank building described in the information and steal, take, and carry away the contents of the safe therein, and that the said defendant and M., or the said defendant and M., with others or some one or more of those participating in the conspiracy, did actually enter the said bank by breaking into the building, and while therein did open the safe therein situated with nitroglycerine, dynamite, or some other explosive, and did take, steal, and carry away the property of said bank as charged in the first and second counts of the information, then I instruct you that it would make no difference whether the defendant was personally present or not, for each one of those participating in the agreement or conspiracy would be just as guilty of the commission of the crime as if they were personally present

[9] State v. Lapista (Gen. Sess.) 105 A. 676.

[10] State v. Aughtry, 26 S. E. 619, 49 S. C. 285.

and participating in everything that was done to accomplish its purpose.[11]

§ 1935. Defense of former jeopardy

§ 1935(1). Delaware

You are instructed that the defendant is indicted for pointing a pistol at one ———. He has interposed as a plea in bar to that indictment that he was heretofore convicted of the offense with which he is now charged in a trial that was had before a justice of the peace, for an assault and battery, and that, having been so convicted, he is not liable to be convicted in this case; nor may he be a second time put in peril or punished for the same offense. In order to avail himself of that plea, we will state to you what the law requires: To plead autrefois convict, or a former conviction, with effect, the crime must be the same in fact for which the defendant was before convicted, or must be necessarily included in the former. The defendant claims that it was included in the former, that in the trial for assault and battery before the justice this whole matter was gone into, and that this offense was included. If you find as a matter of fact, from the evidence which has been adduced in this case, that the pointing of this pistol was included and was a necessary part of the assault then alleged to have been made by defendant upon ———, then the defense of former conviction would avail, and your verdict should be for the defendant; otherwise, your verdict should be for the state. You are only impaneled in this case to ascertain whether or not, from the facts and the law as laid down to you by the court, the defendant has been convicted of the same offense before, or of an offense including this, and, if he has, your verdict should be for him. If he has not, as the facts are disclosed before you and upon the law as we have stated it to you, then your verdict should be that he has not been so convicted.[12]

§ 1935(2). Texas

You are instructed that, if you believe from the evidence that the defendant's plea of former acquittal is true, you need not look further into the case, but return a verdict as follows: "We, the jury, find that the defendant's plea of former acquittal is true, and find the defendant not guilty." But if you should believe from the evidence, beyond a reasonable doubt, that the defendant's plea of former acquittal is not true, then you will determine whether or not the defendant is guilty as charged; and, if you find the defendant

[11] State v. Berger, 124 P. 400, 87 Kan. 479.

[12] State v. Day, 58 A. 946, 5 Pennewill, 101.

guilty, from the evidence, beyond a reasonable doubt, the form of your verdict will be as follows.[13]

§ 1936. Same—Identity of offenses

You are instructed that defendant has not only entered a plea of not guilty, but has also entered in this case a plea of former conviction, viz., the conviction at the former ——— term of this court, ———, for the larceny of a brown gelding, the property of this prosecuting witness, ———. If the gelding for the larceny of which he is prosecuted in this case is the same animal for the larceny of which he was prosecuted in the former case, then the conviction in this former case is a bar to a prosecution in this case, and if you so find then your verdict should be for the defendant upon this issue. But if you find that the prosecution in this case is for the larceny of a different gelding than the one for the larceny of which he was convicted in the former case, then your verdict on the issue of former conviction should be for the state on that issue.[14]

§ 1937. Same—Good faith of former prosecution

§ 1937(1). Arkansas

You are instructed that if the prosecution of the defendant before the justice of the peace was begun, and the purported trial before him had, under circumstances showing collusion, or under circumstances showing intention merely to elude prosecution by the state, an acquittal of defendant under such circumstances would be no bar to an indictment for the same offense.[15]

§ 1937(2). Wisconsin

You are instructed that, if the defendant in this case procured the complaint in the case, which has been pleaded in bar, to be made by a person acting in collusion with him, or with the attorney of the defendant, with the defendant's sanction, and with the expectation upon the part of the defendant of deriving some benefit from it by getting off better than by another prosecution, or thinking to avoid a prosecution which he thinks may be more serious to him, or with a design to avoid another prosecution, the result of which he thinks might be more serious to him, then it is no bar.[16]

[13] Stone v. State, 85 S. W. 808, 47 Tex. Cr. R. 575.

[14] State v. Deal, 70 P. 534, 43 Or. 17.

[15] State v. Caldwell, 66 S. W. 150, 70 Ark. 74.

[16] McFarland v. State, 32 N. W. 226, 68 Wis. 400, 60 Am. St. Rep. 867.

B. Capacity to Commit Crime and Responsibility Therefor

1. *Insanity*

§ 1938. What constitutes insanity which will relieve from consequences of act otherwise criminal

Insanity as defense in prosecution for homicide, see post, § 2786.

§ 1938(1). Connecticut

The jury are instructed that, to be a subject of punishment, an individual must be a moral agent; must have mind and capacity, must have reason and understanding, enough to enable him to judge of the nature, character and consequences of the act charged against him, that the act is wrong and criminal, and that the commission of it will properly and justly expose him to penalties. He must not be overcome by an irresistible impulse arising from disease. The law can give no full and precise definition of sanity or of insanity; each is a question of fact, and the jury should be satisfied beyond a reasonable doubt, before convicting a man of crime, that he is of sound mind—a sane man; if insane, he should be acquitted. Every person of mature years is presumed to be competent to commit crime, and to be of sound mind. If a person charged with crime be shown to have been insane a short time before the commission of the act, the evidence should show sanity at the time, or the jury should acquit.[17]

§ 1938(2). Kentucky

The jury are instructed that the law presumes every man sane until the contrary is shown by evidence, and before the defendant can be excused on the ground of insanity, the jury must believe from all the evidence that the defendant was at the time of the commission of either of the offenses referred to, if either was committed, without sufficient reason to know what he was doing, or had not sufficient reason to know right from wrong, or that as a result of mental unsoundness he had not then sufficient will power to govern his actions by reason of an insane impulse which he could not resist or control.[18]

§ 1938(3). Missouri

The jury are instructed that the law does not excuse unless the insanity is of such a character that it actually renders the person incapable of distinguishing between right and wrong in respect to the particular act charged, at the time of its commission. But to establish insanity as a defense, positive or direct testimony is not required, nor is it necessary to establish this defense beyond a

[17] State v. Johnson, 40 Conn. 136.

[18] Thompson v. Commonwealth, 159 S. W. 829, 155 Ky. 333.

reasonable doubt. It is sufficient if the jury are reasonably satisfied by the weight or preponderance of the testimony that the accused was, at the time he committed the act, if he did commit it, incapable of distinguishing between right and wrong. Wherefore the court instructs the jury that if they believe from the evidence that, at the time the defendant did the killing (if you find that he did the killing) charged in the information, the defendant was so perverted and deranged in one or more of his mental or moral faculties as to be incapable of understanding at the time he killed ——— (if you find that he did kill her) that such killing was wrong, and that he (the defendant) at the time was incapable of understanding that this act of killing was a violation of the laws of God and society, if the jury find that he was so insane, they should find him not guilty. The law does not excuse unless the derangement is so great that it actually renders the person incapable, at the time of its commission, of distinguishing between right and wrong in respect to the particular act charged and proved against him. Whether the hypothetical case upon which the opinions of the experts are based corresponds to and coincides with the case of the defendant, the jury alone must determine, in the light of the testimony presented on this trial. And whenever it supposes facts not given in evidence, it should be disregarded by the jury.[19]

You are instructed that insanity is a physical disease located in the brain, which disease so perverts and deranges one or more of the mental and moral faculties as to render the person suffering from this affliction incapable of distinguishing right from wrong, in reference to the particular act charged against him, and incapable of understanding that the particular act in question was a violation of the laws of God and society. Wherefore, the court instructs the jury that if they believe and find from the evidence that the defendant, at the time he did the killing alleged in the information, was so perverted and deranged in one or more of his mental and moral faculties as to be incapable of understanding at the time he killed ——— that such killing was wrong, and that he (the defendant) at the time was incapable of understanding that this act of killing was a violation of the laws of God and society, they should find him not guilty.[20]

The court further instructs you that you must determine from all the facts and circumstances proven in the case whether or not the defendant was sane or insane at the time of the shooting of ———. If you find from the evidence that the defendant at the time of the shooting had the capacity to distinguish between right and wrong as to the particular act with which he stands charged,

[19] State v. Coats, 74 S. W. 864, 174 Mo. 396.

[20] State v. Paulsgrove, 101 S. W. 27, 203 Mo. 193.

that he knew his act was criminal and wrong and would deserve punishment, then in law he had a criminal intent, and is not so far insane as to be exempt from responsibilities. On the other hand, if you find from the evidence that at the time of the shooting of ——— the defendant was insane or of unsound mind, and by reason thereof was not conscious of what he was doing when he fired the pistol at ———, that he did not know the nature of the act he was about to commit when he fired the pistol, that he did not know the act was criminal and would subject him to punishment, that he had no capacity to distinguish right from wrong, as to the act with which he stands charged, or that he was impelled by an insane impulse, and his powers were so impaired by disease that he could not restrain from doing the act, then the defendant is not responsible in law, and you should find him not guilty.[21]

§ 1938(4). Montana

You are instructed that if, from all the evidence in the case, you believe, beyond a reasonable doubt, that the defendant committed the crime of which he is accused, in manner and form as charged in the information, and that at the time of the commission of such crime the defendant knew that it was wrong to commit such crime, and was mentally capable of choosing either to do or not to do the act or acts constituting such crime, and of governing his conduct in accordance with such choice, then it is your duty, under the law, to find him guilty, even though you should believe from the evidence that at the time of the commission of the crime he was not entirely and perfectly sane.[22]

§ 1938(5). North Carolina

In this case the defendant interposes a plea of insanity, and he says by this plea that he did the killing, but the act is not one for which he can be held responsible. The court instructs you that whether or not the defendant had a mental disease is a question of fact to be determined by the jury, that it is as much a question of fact as the question as to whether or not he had a bodily disease, if such a question was raised. The court charges you, further, that it is also a question of fact for the jury to determine whether the killing of the deceased by the defendant was the product of mental disease of the defendant. The court instructs the jury that if you find from the evidence at the time of the killing of the deceased the prisoner was not of sound mind, but affected with mental disease, that is, insanity, and that this unsoundness of mind or affection of insanity was of such a degree as to create an uncontrollable impulse to do the act charged, by overriding the reason and judgment

[21] State v. Miller, 225 S. W. 913.

[22] State v. Peel, 59 P. 169, 23 Mont. 358, 75 Am. St. Rep. 529.

and to obliterate the sense of right and wrong as to that particular act, and deprive the prisoner of the power of choosing between them, then and in that event the prisoner would not be guilty of murder in the first degree, and the jury should so find.[23]

The court instructs you that, if you are satisfied from the evidence in this case that at the time of the commission of the offense the defendant was suffering from mental aberration or sickness of mind produced by any cause, and by reason thereof his judgment, memory, and reason were so perverted or dethroned that he did not realize the nature and quality of the acts he was doing, or that he did not realize that it was wrong, you must find that he was insane, and for that reason not guilty.[24]

§ 1938(6). Oklahoma

You are instructed that, if you believe from the evidence in this case that the defendant shot and killed the deceased in manner and form as charged in the information, and you further believe that the defendant at the time of the killing was a lunatic, or an insane person, or was a person of unsound mind, or was temporarily or partially deprived of his reason, to such an extent that he was incapable of knowing the wrongfulness of his act, then it will be your duty to acquit the defendant, and you are instructed that, if you acquit the defendant on the ground of insanity, you should state that fact in your verdict.[25]

§ 1938(7). Oregon

The jury are instructed that if a party, notwithstanding some disease or infirmity, still has reason enough to know the act which he proposes to commit is wrong and unlawful, and knows its nature and quality, and has left the power of deliberation and premeditation, and the power to do or refrain from doing the act charged as a crime, such mental disease will not avail as a defense. In other words, while the law will not punish a man for an act which is the result of or produced by mental weakness, it will punish him for an unlawful act, not the result of, or produced or influenced by, mental disease, even though some mental unsoundness is shown to have existed.[26]

§ 1938(8). Texas

You are instructed that among other defenses made in this case is that of insanity or idiocy. You are charged that only a person with a sound memory and discretion can be punishable for a crime, and that no act done in a state of insanity or idiocy can be held punishable as an offense. Every man is presumed to be sane until

[23] State v. Terry, 82 S. E. 154, 173 N. C. 761.

[24] State v. English, 80 S. E. 72, 164 N. C. 497.

[25] Alberty v. State, 140 P. 1025, 10 Okl. Cr. 616, 52 L. R. A. (N. S.) 248.

[26] State v. Branton, 56 P. 267, 33 Or. 533.

the contrary appears to the jury trying him. He is presumed to entertain, until this appears, a sufficient degree of reason to be responsible for his acts; and to establish a defense on the ground of insanity or idiocy it must be clearly proved that at the time of committing the act the party accused was laboring under such defect of reason, from disease of mind, as not to know the nature or quality of the act he was doing; or, if he did know that, he did not know he was doing wrong—that is, that he did not know the difference between the right and wrong as to the particular act charged against him. The insanity or idiocy must have existed at the very time of the commission of the offense, and the mind must have been so dethroned of reason as to deprive the person accused of a knowledge of the right and wrong as to the particular act done. You are to determine from the evidence in this case the matter of insanity or idiocy, it being a question of fact, controlled, so far as the law is concerned, by the instructions herein given you. In case you find from the evidence that the defendant was insane or an idiot at the time of the commission of the act, and you acquit him under the instructions heretofore given you, you will state in your verdict that you have acquitted defendant on the grounds of insanity or idiocy; and the burden of proof to establish his plea of insanity or idiocy devolves upon defendant.[27]

§ 1938(9). Wisconsin

The jury are instructed that the term "insanity" as used in the special plea and issue of insanity made by the defendant, means such perverted condition of the mental and moral faculties as to render the person incapable of distinguishing between right and wrong, or unconscious at the time of the nature of the act he is committing.[29]

The jury are instructed that, if you find from the evidence that at the time of the alleged commission of the offense the defendant was suffering from mental aberration or sickness of mind produced by any cause, and by reason thereof his judgment, memory, and reason were so perverted that he did not realize the nature and quality of the act he was doing, or that he did not realize that it was wrong, you must find that he was insane, and for that reason not guilty.[30]

§ 1939. Weakness of intellect

§ 1939(1). Missouri

The court instructs the jury that mere weakness of intellect will not shield one who commits a crime, and in this case, although

[27] Nugent v. State, 80 S. W. 84, 46 Tex. Cr. R. 67.

[29] Oborn v. State, 126 N. W. 737, 143 Wis. 249, 31 L. R. A. (N. S.) 966.

[30] Oborn v. State, 126 N. W. 737, 143 Wis. 249, 31 L. R. A. (N. S.) 966.

you may believe from the evidence that the defendant is mentally deficient in some degree, yet, unless you are reasonably satisfied by the evidence that, at the time the alleged crime is charged to have been committed by the defendant, his mental faculties were so weak and his mind so deficient that he was unconscious at the time of committing the act that it was wrong, and that he ought not do it, and that he had not the ability or mental capacity to choose between right and wrong, you will find the defendant guilty as charged in the information.[31]

§ 1939(2). Texas

You are instructed that mere weakness of mind is no defense to crime, provided the party accused has sufficient reason to know the nature and quality of the act charged against him, and knew the difference between the right and wrong thereof.[32]

§ 1940. Right and wrong test of responsibility for crime

§ 1940(1). Kansas

The court instructs the jury that if the defendant shot and killed the said ——— at the time and place and with a revolver as charged in the information, and if at the time he did so he was laboring under such a defect of reason from disease of the mind as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know that what he was doing was wrong, then the law does not hold him responsible for his act. On the other hand, if he was capable of understanding what he was doing, and had the power to know that his act was wrong, then the law will hold him criminally responsible for it. If this power of discrimination existed, he was sane, or, in other words, a person of sound memory and discretion, and will not be exempt from punishment because he might have been a person of weak intellect or one whose moral perceptions were blunted or ill developed, or because his mind may have been depressed or distracted from brooding over misfortunes or disappointments, or because he may have been wrought up to the most intense mental excitement from sentiments of disappointment, revenge, or anger. The law recognizes no form of insanity, although the mental faculties may be disordered or deranged, which will furnish one immunity from punishment for an act declared by law to be criminal, so long as the person committing the act had the capacity to know what he was doing and the power to know that his act was wrong.[33]

[31] State v. Paulsgrove, 101 S. W. 27, 203 Mo. 193; State v. Palmer, 61 S. W. 651, 161 Mo. 152.

[32] Cox v. State, 132 S. W. 125, 60 Tex. Cr. R. 471.

[33] State v. Arnold, 100 P. 64, 79 Kan. 533.

§ 1940(2). North Carolina

You are instructed that if the prisoner at the time he committed the homicide was in a state to comprehend his relations to other persons, the nature of the act and its criminal character, or, in other words, if he was conscious of doing wrong at the time he committed the homicide, he is responsible in law, but if, on the contrary, the prisoner was under the visitation of God, or had a diseased mind to such an extent that he could not distinguish between good and evil, and did not know what he did, or, if he knew what he did, he did not know right from wrong in judging of the consequences of his act, he is not guilty of any offense against the law, for guilt arises from the mind and wicked will.[34]

The court instructs you that, if you are satisfied from this evidence that the prisoner was of insane mind to such an extent that he was not conscious of the nature of the act he was doing, then you ought to acquit him on the ground of insanity.[35]

§ 1941. Irresistible impulse

See, also, post, § 2787.

§ 1941(1). Arkansas

The court instructs the jury that the law presumes every man to be sane until the contrary is shown; and when insanity is set up as a defense by a person accused of crime, in order that the defense may avail, the jury ought to believe from the evidence that, at the time of the commission of the alleged crime, the mind of the accused was so far affected with insanity as to render him incapable of distinguishing between right and wrong in respect to the act with which he is charged; or, if he was conscious of the act he was doing, and knew its consequences, that he was in consequence of his insanity wrought up to a frenzy which rendered him unable to control his actions or direct his movements.[36]

§ 1941(2). Iowa

You are instructed that, if you believe from all the evidence and circumstances in the case that defendant was in the possession of a rational intellect or sound mind, and from real or fancied injury he allowed his passion to escape control, then, though passion or revenge may for a time have driven reason from its seat and usurped it, and urged the defendant with a force at the moment irresistible to do the deed, if he did do it, he cannot then escape legal responsibility for such acts.[37]

[34] State v. Terry, 92 S. E. 154, 173 N. C. 761.

[35] State v. English, 80 S. E. 72, 164 N. C. 497.

[36] Scruggs v. State, 198 S. W. 694, 131 Ark. 320.

[37] State v. Brandenberger, 130 N. W. 1065, 151 Iowa, 197.

§ 1941(3). Montana

You are instructed that, in order to be criminally responsible, a person must have intelligence and capacity to have criminal intent and purpose; and if his mental powers are so deficient that he has no will, or no conscience, or no controlling mental power, or if, from the overwhelming violence of mental disease, his intellectual power is, for the time, obliterated, he is not criminally responsible; the question to be determined being whether, at the time of the act, he had the mental capacity to entertain a criminal intent, and whether in point of fact, he did entertain it.[38]

§ 1941(4). Nevada

You are instructed, that the law presumes every man sane until the contrary is shown by the evidence, and before the defendant can be excused on the ground of insanity, the jury must believe from the evidence that the defendant, at the time of the commission of the crime, was without sufficient reason to know what he was doing, or that, as the result of mental unsoundness, he had not sufficient will power to govern his action by reason of some insane impulse which he could not resist or control.[39]

§ 1941(5). Wyoming

You are instructed that it is plain law, as well as common sense, that a man is ordinarily responsible for his voluntary acts. In this case it is sought to excuse this defendant for acts which would ordinarily subject him to certain criminal responsibility, on the ground that at the time of performing such acts he was insane. It becomes, then a matter of the highest importance to inquire what is insanity in the sense the term is here used, and at what times and under what circumstances such insanity will excuse the defendant from the consequences of his acts. There are various forms of insanity which are recognized by medical men and those who have given particular study to the manifestations of the human mind. Particular terms are applied to it as it manifests itself in different forms, and as the persons so afflicted exhibit different symptoms, delusions, dispositions, and tendencies. It is unnecessary for us to explain or to consider all these different forms of insanity and their peculiar characteristics. Perhaps no exact scientific definition of insanity has ever been given or is possible; but it will be quite possible to explain what insanity is in a way which shall be entirely sufficient for our purpose. Insanity may be said to be a defect, an unsoundness or injury of the mind, induced by disease, whereby its functions or duties, or some of them, are disordered or deranged and are no longer perfectly performed. If you find in this case

[38] State v. Peel, 59 P. 169, 23 Mont. 358, 75 Am. St. Rep. 529.

[39] State v. Clancy, 147 P. 449, 38 Nev. 181.

any evidence which raises in your minds a question as to the sanity of the defendant at the time the fatal shots were fired, then, in considering the question of his sanity or insanity, and his consequent responsibility or irresponsibility for the act committed, you should proceed in the manner indicated as follows and inquire: (1) Was the defendant at the time of the shooting as a matter of fact insane? (2) If such be the case, was he at the time able to distinguish between right and wrong as applied to the particular act in question? And did he understand and appreciate the nature and probable consequences of his act? If in consequence of such disease he was not able so to distinguish, and could not appreciate, the nature and probable consequences of his act, he is not legally responsible, and must be acquitted. The inquiry in such case must end right here. (3) And, although he may have had at the time of the act a knowledge of right and wrong and the power to distinguish between them, he may nevertheless be not legally responsible; but to excuse him under such circumstances from responsibility two other conditions must exist at the same time: (a) If his insanity was the cause of his act (as through an insane delusion), but for which it would never have been committed; and (b) if also at the same time by reason of the progress of the mental disease upon his will, he was powerless to choose the right which he knew and approved, and to abstain from the wrong, though he may have recognized it as such, then and in that case also the defendant cannot be held legally accountable, and must be acquitted. But right here a word of caution is necessary. When we are talking of inability of an insane person to choose the right and to avoid the wrong, something different is meant from mere frenzy or ungovernable passion, however furious, growing out of hatred, anger, jealousy, revenge, or the like. There is no injustice in holding a sane man accountable for the fury of his angry passions; and, if he is accustomed to allow his bursts of anger to manifest themselves in violence until from continued lack of control he becomes unable (or thinks he is) to restrain himself, he is not less blameworthy, but rather more so. The lack of will power to control one's passion which will excuse him from the consequences of crime is not mere ungovernable rage displacing the reason, but is the distinct result of a mental disease destroying and overpowering the will. Much of the so-called emotional insanity is not insanity at all, but mere fury of a passionate soul which has been habitually allowed to go without control.[41]

You are instructed that, if the testimony convinces you of the defendant's irresponsibility as measured by the above test, or if

[41] Flanders v. State, 156 P. 39, 24 Wyo. 81.

you, upon a full and fair consideration of all the evidence, have a reasonable doubt whether the defendant was insane at the time of the act complained of, and on account of such insanity could not at the time appreciate the nature and probable consequences of his act and could not distinguish between right and wrong with reference to his act, you should acquit him. And, furthermore, if there remains with you a reasonable doubt whether the defendant, being insane, but knowing right from wrong, would not but for such insanity have committed the act complained of, and was at the time on account of such infirmity powerless to refrain from doing the act—if, I say, you have such reasonable doubt, you should acquit him. If you believe the defendant sane, and have no reasonable doubt on this subject, you should lay aside all consideration of insanity. And although you may believe that the defendant is in some manner a victim of mental disease, or is insane, as it is said, nevertheless, if the evidence convinces you beyond a reasonable doubt that at the time of the shooting he knew and understood the nature and probable consequences of his act, and knew that it was morally wrong or forbidden by law, and, furthermore, that at the same time he had sufficient power of will to enable him to control his acts and to repress the impulse to kill his victim, then I charge you his insanity will not constitute any legal excuse for his act, and you should treat the case as though no evidence of insanity had been introduced.[42]

§ 1942. Lucid interval

The jury are instructed that a person who is insane only at intervals may, during a lucid interval, commit a crime and be responsible therefor, if the evidence shows beyond every reasonable doubt that at the time of the commission of the crime the person had sufficient mental capacity and will power to make him criminally responsible under the law. It is not a question of whether he exercised sufficient will power or not, but the question is, did he possess sufficient will power at the time to resist the impulse to commit the crime, and could he have resisted had he tried?[43]

§ 1943. Partial insanity or insane delusions

Effect as defense in prosecution for homicide, see post, § 2790.

§ 1943(1). Missouri

You are instructed that insanity is either partial or general. Total insanity always excuses. Partial insanity does not always excuse. One may be partially insane, and yet be responsible for his criminal acts. The law does not excuse unless the derangement is

[42] Flanders v. State, 156 P. 39, 24 Wyo. 81.

[43] Wheeler v. State, 63 N. E. 975, 158 Ind. 687.

so great that it actually renders the person incapable at the time of its commission of distinguishing between right and wrong, in reference to the particular act charged and proven against him.[44]

§ 1943(2). Pennsylvania

The jury are instructed that, if the prisoner, although he labors under partial insanity, hallucination, or delusion, did understand the nature and character of his act, had a knowledge that it was wrong and criminal, and mental power sufficient to apply that knowledge to his own case, and he knew if he did the act he would do wrong and would receive punishment, and if, further, he had sufficient power of memory to recall the relation in which he stood to others, and others stood to him, and that the act in question was contrary to the plain dictates of justice and right, injurious to others, and in violation of the dictates of duty, he would be responsible; or, putting it in briefer shape, the law is that whether the insanity be general or partial the degree of it must be so great as to have controlled the will of its subject, and to have taken from him the freedom of moral action. These are the guides as to the insanity that will excuse the commission of the crime, if you find that such a crime has been committed.[45]

§ 1944. Excitement and passion as constituting insanity

§ 1944(1). Idaho

Should you first find that the defendant fired the fatal shot then the court instructs you, gentlemen, that the true test and standard of accountability is: Had the defendant sufficient mental capacity to appreciate the character and quality of his acts? Did he know and understand that it was in violation of the rights of another and in itself wrong? Did he know that it was prohibited by the laws of the state and that its commission would entail punishment and penalty upon himself? If he had the capacity thus to appreciate the character and comprehend the possible or probable consequences of his acts, he is responsible to the law for the acts thus committed and is to be adjudged accordingly. A person in the possession of a sound mind who commits a criminal act under the impulse of passion or revenge, which may temporarily dethrone reason, or for the time being control his will, cannot be shielded from the consequences of his act.[46]

§ 1944(2). Missouri

The jury are further instructed that excitement, passion, and angered feelings or revenge, produced by motives of anger, hatred,

[44] State v. Paulsgrove, 101 S. W. 27, 203 Mo. 193.

[45] Commonwealth v. Lewis, 71 A. 18, 222 Pa. 302.

[46] State v. Fleming, 106 P. 305, 17 Idaho, 471.

or revenge, is not insanity, and that the law holds the wrongdoer of an act under such conditions responsible for his acts, and the jury have no right to excuse or in any wise justify or mitigate defendant's act in the taking of ———'s life, except they can do so under and according to law as declared in these instructions.[47]

§ 1945. Matters considered in determining issue of sanity

You are instructed that, in determining the question whether the defendant was insane at the time of the alleged commission of the crime, the jury are to consider all of his acts at the time of, before, and since the commission of the crime, as such acts and conduct have been shown by the evidence, and the jury should consider the defendant's' appearance and actions at the time of, before, and after the commission of the offense, and, if the jury is satisfied from the evidence that at the time defendant shot the deceased defendant was so affected in his mind and memory that he was not able to distinguish right and wrong, and had no knowledge and understanding of the character and consequences of the act, and power and will to abstain from it, then he was not a legally responsible being, and the jury should find defendant not guilty.[48]

§ 1946. Cautionary instruction with respect to plea of insanity

§ 1946(1). Alabama

The jury are instructed that the jury should be careful that the plea of insanity is not used as a means to evade the law, as well as to see to it that a person irresponsible should not be punished.[49]

§ 1946(2). California

The jury are instructed that the defense of insanity is one which may be, and sometimes is, resorted to in cases where the proof of the overt act is so full and complete that any other means of avoiding conviction and escaping punishment seems hopeless. While, therefore, this is a defense to be weighed fully and justly, and, when satisfactorily established, must recommend itself to the favorable consideration of the humanity and justice of the jury, they are to examine it with care, lest an ingenious counterfeit of such mental disorder should furnish protection to guilt.[50]

It is my duty to say to you, gentlemen, that against the defense of insanity the law entertains no prejudice. On the contrary, if it be established by a preponderance of evidence, the law accords to the accused the full benefit of it, and your duty will be to acquit him of all criminal responsibility by reason of his insanity. It may be true that this defense is sometimes resorted to in cases in which the

[47] State v. Paulsgrove, 101 S. W. 27, 203 Mo. 193.

[48] State v. English, 80 S. E. 72, 164 N. C. 497.

[49] Braham v. State, 38 So. 919, 143 Ala. 28.

[50] People v. Donlan, 67 P. 761, 135 Cal. 489.

proof of the overt act is so full and complete that any other means of avoiding conviction and escaping punishment seems hopeless. It may have been abused and used in cases of unquestionable guilt, and may have been an excuse for jurors acquitting when their own and the public sympathy has been with the accused party, and justified and excused, according to public sentiment, but not according to law. While, therefore, all this may be true, it is a defense to be weighed fairly, fully, and justly, and, when proven in the manner I shall state and explain to you, must recommend itself to the sense of humanity and the justice of the jury. You are to examine it with care and caution, however, lest an ingenious counterfeit of this mental infirmity should furnish immunity from and perhaps defeat proper and just punishment.[51]

You are instructed that in prosecutions for crimes the defense of insanity is often interposed, and thereby becomes a subject of paramount importance in criminal jurisprudence. A due regard for the ends of justice, and the peace and welfare of society, no less than mercy to the accused, require that it should be thoroughly and carefully weighed. It is a plea sometimes resorted to in cases where aggravated crimes have been committed under circumstances which afford full proof of the overt acts, and render hopeless all other means of evading punishment. While, therefore, it ought to be viewed as a not less full and complete than it is a humane defense, when satisfactorily established, it yet should be satisfactorily examined into with great care, lest an ingenious counterfeit of the malady furnish protection to guilt.[52]

2. *Drunkenness or Use of Drugs*

§ 1947. Drunkenness in general

See, also, post, § 4518.

Consideration of intoxication of defendant in prosecution for burglary, see ante, § 1355.

Consideration of intoxication of defendant in prosecution for homicide, see post, §§ 2794–2797.

Consideration of drunkenness of accused, in prosecution for larceny, see post, § 3325.

Consideration of drunkenness of accused in prosecution for robbery, see post, § 4608.

§ 1947(1). Arkansas

The court instructs the jury that mere drunkenness is no excuse or justification for committing a crime; so, in this case, if you believe from the evidence, beyond a reasonable doubt, that defendant voluntarily became too drunk to know what he was about, and then, without provocation, assaulted and killed the deceased, at a

[51] People v. Kloss, 47 P. 459, 115 Cal. 567.

[52] People v. McCarthy, 46 P. 1073, 115 Cal. 255.

time when the deceased was making no attempt or demonstration to kill the defendant, or to do him some great bodily harm, then and in that event he would not be guilty of murder in the first degree, but it would be your duty to find the defendant guilty of murder in the second degree if he acted with malice in killing the deceased, or manslaughter if he killed deceased without malice.[53]

§ 1947(2). California

The court instructs the jury that evidence of drunkenness can only be considered by the jury for the purpose of determining the degree of crime, and the weight to be given it is a matter for the jury to determine in connection with all the other evidence and circumstances in proof in the case.[54]

You are instructed that no act committed by a person while in a state of voluntary intoxication is less criminal by reason of his having been in such condition, but, whenever the actual existence of any particular purpose, motive, or intent is a necessary element to constitute any particular species or degree of crime, the jury may take into consideration the fact that the accused was intoxicated at the time, in determining the purpose, motive, or intent with which he committed the act.[55]

You are instructed that it is a well-settled rule that drunkenness is no excuse for the commission of a crime. Insanity produced by intoxication does not destroy responsibility when the party, when sane and responsible, made himself voluntarily intoxicated; and drunkenness forms no defense whatever to the fact of guilt, for, when a crime is committed by a party while in a fit of intoxication the law will not allow him to avail himself of his own gross vice and misconduct to shelter himself from the legal consequences of such crime. Evidence of such intoxication can only be considered by the jury for the purpose of determining the degree of crime, and for that purpose it must be received with great caution.[56]

§ 1947(3). Connecticut

The jury are instructed that drunkenness does not excuse a party from the consequences of a criminal act; one crime cannot justify another. A man committing a criminal act, though intoxicated at the time, is a legal and proper subject of punishment.[57]

§ 1947(4). Iowa

The jury are instructed that drunkenness is no excuse for crime, and in this case the evidence before you tending to show that the defendant, at or near the time of the alleged crime, was drunk,

[53] Henslee v. State, 133 S. W. 172, 97 Ark. 103.

[54] People v. Hopper (App.) 183 P. 836.

[55] People v. Hower, 91 P. 507, 151 Cal. 638.

[56] People v. Hower, 91 P. 507, 151 Cal. 638.

[57] State v. Johnson, 40 Conn. 136.

was not admitted for the purpose of excusing the offense, but for the purpose of showing that he was so unconscious at the time that he could have no criminal intent in what he did, and if you fail to find that he was so unconscious then the evidence of his drunkenness should have no weight, but should be entirely disregarded by you in arriving at a verdict.[58]

The jury are instructed that as men do not, while in possession of their usual senses, act without some motive, purpose or intent, if the defendant in this case was not, at the time he entered the house of ———, if he did enter it, so drunk that he did not know what he was doing, that is, if he was not unconscious of what he was doing, the law presumes that that entrance was for some purpose and with some intent, and it is for you to determine from all the evidence in this case whether he was at the time unconscious, and, if not unconscious, then whether he entered the house in question with intent to commit larceny.[59]

The jury are instructed that, if you find from the evidence that defendant entered the dwelling house of ———, and that at the time he went in he was drunk and went in unconsciously, through drunkenness, not knowing where he was, or what he was doing, and without any intent to steal, or to commit any other crime, then he would not be criminally responsible for what he is shown to have done.[60]

§ 1947(5). Kentucky

You are instructed that, although you may believe from the evidence beyond a reasonable doubt that the defendant took the watch and other property of ———, yet, if you further believe from the evidence that the defendant was so drunk that he did not have the intention of robbing said ———, you will find him not guilty.[61]

§ 1947(6). Nebraska

You are instructed that it is the rule of law that a person, having made himself drunk by the voluntary use of intoxicating liquor, cannot make such condition an excuse for crime committed while so intoxicated.[62]

§ 1948. Insanity from use of drugs or liquor

Effect as defense in prosecution for homicide, see post, § 2795.

§ 1948(1). Connecticut

The jury are instructed that if a man, by long-continued habits of intoxication, has brought on insanity, or so impaired and en-

[58] State v. Maxwell, 42 Iowa, 208.
[59] State v. Maxwell, 42 Iowa, 208.
[60] State v. Maxwell, 42 Iowa, 208.
[61] Terhune v. Commonwealth, 138 S. W. 274, 144 Ky. 370.
[62] Brinegar v. State, 118 N. W. 475, 82 Neb. 558.

feebled his mind as to be utterly imbecile, he is no longer responsible for crime.[63]

§ 1948(2). Missouri

The court instructs the jury that if you believe and find from the evidence that the defendant, at the time of the act mentioned in evidence, was laboring under a fit of temporary insanity, which was then and there the result of the immediate use of a drug called ———, then in such case there is no mitigation or excuse for the act charged to have been committed in this case. But if the evidence shows that the defendant was insane, as heretofore explained, the fact that it might have been caused by taking morphine will not make him criminally liable, and if you believe he was insane at the time the alleged act was committed, as insanity is explained in the instructions, it would be your duty to acquit the defendant.[64]

§ 1948(3). North Carolina

The jury is instructed that, although they might find from the evidence that the defendant committed the criminal act in the manner and form as charged in the indictment, still, if the jury believe from the evidence that at the time he committed the act he was so affected by long and continued use of alcoholic liquors or drugs, or both, that he did not know the nature of the act, whether it was wrongful or not, and did not know his relations to others, and that such mental deficiency was induced by antecedent and long-continued use of such intoxicating drinks or drugs, and not the immediate effects of intoxication, then the defendant cannot be held criminally responsible for such act, and the jury should find the defendant not guilty.[65]

§ 1949. Same—Temporary insanity

Defense in prosecution for homicide, see post, § 2796.

§ 1949(1). Texas

Now, apply the foregoing instructions relative to insanity to the evidence in the case. If you believe that at the time of the commission of the act with which defendant is charged, and is on trial before you, he was temporarily insane, and that such temporary insanity, if such there was, was produced by the voluntary recent use of ardent spirits, it would afford no excuse for the commission of the act charged against him, if the act was otherwise criminal. But such temporary insanity produced by voluntary recent use of ardent spirits alone, if you find there was such in-

[63] State v. Johnson, 40 Conn. 136.

[64] State v. Morris, 172 S. W. 603, 263 Mo. 339.

[65] State v. English, 80 S. E. 72, 164 N. C. 497.

sanity so produced, should be considered in mitigation of the penalty attached to the offense of which you find him guilty.[66]

§ 1949(2). Virginia

The court further instructs the jury that drunkenness or voluntary intoxication is no excuse for crime, although such drunkenness may be the result of long-continued and habitual drinking without any purpose to commit crime, and may have produced a temporary insanity, during the existence of which the criminal act is committed; in other words, a person, whether he be an habitual drinker or not, cannot voluntarily make himself so drunk as to become on that account irresponsible for his conduct during such drunkenness.[67]

C. Parties to Offenses

§ 1950. Who are parties in general

See, also, post, §§ 4519, 4520.

The court instructs the jury that, if you believe from the evidence beyond a reasonable doubt that ———'s hog was taken, and was taken under circumstances amounting to theft, and that this defendant and F. acted together in such taking, with a mutual understanding and with a common purpose and intent fraudulently to take such hog, knowing it did not belong to either of them, and with intent to deprive the owner of same of its value, and to appropriate it to the use or benefit of themselves, or if you so believe F. had such knowledge and intent, and that the defendant, having the same knowledge and knowing F.'s unlawful intent, aided F. in taking the hog, by shooting the hog or otherwise, you will in either such case find that the defendant is a principal in the offense; but if this defendant shot the hog at the instance and direction of F., believing it was F.'s hog, then this defendant would not be guilty, no matter whether F. believed it was his hog, or knew it was not his. So in this case, if you believe this defendant killed ———'s hog, or participated with F. in killing such hog, yet if you believe from the evidence that at the time the hog was killed this defendant believed, and acted upon the belief, that the hog belonged to F., or if you have a reasonable doubt as to whether or not he had and acted upon such belief, you will acquit the defendant.[68]

§ 1951. Liability, as principals, of persons aiding and abetting

See, also, post, § 4610.

Parties in prosecution for homicide, see post, § 2805.

[66] Edwards v. State (Cr. App.) 54 S. W. 589.

[67] Longley v. Commonwealth, 37 S. E. 339, 99 Va. 807.

[68] Fry v. State, 124 S. W. 920, 58 Tex. Cr. R. 169.

§ 1951(1). Alabama

The jury are instructed that it is the law of ——— in felony cases, and by felony cases the law means an offense against the criminal law which is punishable capitally or by imprisonment in the penitentiary, that all parties who are concerned in the commission of the felony, whether they directly commit the act constituting the felony, or aid and abet in its commission, are held to be equally responsible; so that, whether a party commits by himself the entire act which constitutes a felony, or if he is concerned with another in its commission, if he aids another in his commission, if he assists another in its commission by word or deed, either by words of encouragement, assistance, or support, or by actions giving encouragement, assistance, or support, either party under these circumstances would, in the eyes of the law, be held to be equally responsible; that is, so far as the personal guilt or innocence is concerned. The question of punishment is one which is always to be fixed by the jury entirely within their own discretion.[69]

§ 1951(2). Arkansas

You are instructed that all persons who stand by, aid, or assist, or who, not being present aiding, abetting, or assisting, hath advised and encouraged the perpetration of a crime, are guilty of the commission of a crime as the person so aided, abetted, assisted, advised, or encouraged one who commits the same.[70]

§ 1951(3). Kansas

You are instructed that under the law of ——— any one who aids, abets, or assists another or others in the commission of any crime either by conspiring or confederating together, counseling and advising in the commission of such crime and preparation thereof, or by counseling, aiding, or assisting in the commitment thereof, is equally guilty with the one actually committing the crime; and you are therefore instructed in this case that should you find beyond a reasonable doubt that the defendant conspired and confederated with other persons for the commission of the crime alleged in the information, and that he did in any way aid, assist, or abet in its commission, then he is guilty as though he had himself without assistance committed the crime.[71]

You are instructed that the statutes of ——— provide that any one who knowingly aids, counsels, abets, or assists another in the commission of crime is himself guilty of its commission, and may be charged, tried, and convicted the same as if he alone had been

[69] Ware v. State, 67 So. 763, 12 Ala. App. 101.

[70] Burrow v. City of Hot Springs, 108 S. W. 823, 85 Ark. 396.

[71] State v. Hoerr, 129 P. 153, 88 Kan. 573.

the perpetrator of the offense. So, if you believe from the evidence beyond a reasonable doubt that the crime alleged in the indictment was committed by some person or persons different from the defendant, and that the defendant knowingly aided, counseled, abetted, or assisted such person or persons in so doing, you will find the defendant guilty as charged.[72]

§ 1951(4). Missouri

The jury are instructed that all persons are equally guilty who act together with a common intent in the commission of a crime, and a crime so committed by two or more persons jointly is the act of all and of each one so acting.[73]

§ 1951(5). Montana

The jury are instructed that in this state the distinction between an accessory before the fact and the principal, and between principals in the first and second degree, in cases of felony, is abrogated; and all persons concerned in the commission of a felony, whether they directly commit the act constituting the offense, or aid and abet in its commission, though not present, must be prosecuted, tried, and punished as principals, and no other facts need be alleged or proved under an information against such accessory than are required under an information against his principal.[74]

§ 1951(6). Oklahoma

You are instructed that, under the laws of the state of ———, all persons concerned in the commission of any felony, whether they directly commit the act constituting the offense, or aid and abet in its commission, though not present, are principals; and in this connection you are instructed that if you should find beyond a reasonable doubt that defendant did unlawfully, feloniously, fraudulently, and knowingly aid and abet, or did unlawfully, feloniously, fraudulently, and knowingly participate with the said ———, in the commission of embezzlement as alleged in the indictment, then and in that event you should find the defendant guilty. Otherwise, if you entertain a reasonable doubt as to whether the said defendant did knowingly, unlawfully, fraudulently, and feloniously aid or abet or participate with the said ——— in the commission of the embezzlements alleged in the indictment, then and in that event you should acquit him.[75]

§ 1951(7). Texas

The jury are instructed that all persons are principals who are guilty of acting together in the commission of an offense. When ar

[72] State v. Johnson, 50 P. 907, 6 Kan. App. 119.

[73] State v. Valle, 65 S. W. 232, 164 Mo. 539.

[74] State v. De Wolfe, 74 P. 1084, 29 Mont. 415.

[75] Middleton v. State (Cr. App.) 153 P. 626.

offense has been actually committed by one or more persons, the true criterion for determining who are principals is, Did the parties act together in the commission of the offense; was the act done in pursuance of a common intent and in pursuance of a previously formed design in which the minds of all united and concurred? If so, then the law is that all are alike guilty, provided the offense was actually committed during the existence and in the execution of the common design and intent of all, whether in point of fact, all were actually, bodily present on the ground when the offense was actually committed or not. If there was no such common design and intent of all, including the defendant, to commit the offense, or if the offense, if any, was committed by one or more, acting independently of the defendant in so doing and without participation by him in the design and intent to commit it, then the defendant is not guilty; and if you have a reasonable doubt as to this issue, you must give the defendant the benefit of the doubt and acquit him. Now, if you believe from the evidence, beyond a reasonable doubt, that the defendant, acting together with ———, ———, ———, and ———, as a principal as hereinbefore defined, in the county of ——— and state of ———, on or about the time alleged in the indictment, with a deadly weapon or instrument reasonably calculated and likely to produce death by the mode and manner of its use, and not in defense of himself against an unlawful attack, real or apparent, reasonably producing a rational fear or expectation of death or serious bodily injury, with intent to kill, did unlawfully and with malice aforethought shoot and thereby kill said ——— as charged in the indictment, you will find him guilty of murder, as charged, and assess his punishment at death or by confinement in the penitentiary for life, or for any term of years not less than ———.*

Gentlemen of the jury, you are instructed by the court that the mere presence of a party at or near the scene of the commission of an offense does not make him a principal, and mere knowledge that an offense is about to be committed will not make the party a principal; nor will his knowledge that an offense is being committed, or has been committed, nor will his failure to give alarm, his silence or inaction, make him a principal. Now, therefore, unless you believe from the evidence beyond a reasonable doubt that ——— was present at the time ——— was killed, and that he knew both of the act of the killing and of the intent of the person who killed him, or unless you believe from the evidence beyond a reasonable doubt that the defendant ——— was not present at the scene of the killing, but was engaged in carrying out his part of

* Serrato v. State, 171 S. W. 1133, 74 Tex. Cr. R. 413.

a previously conceived design theretofore entered into with others to take the life of said ———, and unless you believe from the evidence beyond a reasonable doubt that the defendant did some overt act in connection with the person or persons who did kill ———, whoever they may be, and that he had a guilty knowledge, and had conspired and confederated with the person or persons who did kill said ———, before the act was done, then his mere presence at or near the scene of the killing, or his mere knowledge that such killing was about to be committed or had been committed, or his failure to give an alarm, or his silence or inaction, would not make him a principal, and you will acquit the defendant.[76]

The jury are instructed that any person who advises or agrees to the commission of an offense, and who is present when the same is committed, is a principal, whether he aids in the illegal act or not.*

§ 1952. Necessity of actual bodily presence at scene of crime

Criminal liability for homicide, see post, § 2807.
Right to convict one not present at time and place of killing, and not indicted as an accessory before the fact, see post, § 2813.

§ 1952(1). California

It is the law, gentlemen, that all persons concerned in the commission of a crime, whether they directly commit the act constituting the offense or aid and abet in its commission, or, not being present, have advised and encouraged its commission, are principals in any crime so committed. So that in the case before you, if you are satisfied beyond all reasonable doubt that the defendant here directly committed the crime charged, or aided and abetted in its commission, or, not being present, advised and encouraged its commission, you will be justified in finding him guilty as a principal.[77]

§ 1952(2). Oregon

In this case you should bear in mind the instructions which I have heretofore given you that, if the defendant and B. were acting together with the common design to bring about the death of ——— in the manner and as charged in the indictment, it would not be necessary for both of them to be actually present at the place and time of the alleged crime; for, as I have stated to you before, each codefendant is bound by the act of the other in the furtherance and execution of a common design. Now then, you should determine first, Were they acting together in such common design? If they were not acting together in such design,

[76] Serrato v. State, 171 S. W. 1133, 74 Tex. Cr. R. 413.

* Tally v. State, 90 S. W. 1113, 49 Tex. Cr. R. 91.

[77] People v. Wong Hing, 169 P. 357, 176 Cal. 699.

and defendant was not present at the time and place of the alleged killing, then it would necessarily follow that it would be impossible for her to have committed the crime. But if they were acting together in a common design, then it does not make any difference whether she was present or not, if she aided, counseled, and abetted B. in the commission of the crime.[78]

§ 1952(3). Texas

The jury are instructed that all persons are principals who are guilty of acting together in the commission of an offense. When an offense is actually committed by one or more persons, but others are present and, knowing the unlawful intent, aid by acts or encourage by words or gestures those actually engaged in the commission of an unlawful act, or who, not being actually present, keep watch, so as to prevent the interruption of those engaging in committing the offense, such persons so aiding, encouraging, or keeping watch are principal offenders, and may be prosecuted and convicted as such. All persons who endeavor, at the time of the commission of an offense, to secure the safety or concealment of the offenders, are principals. Any person who advises or agrees to the commission of an offense, and who is present when the same is committed, is a principal thereto, whether he aids or not in the illegal act. In this connection you are further instructed that no person is a principal in the commission of an offense unless he is at the time of the commission thereof either present, or keeping watch, or doing something to conceal the offender, or is doing something in aid of the offender.[79]

You are instructed that all persons are principals who are guilty of acting together in the commission of an offense. When an offense has been actually committed by one or more persons, the true criterion for determining who are principals is: Did the parties act together in the commission of the offense? Was the act done in pursuance of a common intent and in pursuance of a previously formed design in which the minds of all united and concurred? If so, then the law is that all are alike guilty, provided the offense was actually committed during the existence and in the execution of the common design and intent of all, whether in point of fact all were actually bodily present on the ground when the offense was actually committed or not.[80]

You are instructed that, if you believe from the evidence in this case, beyond a reasonable doubt, that the defendant acted with another or others in the commission of the offense charged in

[78] State v. Booth, 161 P. 700, 82 Or. 394.

[79] Smith v. State (Cr. App.) 230 S. W. 410.

[80] Silvas v. State, 159 S. W. 223, 71 Tex. Cr. R. 213.

the indictment, and that the act was done in pursuance of a common intent and in pursuance of a previously formed design of the defendant and another or others, in which the minds of all united and concurred, including the mind of the defendant, then the defendant would be guilty of the theft, as hereinbefore charged, whether or not in point of fact he was actually bodily present on the ground when the offense was actually committed.[81]

§ 1953. Liability as principals in second degree

In prosecution for homicide, see post, § 2812.

§ 1953(1). Georgia

The jury are instructed that there is no practical distinction between principals in the first degree and principals in the second degree, and that if the state has shown, beyond a reasonable doubt, that the accused is guilty as a principal in either the first or the second degree, a general verdict of guilty would be authorized.[82]

§ 1953(2). Virginia

The court instructs the jury that principals in the first degree in every murder or other crime are those who are the actors, or actual perpetrators of the crime, those who are the immediate perpetrators of the act; that principals in the second degree are those who did not, with their own hands, commit the act, but were present, aiding, and abetting it. It is not necessary, in order to make a person principal in the second degree, that he be actually present when the crime was committed, or that he actually participated in the commission of the crime. The test as to whether or not he is a principal in the second degree is, was he encouraging, inciting, or in some manner offering aid or consent to the crime? All persons present lending countenance or otherwise aiding while another does the act, are principals in the second degree, and liable to the same punishment as if they were principals in the first degree, and actually committed the crime.[83]

D. EVIDENCE

§ 1954. Presumption of innocence

§ 1954(1). United States

The jury are instructed that, this being a criminal prosecution, each of the defendants is presumed to be innocent until the contrary has been shown beyond a reasonable doubt. This presumption of innocence attends the defendants throughout the trial. The burden of overcoming this presumption rests upon the gov-

[81] Silvas v. State, 159 S. W. 223, 71 Tex. Cr. 213.

[82] August v. State, 76 S. E. 164, 11 Ga. App. 798.

[83] Horton v. Commonwealth, 38 S. E. 184, 99 Va. 848.

ernment, and never shifts to the defendants, and, unless the government has satisfied this requirement as to each defendant, the jury will acquit such defendant.[84]

The jury are instructed that in this case the defendant is accused of an offense of which he is presumed to be innocent until his guilt is proven beyond a reasonable doubt. This presumption of innocence attends him throughout the case and until, after a consideration of all the evidence, you are satisfied beyond a reasonable doubt of his guilt. By reasonable doubt is not meant every possible doubt, but is meant that kind of a doubt that would suggest itself to a reasonable man and of such weight as to deter him from acting or deciding in matters of the highest importance to him. If you have such a doubt of the defendant's guilt, it is your duty to find him not guilty. If, on the other hand, you have no such doubt, but are persuaded of that guilt to a moral certainty, it is your duty to find him guilty.[85]

The jury are instructed that the law presumes a defendant charged with a crime innocent until proven guilty beyond a reasonable doubt. If you can reconcile the evidence before you upon any reasonable hypothesis consistent with the defendant's innocence, you should do so and in that case find the defendant not guilty. You are further instructed that you cannot find the defendant guilty unless from all the evidence you believe him guilty beyond a reasonable doubt.[86]

§ 1954(2). Alabama

The jury are instructed that the defendant enters into this trial with a presumption of innocence, and this is a fact in the case which must be considered with the evidence and should not be disregarded.[87]

Gentlemen of the jury, I charge you, that the legal presumption of innocence is to be regarded by the jury, in every case, as a matter of evidence, to the benefit of which the accused is entitled, and, as a matter of evidence it attends the accused until his guilt is, by the evidence, placed beyond a reasonable doubt.[88]

The court charges the jury the defendant is presumed to be innocent until the evidence convinces the jury beyond all reasonable doubt that he is guilty; and if, upon a consideration of all the

[84] Smith v. United States (C. C. A. Mo.) 157 F. 721, 85 C. C. A. 353, certiorari denied 28 S. Ct. 569, 208 U. S. 618, 52 L. Ed. 647.

[85] Shepard v. United States (C. C. A. Utah) 160 F. 584, 87 C. C. A. 486, certiorari denied 29 S. Ct. 682, 212 U. S. 571, 53 L. Ed. 655.

[86] Shepard v. United States (C. C. A. Cal.) 236 F. 73, 149 C. C. A. 283.

[87] Neilson v. State, 40 So. 221, 146 Ala. 683.

[88] Bryant v. State, 23 So. 40, 116 Ala. 445.

evidence, the jury have a reasonable doubt, growing out of all the evidence, they must acquit the defendant.[89]

§ 1954(3). California

The jury are instructed that the charge in the information puts upon the prosecution the burden of proving that he is guilty of the charge laid in the information beyond all reasonable doubt. In other words, gentlemen, the defendant at the outset of this trial is presumed to be an innocent man. He is not required to prove himself innocent, or to put in any evidence at all upon that subject until the prosecution has proven to your satisfaction and beyond all reasonable doubt that he is guilty. Now, in considering the testimony in the case, you must look at that testimony, and view it in the light of that presumption which the law clothes him with, that he is innocent, and it is a presumption that abides with him throughout the trial of the case, until the evidence convinces you to the contrary beyond all reasonable doubt.[90]

§ 1954(4). Georgia

The jury are instructed that defendant pleads not guilty, and that puts upon the state the burden of proving his guilt, and satisfying your judgments beyond a reasonable doubt that he is guilty of this charge, in order to overcome the presumption that he is innocent, before you could find a verdict of guilty. If you have a reasonable doubt about any material evidence, as stated to you, a doubt which leaves your minds unsettled and unsatisfied, and you would not be willing to act upon such evidence in the most serious concerns of life which affected you personally, you will find him not guilty. If you have a reasonable doubt growing out of the evidence, the defendant's statement, or want of evidence, you should give the defendant the benefit of that doubt, and the form of your verdict would be: "We, the jury, find the defendant not guilty."[91]

The jury are instructed that, on arraignment, the defendant pleads not guilty, and that is the issue you are impaneled to try. Notwithstanding the indictment, the defendant enters into this trial with the presumption of innocence in his favor, and that presumption rests with him throughout the trial, until the state, by satisfactory evidence, overcomes that presumption, and establishes his guilt upon each material allegation contained in the indictment and beyond all reasonable doubt. The state is not required to demonstrate with mathematical accuracy and precision the guilt of the accused, but

[89] Rogers v. State, 23 So. 82, 117 Ala. 192.

[90] People v. Arlington, 63 P. 347, 131 Cal. 231.

[91] Mauldin v. State, 90 S. E. 50, 23 Ga. App. 537.

the state is bound to satisfy you, to a reasonable and moral certainty, of his guilt.[92]

§ 1954(5). Illinois

The court instructs the jury, as a matter of law, that the rule which clothes every person accused of crime with the presumption of innocence and imposes upon the state the burden of establishing his guilt beyond a reasonable doubt is not intended to aid any one who is, in fact, guilty of crime to escape but is a humane provision of the law, intended, so far as human agencies can, to guard against the danger of any innocent person being unjustly punished.[93]

The court further instructs the jury that you must presume the defendant to be innocent until his guilt is fully established by legal evidence, beyond a reasonable doubt, and the presumption of innocence prevails throughout the trial, and it is your sworn duty as jurors trying this case, to reconcile, if possible, the evidence in this case with this presumption.[94]

You are further instructed, as a matter of law, that the indictment in this case is no evidence, in the slightest degree, but is a mere formal charge, requiring proof of all the material allegations contained therein, by the testimony of witnesses, or by facts and circumstances. And you are further instructed that the law presumes the defendants to be innocent of the crime charged in the indictment, until they have been proven to be guilty beyond all reasonable doubt; and this presumption of innocence is no mere idle theory, to be cast aside by the jury through mere caprice, passion, or prejudice, but it is a substantial part of the law of the land, and follows the defendant throughout the entire case, and must not be lost sight of by the jury until it has been overcome by evidence which establishes the defendant's guilt beyond all reasonable doubt, and to a moral certainty.[95]

The jury are instructed that it is incumbent upon the prosecution to prove every material allegation of the indictment as therein charged. Nothing is to be presumed or taken by implication against the defendants. The law presumes them innocent of the crime with which they are charged until they are proved guilty by competent evidence; and, if the evidence in this case leaves upon the minds of the jury any reasonable doubt of the defendants' guilt, the law makes it your duty to acquit them.[96]

[92] Battle v. State, 29 S. E. 491, 103 Ga. 53.

[93] People v. Lopez, 129 N. E. 791, 296 Ill. 438; People v. Rees, 109 N. E. 473, 268 Ill. 585; People v. Scarbak, 92 N. E. 286, 245 Ill. 435.

[94] Parsons v. People, 75 N. E. 993, 218 Ill. 386.

[95] Cunningham v. People, 63 N. E. 517, 195 Ill. 550.

[96] Schintz v. People, 52 N. E. 903, 178 Ill. 320.

§ 1954(6). Indiana

The jury are instructed that this rule of law, which clothes every person accused of a crime with the presumption of innocence and imposes on the state the burden of establishing his guilt beyond a reasonable doubt, is not intended to aid any one who is, in fact, guilty of crime to escape, but is a humane provision of the law, intended, so far as human agencies can, to guard against the danger of any innocent person being unjustly punished. And by reasonable doubt is not meant a whim, or captious or speculative doubt. It is properly termed a reasonable doubt, as distinguished from an unreasonable or speculative doubt; and it must arise from all the evidence relating to some material fact or facts charged in the indictment, and not spring from mere subsidiary evidence. Such doubt may also arise from the absence of evidence as to material matters.[97]

The jury are instructed that the rule of law which clothes every person accused of crime with the presumption of innocence, and imposes upon the state the burden of establishing his guilt beyond a reasonable doubt, is not intended to aid any one who is in fact guilty of crime to escape, but is a humane provision of law, intended, so far as human agencies can, to guard against the danger of any innocent person being unjustly punished.[98]

The jury are instructed that the defendant in a criminal case is presumed to be innocent of the crime with which he is charged and before he can be convicted of the crime charged the state must prove him guilty of such crime beyond a reasonable doubt.[99]

§ 1954(7). Iowa

The jury are instructed that the defendant, in the first instance, is presumed to be innocent of the offense charged until he is proven guilty according to the forms of law. His plea of "not guilty" puts in issue every material allegation of the indictment, and he cannot be rightfully convicted unless the state, by the evidence, has overcome the presumption of innocence in defendant's favor and has made out every material allegation of the indictment to your satisfaction, and beyond all reasonable doubt. Clear and satisfactory proof is required. No mere weight or preponderance of testimony will be sufficient to warrant a conviction herein, unless it be so strong and convincing as to remove from your minds all reasonable doubt of the defendant's guilt.[1]

[97] Hauk v. State, 46 N. E. 127, 148 Ind. 238.

[98] Turner v. State, 1 N. E. 869, 102 Ind. 425.

[99] Line v. State, 51 Ind. 172.

[1] State v. Brown, 69 N. W. 277, 100 Iowa, 50.

§ 1954(8). Kansas

The jury are instructed that the rule of law which throws around the defendant the presumption of innocence and requires the state to establish, beyond a reasonable doubt, every material fact averred in the information, is not intended to shield those who are actually guilty from just and merited punishment, but it is a humane provision of the law which is intended for the protection of the innocent and to guard, so far as human agency goes, against the conviction of those unjustly accused of crime.[2]

§ 1954(9). Kentucky

The jury are instructed that the law presumes the defendant to be innocent until proven guilty beyond a reasonable doubt, and if, upon the entire case, the jury have a reasonable doubt of defendant's having been proven guilty, or a reasonable doubt as to any fact necessary to establish his guilt, then you will find the defendant not guilty.[3]

The jury are further instructed that the defendant is presumed to be innocent, and this presumption of his innocence entitles him to an acquittal at their hands, unless his guilt has been proved from the evidence beyond a reasonable doubt.[5]

§ 1954(10). Louisiana

The jury are instructed that all persons accused of crime are presumed by law to be innocent until they are proven to be guilty. The consequence of this rule of law is that they are not required to prove their innocence, but may rest upon the presumption in their favor until it is overcome by positive affirmative proof. It is therefore the duty of the state to establish to your satisfaction, beyond a reasonable doubt, every essential ingredient necessary to constitute the guilt of the prisoners of the crime charged.[6]

§ 1954(11). Michigan

The court instructs the jury that the defendant in this case is presumed to be innocent of the charge brought against him here, and that presumption of innocence abides with him throughout the entire trial of the case until he is proven beyond a reasonable doubt by the testimony given to be guilty of the charge brought against him. The mere fact that he is here on trial, that he has been arrested and brought into court by the ordinary criminal process, should not be considered by you as in any way raising the presumption that he is guilty. The burden of establishing the guilt of the accused is upon the people, and in order to justify you as jurors in rendering a verdict of guilty it must be proven beyond

[2] State v. Roberts, 147 P. 828, 95 Kan. 280.

[3] Harris v. Commonwealth, 174 S. W. 476, 163 Ky. 781.

[5] Watkins v. Commonwealth, 97 S. W. 740, 123 Ky. 817.

[6] State v. Nicholls, 23 So. 980, 50 La. Ann. 699.

a reasonable doubt that this defendant has committed the offense charged here and at the time charged, and, as I have said to you, it is necessary for you to decide in your deliberations whether or not that has been shown beyond a reasonable doubt.[7]

The court charges the jury that "the defendant has pleaded not guilty to the information, and the presumption of law falls on him all through this case that he is innocent until he is proved guilty. He does not have to establish his innocence; the people have to establish his guilt. The burden of proof is on the people all the way. They have to satisfy your minds beyond any reasonable doubt, by the evidence which they have produced before you for your consideration, of the guilt of the respondent. If, after you have considered the testimony in this case and viewed it in connection with the surrounding circumstances, you can say, in your own minds, you have a reasonable doubt as to whether or not the defendant is guilty, then it is your duty to acquit him. He is entitled to the benefit of that doubt. On the other hand, after you have considered the evidence, if no such doubt exists, it is your duty, as honest, intelligent, conscientious jurors, to say by your verdict that he is guilty.[8]

The jury are instructed that the law presumes every man innocent of the crime charged, and of every offense included in the formal charge; and this presumption surrounds and abides with him throughout the entire trial, and this presumption should be borne in mind at each successive step in your deliberations as to your verdict.[9]

The jury are instructed that you will start out in the trial of this case with the presumption that the defendant is wholly innocent of the crime charged, and that presumption must be overcome by evidence so convincing that you can say, beyond any reasonable doubt, that the defendant is guilty as charged.[10]

§ 1954(12). Mississippi

The jury are instructed that the defendant at the outset of the trial is presumed to be an innocent man. He is not required to prove himself innocent or to put in any evidence at all upon that subject. In considering testimony in the case, you must look at the testimony, and view it in the light of that presumption which the law clothes the defendant with that he is innocent, and it is a presumption that abides with him throughout the trial of the case

[7] People v. Kenyon, 167 N. W. 997, 201 Mich. 647.

[8] People v. Nunn, 79 N. W. 800, 120 Mich. 530.

[9] People v. Willett, 62 N. W. 1115, 105 Mich. 110.

[10] People v. Stewart, 42 N. W. 662, 75 Mich. 21.

until the evidence convinces you to the contrary, beyond all reasonable doubt, of his guilt.[11]

§ 1954(13). Missouri

You are instructed that the law presumes the defendant to be innocent, and this presumption attends him until overcome by evidence which proves him guilty beyond a reasonable doubt. If you have a reasonable doubt of defendant's guilt you should acquit him, but a doubt to authorize an acquittal on that ground alone should be a substantial doubt touching defendant's guilt and not a mere possibility of his innocence.[12]

You are further instructed that the indictment contains the formal statement of the charge, but is not to be taken as any evidence of defendant's guilt. The law presumes the defendant to be innocent, and this presumption continues until it has been overcome by evidence which establishes his guilt to your satisfaction and beyond a reasonable doubt. And the burden of proving his guilt rests with the state. If, however, this presumption has been overcome by the evidence, and the guilt of the defendant established to a moral certainty and beyond a reasonable doubt, your duty is to convict. If, upon consideration of all the evidence, you have a reasonable doubt of the defendant's guilt, you should acquit; but a doubt, to authorize an acquittal on that ground, ought to be a substantial doubt touching the defendant's guilt, and not a mere possibility of his innocence.[13]

The court instructs the jury that the defendants are presumed to be innocent, and this presumption attends them throughout the progress of the whole trial, until it is overcome by evidence proving their guilt beyond any reasonable doubt; and, before the jury can convict, the state must establish the guilt of the defendants beyond a reasonable doubt that the defendants are guilty as charged.[14]

The court instructs the jury that the law presumes the innocence, and not the guilt, of the defendant, and this presumption of innocence attends the defendant throughout the trial, and at the end entitles the defendant to an acquittal, unless the evidence in the case, when taken as a whole, satisfies you of defendant's guilt beyond a reasonable doubt, as defined in these instructions.[15]

The jury are instructed that the law presumes the defendants' innocence until the state has proven their guilt beyond a reasonable doubt, and, unless the state has so proven their guilt, you will

[11] Gentry v. State, 66 So. 982, 108 Miss. 505.

[12] State v. Dooms, 217 S. W. 43, 280 Mo. 84.

[13] State v. Miller, 89 S. W. 377, 190 Mo. 449.

[14] State v. Hendricks, 73 S. W. 194, 172 Mo. 654.

[15] State v. Hudspeth, 60 S. W. 136, 159 Mo. 178.

acquit them. But such a doubt, to authorize an acquittal on that ground alone, should be a substantial doubt of guilt, and not a mere possibility of their innocence.[16]

The jury are instructed that the law clothes the defendants with the presumption of innocence, which attends and protects them until it is overcome by testimony which proves their guilt beyond a reasonable doubt.[17]

§ 1954(14). Montana

You are instructed that the law presumes a person innocent until he is proved guilty, and this proof must be of a nature to satisfy your minds beyond a reasonable doubt of the guilt of the accused. The mere fact that an information has been filed, charging a person with a crime, does not in itself raise a presumption of guilt. A reasonable doubt, within the meaning of the law, is not a mere imaginary or possible doubt, but a substantial doubt, based upon reason and common sense, and induced by the facts and circumstances attending the particular case, and growing out of the testimony. It is such a doubt as will leave one's mind, after a careful examination of all the evidence, in such a condition that he cannot say that he has an abiding conviction, to a moral certainty, of the defendant's guilt as charged. The presumption of innocence has the weight and effect of evidence in the defendant's behalf, and this should continue until it is rebutted by competent evidence which displaces any reasonable doubt you might otherwise have of the defendant's guilt.[18]

§ 1954(15). Nebraska

The jury are instructed that the plea of not guilty in this case, made by the defendant, places upon the state the burden of proving every essential element of the crime charged in the information by competent evidence which satisfies your minds beyond a reasonable doubt of the truth of such facts, and the resulting guilt of the accused. The defendant is presumed to be innocent until every one of these essential facts is proven byond a reasonable doubt, and unless the essential facts constituting the crime charged in the information are established to that degree of certainty then you should acquit him.[19]

The jury are instructed that the law presumes the defendant innocent until he is proved guilty beyond a reasonable doubt. This presumption partakes of the nature of evidence, and, if no evidence was introduced, under the presumption of innocence, you should acquit him; and this presumption continues throughout the

[16] State v. Hale, 56 S. W. 881, 156 Mo. 102.

[17] State v. Paxton, 29 S. W. 705, 126 Mo. 500.

[18] State v. Harrison, 57 P. 647, 23 Mont. 79.

[19] Brinegar v. State, 118 N. W. 475, 82 Neb. 558.

trial until he has been proven guilty beyond a reasonable doubt. The defendant has been arraigned on the information in this case, and has pleaded not guilty. The plea of not guilty casts upon the state the burden of establishing by evidence all the material allegations in the information, as herein explained by the court, beyond a reasonable doubt, before you would be warranted in returning a verdict of guilty against him.[20]

You are instructed that it is not incumbent on the defendant to prove his innocence. Not as a mere form, but by a substantial part of the law, he is presumed to be innocent, and not guilty, until his guilt is proven to the satisfaction of each and every one of you, beyond a reasonable doubt; and this presumption is a matter of evidence, to the benefit of which the defendant is entitled. Mere suspicion, or reason to suspect, however strong, a probability on the doctrine of chances, or simply a preponderance of evidence, is not sufficient to overcome the presumption of innocence, but it continues as long as there is a reasonable doubt of any fact necessary to convict; and it matters not whether the ingenuity of counsel has been instrumental in bringing about the doubt, provided it arises from the whole evidence in the case.[21]

§ 1954(16). New Jersey

The jury are instructed that there is a rule of criminal law that everybody is presumed to be innocent; the law does not presume anybody to be guilty. That goes through every case; it goes through this case. If you come to the conclusion, however, as a result of your deliberation, that there is guilt proved—any degree of criminality under this indictment—of course that presumption of innocence cannot stand after that. It does exist up to that time, and unless you do find there is guilt that presumption of innocence would entitle him to a verdict of acquittal.[22]

§ 1954(17). New Mexico

The jury are instructed that the defendant is presumed to be innocent of the crime charged against him, and this presumption continues with him until overcome by proof of his guilt beyond a reasonable doubt. This presumption is not a mere form, but is a substantial right, belonging to the defendant, and if you have a reasonable doubt of defendant's guilt you should acquit him.[23]

§ 1954(18). Oklahoma

The court instructs the jury that the defendant in a criminal case is not required by law to prove his innocence, but the burden is upon the state to prove his guilt of the offense charged against him

[20] McVey v. State, 76 N. W. 438, 55 Neb. 777.

[21] Owens v. State, 49 N. W. 226, 32 Neb. 167.

[22] State v. Leo, 77 A. 523, 80 N. J. Law, [illegible].

[23] Territory v. Gonzales, 68 P. 925, 11 N. M. 301.

and every material element thereof beyond a reasonable doubt. He is presumed to be innocent of such charge until his guilt is established by legal evidence beyond a reasonable doubt, and, in case the jury have a reasonable doubt as to the defendant's guilt, they must acquit the defendant and return a verdict of not guilty.[24]

You are instructed that the defendants are presumed to be innocent until their guilt is established by the evidence beyond a reasonable doubt, and this presumption continues until every material allegation of the information is proven by the evidence beyond a reasonable doubt.[25]

The jury are instructed that the defendant's plea in this case is that he is not guilty. He goes into the trial of this case presumed to be innocent. He is clothed with this presumption, and it remains with him until you find by the proof beyond a reasonable doubt that he is guilty.[26]

§ 1954(19). Texas

The jury are instructed that the defendant is presumed to be innocent until his guilt is established by legal evidence, and in case you have a reasonable doubt as to his guilt you must acquit.[27]

§ 1954(20). Virginia

The court instructs the jury that the prisoner comes to trial presumed to be innocent, and this presumption continues until it is rebutted by the commonwealth beyond a reasonable doubt; and the jury cannot convict unless they can reconcile from the evidence the guilt of the prisoner with all the necessary allegations of the indictment.[28]

§ 1955. Duration of presumption of innocence

§ 1955(1). Illinois

The court instructs the jury that it is their duty to presume the defendant not guilty; that it is the duty of the jury to give the defendant the benefit of this presumption throughout the trial, and when they shall have retired to consider of their verdict.[29]

§ 1955(2). Indiana

The jury are instructed that defendant is presumed to be innocent of any crime, and this presumption follows him throughout the various stages of the trial, and should prevail, unless overcome by evidence of his guilt beyond a reasonable doubt.[30]

[24] Brantley v. State, 175 P. 51, 15 Okl. Cr. 6.

[25] McDaniel v. State, 127 P. 358, 8 Okl. Cr. 209.

[26] Hendrix v. United States, 101 P. 125, 2 Okl. Cr. 240.

[27] Flournoy v. State, 122 S. W. 26, 57 Tex. Cr. R. 88.

[28] Barker v. Commonwealth, 20 S. E. 776, 90 Va. 820.

[29] Flynn v. People, 78 N. E. 617, 222 Ill. 303.

[30] Rigsby v. State, 91 N. E. 925, 174 Ind. 284.

§ 1955(3). Kansas

You are instructed that in law the defendants are presumed to be innocent of the offense preferred against them, innocent of any guilty intent, and innocent of every fact necessary for the state to prove in order to establish their guilt, and this presumption of innocence continues to operate in their favor until their guilt is proven by the evidence, and until each and every fact necessary to constitute the offense charged against them is so proved beyond a reasonable doubt.[31]

§ 1955(4). Oklahoma

The court further instructs the jury that of the offense charged in the information and each and every material ingredient thereof the defendants are presumed to be innocent, and this presumption continues until the state shall overcome same by competent evidence, which convinces you of the guilt of the defendants beyond a reasonable doubt.[32]

§ 1955(5). Washington

You are further instructed that the law presumes the innocence of a person accused of crime, and this presumption is not a matter of form merely, which the jury may disregard at pleasure, but is a part of the law of the land and is a right guaranteed by that law to every person accused of crime. This presumption of innocence continues with the defendant throughout all the stages of the trial, and until the case has been finally submitted to the jury, and the jury has found that this presumption has been overcome by the evidence of the prosecution in the case beyond a reasonable doubt as to each and every material fact.[33]

§ 1956. Presumptions and burden of proof as to sanity

In prosecution for homicide, see post, § 3037.

§ 1956(1). California

The court instructs the jury that, although it is true, as you have been instructed, that generally the burden of proof is upon the prosecution, yet to this rule there is this exception: Where insanity is relied upon as a defense, the burden of proving the existence of such insanity is on defendant, and it is incumbent upon him to establish by a preponderance of evidence that he was insane at the time of committing the act charged, and the evidence of mental derangement must be such in amount that if the single issue of sanity or insanity of the defendant should be submitted to the jury in a civil case they must find that he is insane. Insanity must be established by a preponderance of the evidence. Therefore, if you

[31] State v. Furney, 21 Pac. 213, 41 Kan. 115, 13 Am. St. Rep. 262.

[32] Berry v. State, 111 P. 676, 4 Okl. Cr. 202, 31 L. R. A. (N. S.) 849.

[33] State v. Totten, 121 P. 70, 67 Wash. 192.

believe that the preponderance of evidence is in favor of the sanity of the defendant, or that there is not a preponderance of evidence to the effect that he was insane at the time of the transaction involved herein, you will act upon the hypothesis that he was sane at that time.[34]

§ 1956(2). Florida

You are instructed that, as the law presumes every one sane and responsible, the question is, what is there in this case to show to the contrary as to this defendant's mental condition on the ——— day of ——— last? You are instructed that you are not warranted, as a jury, in inferring that a man is insane from the mere fact alone of his committing a crime, or from the enormity of the crime, or from the mere absence of adequate motives for its commission.[35]

§ 1956(3). Illinois

The jury are instructed that, while the law presumes all men to be sane, yet this presumption may be overcome by evidence tending to prove insanity of the accused at the time of the commission of the alleged offense. When such evidence is introduced, then the presumption of sanity ceases, and the prosecution is bound to prove the sanity of the accused beyond a reasonable doubt. So, in this case, in which the defense of sanity is interposed, if the jury, after considering all the evidence, entertains a reasonable doubt of the sanity of the defendant at the time of the alleged offense, then he must be acquitted.[36]

§ 1956(4). Missouri

You are instructed that the law presumes every person who has reached the years of discretion to be of sound mind, and this presumption continues until the contrary is shown. So that when, as in this case, insanity is pleaded as a defense to a criminal charge, the fact of the existence of such insanity at the time of the commission of the act complained of must, before you can acquit on that ground, be established by the evidence to your reasonable satisfaction, and the burden of proving this fact is upon the defendant.[37]

§ 1956(5). Nebraska

You are instructed that the law presumes that every person is sane, and it is not necessary for the state to introduce evidence of sanity in the first instance. When, however, any evidence has been introduced tending to prove insanity of an accused, the burden is then upon the state to establish the fact of the accused's sanity, the same as any other material fact to be established by the state

[34] People v. Keyes, 175 P. 6, 178 Cal. 794.

[35] Davis v. State, 32 So. 822, 44 Fla. 32.

[36] Jamison v. People, 34 N. E. 486, 145 Ill. 357.

[37] State v. Paulsgrove, 101 S. W. 27, 203 Mo. 193.

to warrant a conviction. If the testimony introduced in this case tending to prove that the defendant was insane at the time of the alleged burning described in the information raises in your mind a reasonable doubt of his sanity at the time of the alleged burning, then your verdict should be acquittal.[38]

§ 1956(6). Nevada

You are instructed that every man is presumed to be sane and to intend the natural and usual consequences of his own acts. As the law presumes a man to be sane until the contrary is shown, I charge you that the burden of proving insanity as a defense to a crime is upon the defendant to establish by a preponderance of the evidence, and unless insanity is established by a preponderance of the evidence, the presumption of sanity should prevail.[39]

§ 1956(7). New York

The jury are instructed that, sanity being the normal and usual condition of mankind, the law presumes that every individual is in that state. Hence the prosecutor may rest upon that presumption. Without other proof, the fact is deemed to be proved prima facie. Whoever denies this, or interposes a defense based upon its untruth, must prove it. The burden, not of the general issue of the crime by a competent person, but the burden of overthrowing the presumption of sanity or of showing insanity, is upon the person who alleges it. And if evidence is given tending to establish insanity, then the general question is presented to the court and jury whether the crime, if committed, was committed by a person responsible for his acts. And upon this question the presumption of sanity and the evidence are all to be considered, and the prosecutor holds the affirmative, and, if a reasonable doubt exists as to whether the prisoner is sane or not, he is entitled to the benefit of that doubt.[40]

§ 1956(8). North Carolina

You are instructed that the prisoner pleads that at the time of the alleged shooting of the deceased his mind was dethroned, and that he had not the mental capacity to distinguish between right and wrong, that he did not have the power to premeditate and deliberate upon the nature and consequence of his act, and that in the eye of the law he is excused. The burden of this plea is upon him, and not upon the state, to satisfy you of its truth, for in law he is presumed to be sane, not insane. This presumption of the law is rebuttable by evidence, and to do so he is not required to establish his plea beyond a reasonable doubt; but it is incumbent

[38] Knights v. State, 78 N. W. 508, 58 Neb. 225, 76 Am. St. Rep. 78.

[39] State v. Clancy, 147 P. 449, 38 Nev. 181.

[40] People v. Tobin, 68 N. E. 359, 176 N. Y. 278.

upon him to establish it by evidence to your satisfaction. The prisoner, to be responsible for his act, must have had legal capacity at the time to distinguish between good and evil, and to have known what he was doing, to comprehend his relations towards others, the nature of his act, and to have had a consciousness of wrongdoing. In the inquiry as to the prisoner's mental condition he is assumed to have been sane, that is, to have had the degree of mind and reason required to constitute criminal responsibility for his acts; but the want of such legal capacity may appear by evidence of the presence of insanity. The measure of criminal responsibility is this: If the prisoner at the time of the homicidal act was in a state of mind to comprehend his relations to others, the nature and criminal character of the act, was conscious that he was doing wrong, he was responsible for his act. Otherwise, he was not, and your verdict will be as you find the facts from the evidence. If you find the prisoner was intoxicated at the time of the alleged homicide from the use of some exciting stimulant, and you, notwithstanding, find and are satisfied beyond a reasonable doubt that he had mind sufficient to have a fixed purpose and to plan, and that he deliberately and with premeditation formed the design to kill the deceased, and that he deliberated and premeditated upon the killing in consequence of such formed design, and that, in consequence of such formed design, he executed it, and shot and killed the deceased, then the fact, if found, that the prisoner was intoxicated would not excuse the act; but the offense would under such findings be murder in the first degree. If, however, you have a reasonable doubt as to the shooting and killing with premeditation and deliberation, but you find that the prisoner had capacity to comprehend his relations to others, was conscious that it was wrong to take the life of a fellowman, and knew the nature of the act he was committing, and under these circumstances you find that he shot and killed the deceased, he would be guilty of murder in the second degree, and you would so find. If, however, upon a review of all the evidence you find that the prisoner killed the deceased as alleged by the state, but you find that at the time of the killing he was insane, or was in a state of mind not to comprehend his relations to others, nor the nature and criminal character of the act, when he shot the deceased, and was not conscious that he was doing wrong, under these findings, if so made by you, he would not be responsible, and upon such findings you would acquit the prisoner. The burden of establishing the plea of insanity, however, with the specification as I have heretofore explained, is upon the prisoner, and not upon the state.[41]

[41] State v. English, 80 S. E. 72, 164 N. C. 497.

§ 1956(9). Oklahoma

You are instructed that, sanity being the normal and usual condition of mankind, the law presumes that every person is sane; hence the state in a criminal prosecution may rely upon such presumption without proof relative thereto. But, when the defendant in a homicide case produces sufficient evidence to raise a reasonable doubt of his sanity, the law then imposes on the state the burden of establishing the sanity of the defendant, the same as any other material fact necessary to warrant a conviction; and if, upon consideration of all the evidence in the case, the jury have a reasonable doubt that the defendant at the time of the commission of the act charged was mentally competent to distinguish between right and wrong, or to understand the nature of the act he was committing, he must be acquitted.[42]

§ 1956(10). Tennessee

The court instructs the jury that the law presumes that all persons are of sound mind until the contrary is made to appear. When, therefore, any person charged with a criminal offense punishable by death or imprisonment pleads insanity, as in this case, and presents evidence establishing or tending to establish the said plea, which evidence is sufficient to rebut and overturn the presumption of sanity, then it must be made to appear to your satisfaction from all the evidence that the defendant is of sufficient mental capacity to give sane advice to his counsel involving the charge in the indictment.[43]

§ 1956(11). Texas

You are charged that only a person with a sound memory and discretion can be held punishable for a crime, and that no act done in a state of insanity can be held punishable as an offense. Every man is presumed to be sane until the contrary appears to the jury trying him. He is presumed to entertain, until this appears, a sufficient degree of reason to be responsible for his acts, and to establish a defense on the ground of insanity, it must be shown by a preponderance of the evidence that at the time of committing the act the party accused was laboring under such defect of reason, from disease or defect of mind, as not to know the nature or quality of the act he was doing, or if he did know that, he did not know he was doing wrong—that is, that he did not know the difference between the right and wrong as to the particular act charged against him. The insanity must have existed at the very time of the commission of the offense, and the mind must have been so dethroned of reason as to deprive the person accused of a

[42] Snodgrass v. State, 175 P. 129, 15 Okl. Cr. 117.

[43] Jordan v. State, 135 S. W. 327, 124 Tenn. 81, 34 L. R. A. (N. S.) 1115.

knowledge of the right and wrong as to the particular act done. You are to determine from the evidence in this case the matter of insanity; it being a question of fact controlled, so far as the law is concerned, by the instructions herein given you. In case you find from the evidence that the defendant was insane at the time of the commission of the act, and you acquit him, under the instructions heretofore given you, you will state in your verdict that you have acquitted the defendant on the ground of insanity, and the burden of proof to establish his plea of insanity devolves upon the defendant; but it is not necessary that insanity be proven beyond a reasonable doubt.*

§ 1956(12). Washington

You are instructed that every man is presumed to be sane, and to intend the natural and usual consequences of his own acts. As the law presumes a man to be sane until the contrary is shown, I charge you that the burden of proving insanity as a defense to a crime is upon the defendant to establish by a preponderance of the evidence, and unless insanity is established by a fair preponderance of the evidence the presumption of sanity must prevail.[44]

§ 1956(13). Wyoming

You are instructed that the defendant is presumed to be sane, and it is not incumbent upon the state to introduce evidence in the first instance to prove he was sane. But, when evidence is offered by the defendant on that issue, the state must prove his sanity beyond a reasonable doubt at the time of the shooting.[45]

§ 1957. Presumption of continuance of insanity

In prosecution for homicide, see post, § 8039.

§ 1957(1). United States

The jury are instructed that, if the defendant is shown in the proof to have been permanently insane before the commission of the offense, the presumption would be that it continued and existed at the time of its commission. By "permanently insane" is meant insanity not due to a temporary cause, such as delirium tremens or temporary disease or fever, or other temporary cause which passes away.[46]

§ 1957(2). Indiana

The jury are instructed that, when it appears from the evidence that insanity has once existed in the defendant, whether or not it will be presumed to continue depends upon the nature of the mental malady. If it is of a permanent and chronic character, then it is

* Tubb v. State, 117 S. W. 858, 55 Tex. Cr. R. 606.

[44] State v. Clark, 76 P. 98, 34 Wash. 485, 101 Am. St. Rep. 1006.

[45] Flanders v. State, 156 P. 39, 24 Wyo. 81.

[46] Kellogg v. United States (C. C. A. Tenn.) 103 F. 200, 43 C. C. A. 179.

presumed to continue to exist until the contrary appears from the evidence; but if the insanity is the result of physical disease, a weakened condition of the system, remorse, disappointment, shattered hopes, jealousy, an excited condition, strong passions, violent temper, or some other temporary or transient cause, and lucid intervals appear, then no presumption as to its continued existence is indulged, and the mental condition of the defendant at the time of the commission of the crime is to be ascertained by the jury from all the evidence and circumstances of the case.[47]

You are instructed that insanity, once shown to exist in an individual, is presumed to continue until the contrary appears from the evidence, and in this case, if you believe from the evidence that defendant was insane at some time prior to the commission of the offense charged against him, then such insanity is presumed to have continued until the contrary is shown beyond a reasonable doubt.[48]

§ 1958. Presumptions with respect to capacity of child to commit crime

The jury are instructed that there is no exact time when it can be said with certainty that people arrive at the age of accountability, but the law conclusively presumes that a person under the age of seven years is incapable of committing crime, by reason of his presumed lack of understanding sufficient to distinguish between right and wrong, and that a person between the ages of seven and fourteen years is prima facie incapable of committing crime; that, in order to establish as criminal the act of a person between the ages of seven and fourteen years, it must affirmatively appear that the person doing the act was of such maturity of mind and of sufficient discretion to distinguish between right and wrong, and a person over fourteen years is presumed by law to be accountable for his acts and capable of committing crime.[49]

§ 1959. Presumption from absence of evidence of motive

Presumption, in prosecution for homicide, from absence of motive for alleged acts of deceased, see post, § 3035.
Presumption of insanity, in prosecution for homicide, from lack of motive for killing, see post, § 3038.

§ 1959(1). Missouri

The court instructs the jury that, when evidence fails to show any motive to commit the crime charged on the part of the defendant, this is a circumstance in favor of his innocence; and in this case, if the jury finds, upon a careful examination of all the

[47] Wheeler v. State, 63 N. E. 975, 158 Ind. 687.

[48] Grubb v. State, 117 Ind. 277, 20 N. E. 725.

[49] State v. Davis, 58 S. W. 122, 104 Tenn. 501.

evidence, that it fails to show any motive on the part of the defendants to commit the crime charged against them, then this is a circumstance which the jury ought to consider, in connection with all the evidence in the case, in making up their verdict. And, in order to ascertain a motive, the jury will take into consideration all the evidence in relation to the association, relations and deportment toward each other of defendant and the deceased, together with all the other evidence in the case.[50]

§ 1959(2). Virginia

The jury are instructed that the absence of all evidence of an inducing cause or motive to commit the crime, when the fact is in reasonable doubt as to who committed it, affords a strong presumption of innocence.[51]

§ 1960. Effect of indictment

The court instructs the jury that the indictment preferred against the defendant in this case is a mere formal accusation, and is of itself no evidence whatever of his guilt. Before the jury can find the defendant guilty they must believe and find from the evidence before them, and that beyond all reasonable doubt, that he, the said defendant, and in the manner and by some of the means mentioned in the said indictment, willfully, intentionally, deliberately, and premeditatedly, on purpose, and with malice aforethought, did kill the said ———. And the court further instructs the jury that by the term "reasonable doubt" is meant that state of the case which, after the entire comparison and consideration of the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction to a moral certainty that the charge is true.[52]

§ 1961. Presumption that one intends natural consequences of acts

Presumption in prosecution for homicide, see post, § 3025.

As I have said before, the question of intent is one that is hard to establish directly, because grown persons do not always disclose the object they have in view in any acts in which they may indulge, and you have to gather the intent from the character of the act, the circumstances surrounding it, and from conduct of a like character which may appear as tending to aid you in finding and discovering it. But in connection with all this, unless the testimony satisfies you of something else, you are warranted in holding a party responsible for the natural and probable and legiti-

[50] State v. Hendricks, 73 S. W. 194, 172 Mo. 654.

[51] Vaughan v. Commonwealth, 8 S. E. 584, 85 Va. 671.

[52] State v. Howell, 23 S. W. 263, 117 Mo. 307.

mate consequences of his act. I have said that is what is presumed in every case a man means.[53]

The court further charges you that the rule of law in regard to intent in this case is this: The intent to defraud or to deceive is to be inferred from willfully and knowingly doing that which is wrongful or illegal, and which, in its necessary consequences and results, must injure or deceive another. The intent may be presumed from the doing of the wrongful or fraudulent or illegal act. But this inference or presumption is not necessarily conclusive. There may be other evidence which may satisfy the jury that there was no such intent, but such inference or presumption throws the burden of proof upon the defendant, and the evidence in rebuttal to do away with that presumption of guilty intent must be sufficiently strong to satisfy you beyond a reasonable doubt that there was no such guilty intent in such transaction. The presumption is that a person intends the natural and probable consequences of acts intentionally done, and that an unlawful act implies an unlawful intent. The law presumes that every man intends the legitimate consequences of his own acts. Wrongful acts knowingly or intentionally committed can neither be justified nor excused on the ground of innocent intent. The intent to injure or defraud is presumed when the unlawful act which results in loss or injury is proved to have been knowingly committed. It is a well-settled rule, which the law applies in both criminal and civil cases, that the intent is presumed and inferred from the result of the action.[54]

§ 1962. Presumption from previous conviction

You are instructed that the law indulges in no presumption, nor is a jury permitted to indulge in any presumption, that it is more probable that a person previously convicted of felony will commit a subsequent crime.[55]

§ 1963. Presumption from flight

§ 1963(f). United States.

The jury are instructed that evidence has been offered of the escape of the defendant, or attempted escape, after arrest on the charge on which the defendant is now being tried. This evidence is admitted on the theory that the defendant is in fear of the consequences of his crime and is attempting to escape therefrom; in other words, that guilt may be inferred from the fact of escape from custody. The court instructs you that the inference that

[53] Cook v. United States (C. C. A. Pa.) 159 F. 919, 87 C. C. A. 99, certiorari denied 28 S. Ct. 761, 209 U. S. 551, 52 L. Ed. 922.

[54] United States v. German (D. C. Ky.) 115 F. 987.

[55] People v. Chadwick, 76 P. 884, 143 Cal. 116.

may be drawn from an escape is strong or slight according to the facts surrounding the party at the time. If a party is caught in the act of crime and speedily makes an attempt for liberty under desperate circumstances, the inference of guilt would be strong; but if the attempt was made after many months of confinement, and the escape was comparatively without danger, then the inference of guilt to be drawn from an escape is slight; but whether the inference of guilt is strong or slight depends upon the conditions and circumstances surrounding the accused person at the time.[56]

§ 1963(2). Alabama

The jury are instructed that evidence may be offered tending to show flight of a defendant, and, when it is offered by the state, it may be considered by the jury in connection with the other evidence in the case. In the first place, where evidence is offered tending to show defendant's flight, that he went away from the scene of an alleged offense, it would be for the jury to say was it a flight as a matter of fact. You would have to determine from the evidence whether it was a flight or not, and then you would further consider such evidence in the light of all the other evidence in the case, including any explanation or statement which may be offered by defendant of the alleged flight, and whether it was a reasonable explanation or not, and all the other evidence in the case, giving each part of it such weight as you think it entitled to receive.[57]

§ 1963(3). Georgia

Evidence has been offered to show the flight of the defendant. This is, in law, a circumstance that can be considered in determining his guilt. But, says our law, it is only a slight circumstance. It is a circumstance which the defendant may explain, and, if explained to the reasonable satisfaction of the jury, it should not be considered as a circumstance against him.[58]

§ 1963(4). Indiana

The jury are instructed that the fact that defendant fled or concealed himself soon after the death of deceased is not of itself conclusive evidence of the guilt of defendant, but only a circumstance to be taken into consideration by the jury in connection with all the other circumstances in this case, as detailed to you by the witnesses and the facts and circumstances connected therewith; and the weight the jury should give it depends upon the circumstances detailed to you by the witnesses either for the state

[56] Bird v. United States, 23 S. Ct. 42, 187 U. S. 118, 47 L. Ed. 100.

[57] Ware v. State, 67 So. 763, 12 Ala. App. 101.

[58] Hudson v. State, 28 S. E. 1010, 101 Ga. 520.

or defense, the pressure brought to bear upon the defendant by others in inducing him to go away, and all the other circumstances detailed to you in this case.[59]

§ 1963(5). Iowa

You are instructed that evidence has been introduced tending to show an attempt, on the part of the defendant, to escape from the officers of the law. If you find from the evidence, beyond a reasonable doubt, that the offense of breaking and entering was committed, at the time and place substantially as charged in the indictment, and further that the defendant knew, or had reasons to know, that the persons from whom he ran, if he did so run, were officers of the law, and further that the defendant ran away from or attempted to escape arrest, then you are justified in considering such flight as a circumstance which, prima facie, is indicative of guilt, to be considered by you in connection with all the evidence, to aid you in determining the guilt or innocence of the accused. If, upon all the evidence, you entertain a reasonable doubt of defendant's guilt, you should acquit him.[60]

§ 1963(6). Kansas

The jury are instructed that evidence has been offered tending to show flight by the defendant from the state of ——— to the state of ——— at or about the time the complaint was filed charging him with the crime alleged against him in the information. If you find from the evidence that the defendant did, at or about the time the charge contained in the information was first preferred against him, flee to a distant section of the country, and that such flight was induced by such charge, this is a circumstance to be considered by you, in connection with all the other evidence, to aid you in determining the question of his guilt or innocence.[61]

§ 1963(7). Louisiana

You are instructed that the legal presumption from flight is against the prisoner, but is not sufficient of itself to authorize a conviction, and it lies upon the defendant to explain or rebut it. In this connection the jury are instructed that the fact of the accused having fled, if proved, is merely a fact in the case, to be taken into consideration by the jury, in connection with all the other facts in the case, in determining the probabilities for or against the guilt of the accused, that flight may be prompted by a sense of guilt, but this not necessarily so, and that, if the jury find that the accused fled, it is for them to consider what was the motive of the flight.[62]

[59] Waybright v. State, 56 Ind. 122.

[60] State v. O'Callaghan, 138 N. W. 402, 157 Iowa, 545.

[61] State v. Thomas, 51 P. 228, 58 Kan. 805.

[62] State v. Baptiste, 30 So. 147, 105 La. 661.

§ 1963(8). Missouri

The court instructs the jury that, although they may believe and find from the evidence that the defendant fled from the state of ——— after the commission of the alleged offense (if any), yet, if they believe and find from the evidence that he did not flee from a motive to avoid arrest and trial on this charge, they should not consider it as an element in arriving at their verdict as to the defendant's guilt or innocence of this charge.[63]

You are instructed that flight raises the presumption of guilt; and if the jury believe and find, from the evidence, that the defendant, after the alleged commission of the ——— charged in the indictment, fled from the state of ——— for the purpose of avoiding arrest and trial for said offense, you may take this fact into consideration in determining his guilt or innocence.[64]

You are instructed that, if you believe and find from the evidence that the defendant, immediately after the time of the alleged assault, fled from the house where he was staying in the county of ——— for the purpose and with the intent to avoid arrest by the officers of the law and trial for such alleged assault, such flight should be considered by you, in connection with all the other evidence in the case, in determining the question of the defendant's guilt or innocence. But if you do not believe that he fled or attempted to flee for the purpose of avoiding arrest or trial, but that he went away for some other purpose, then such act on his part should not be considered as any evidence against him.[65]

The court instructs the jury that while an attempt to escape of itself does not establish the question of guilt or innocence, yet if the jury believe from the evidence that the defendant, while confined in the ——— county jail, charged with the commission of the crime of which he is now being tried, attempted to escape therefrom, then the jury may take such fact into consideration, in connection with all the other facts detailed in evidence, in determining the guilt or innocence of the defendant.[66]

§ 1963(9). New Jersey

The jury are instructed that the flight of a person charged with crime is deemed, when unexplained, to raise some presumption of guilt akin to the presumption deemed to arise upon the fabrication of false evidence or the suppression of true evidence.[67]

[63] State v. Lewkowitz, 178 S. W. 58, 265 Mo. 613.

[64] State v. Knowles, 83 S. W. 1083, 185 Mo. 141.

[65] State v. Boyd, 76 S. W. 979, 178 Mo. 2.

[66] State v. Howell, 23 S. W. 263, 117 Mo. 307.

[67] State v. Harrington, 94 A. 623, 87 N. J. Law, 713.

§ 1963(10). Oregon

I further instruct you that flight or concealment of a person immediately after a crime has been committed, with which he is charged, is not a sufficient circumstance of itself to establish his guilt, but only a circumstance which the jury may consider along with all the other evidence in the case in determining the probabilities for or against him. The weight to which that circumstance is entitled is a matter for the jury to determine in connection with all the facts and circumstances introduced in evidence before you.[68]

§ 1963(11). Washington

The jury are instructed that, if you find that ——— was committed as charged in the information, evidence of flight of the accused may be considered in determining the question as to whether he was the one who committed the act.[69]

§ 1964. Presumption from voluntary surrender to authorities

§ 1964(1). Alabama

The jury are instructed that the fact that, when charged with the commission of a crime, the defendant refuses to flee, but surrenders himself to the proper authorities, cannot be considered as showing his innocence of the offense charged.[70]

The jury are instructed that the flight of a defendant, in a criminal case, may or may not be considered as a circumstance tending to prove guilt, depending on the motive which prompted it, whether a consciousness of guilt and a pending apprehension of being brought to justice caused the flight, or whether it was caused from some other and more innocent motive, and the jury may look to the fact that he went to police headquarters and gave himself up.[71]

§ 1964(2). Mississippi

The court instructs the jury that in connection with the circumstances that, after the killing of ———, the defendant went to his home, they may also consider the fact, if such is proven, that on the day after the night on which he returned home he voluntarily notified the sheriff of ——— county that he would come in on ———; the next day, and give himself up, and that on ———, the next day, he did voluntarily come to the town of ———, and voluntarily surrendered himself to the sheriff.[72]

[68] State v. Chin Ping, 176 P. 188, 91 Or. 593.

[69] State v. Deatherage, 77 P. 504, 35 Wash. 326.

[70] Walker v. State, 35 So. 1011, 139 Ala. 56.

[71] White v. State, 21 So. 330, 111 Ala. 92.

[72] Bell v. State, 42 So. 542, 89 Miss. 810, 119 Am. St. Rep. 722, 11 Ann. Cas. 431.

§ 1965. Silence as admission

The jury are instructed that if a statement is made in the hearing and presence of a person which affects his rights, or is criminating to him, and he does not reply to it, nor make any explanation, but remains silent, such silence is in the nature of an admission of the truth of the facts contained in the statements made, provided the same was heard and understood by such person, and he is not in custody, nor under restraint, but at liberty to reply or explain, and provided such statement is of such a nature and made under such circumstances and by such persons as naturally to call for a reply. And the court instructs the jury that applying the rule thus given to the case, if they find that the remark was made by the men, and that the defendant remained silent, as testified by the officers, they are to give to the circumstance such weight and significance as they think it entitled to.[73]

§ 1966. Failure to produce evidence

§ 1966(1). Iowa

The jury are instructed that, if defendant failed to introduce proof, which he might have done, explaining facts or circumstances established by the evidence which operated against him, it is a circumstance to be considered in reaching a conclusion as to his guilt, and that if evidence within the power of the defendant, and not accessible to the state, is withheld by the defendant, the jury are authorized to infer that, if produced, it would be against defendant.[74]

§ 1966(2). New Jersey

The jury are instructed that it is proper now for the jury to consider why it was that the defense did not call upon the young man ———, who was found in the ice box, to explain what kind of a house he was in, and why he went into the ice box. It is also proper for the jury to consider why it was that no explanation was offered, and why ———, who had been the housekeeper and servant of the defendant for a period of four months prior to ———, and who had been found in his house on the ———, was not here as a witness. It may easily be that the defendant was justified in law and morals in not calling them, but you may inquire why the explanation was not given.[75]

§ 1967. Inference from failure of accused to testify

The jury are instructed that the fact that the defendant, having an opportunity to take the stand if he saw fit, has elected not to,

[73] Commonwealth v. McCabe, 39 N. E. 777, 163 Mass. 98.

[74] State v. Rodman, 17 N. W. 663, 62 Iowa, 456.

[75] State v. Callahan, 69 A. 957, 76 N. J. Law, 426.

and that he has been here and heard the statements of these witnesses on the stand, would warrant you in presuming that he could not deny that the facts which they stated were true.[76]

The court charges the jury that, where the evidence, if true, would be conclusive of the guilt of the accused, and he can disprove it by his own oath as a witness, then his silence will justify a strong inference that he cannot deny the charge.[77]

In connection with the effect of the confession, and the facts which it states, I think it is proper for me to say to you that the defendant has heard this evidence, which, in this confession, directly connects him with it (the murder), in which he admits he is responsible for it, and that it was done after he had formed the intention to kill this man, but has remained in his seat without attempting to deny or contradict the testimony of any of the state's witnesses. It may be that the circumstantial evidence in the case is not such as you would reasonably expect him to make any answer to, and no inference, of course, can be taken against a man keeping silent against things which cannot connect him with the crime in question, although they may have some possible bearing on it, but, when it comes to his own confession of guilt produced here in open court, the fact that he has seen fit not to deny it in any way is a matter that you have a right to consider. Further than that, I will make no charge to you, but leave it to your own good judgment as to whether or not you will draw any inference from that fact.[78]

§ 1968. Cautioning jury against drawing inferences unfavorable to defendant from his failure to testify

§ 1968(1). Indiana

The jury are instructed that in a criminal case, the defendant is a competent witness in his own behalf, at his election. If he fails to testify, it is his right so to do, and the fact that he does not testify will raise no presumption of any kind against him, and no inference of any kind can be drawn therefrom by the jury.[79]

§ 1968(2). Iowa

You are instructed that the fact that the defendant has not been called as a witness to testify in this case cannot be considered by you for any purpose, and you are instructed that you will not, in your deliberation, consider the fact of his not so testifying for any purpose in arriving at your verdict.[80]

[76] State v. Di Benedetto, 82 A. 521, 82 N. J. Law, 168.

[77] State v. Callahan, 69 A. 957, 76 N. J. Law, 426.

[78] State v. Banusik, 64 A. 994, 84 N. J. Law, 640.

[79] Thrawley v. State, 55 N. E. 95, 153 Ind. 375.

[80] State v. Carnagy, 76 N. W. 805, 106 Iowa, 483.

§ 1968(3). Massachusetts

I have already told you, I am sure, that defendants in prosecutions for crime have the privilege of taking the stand in case they desire to. That is a privilege that is given; it is not an obligation which is imposed upon them. They can or they need not take the stand. It matters not in case they decide not to take the stand what motives prompt them to come to that decision. You should not speculate in your minds as to the reason why they did it. If that is the situation, if the testimony closes without the defendants having taken the stand, you are to consider that they are disqualified from taking the stand, from some reason or other. The situation, so far as your duty is concerned, is exactly as if they could not get from the place where they sit at the bar to this stand, and as if there was some reason which prevented them from getting up here. You have got to take this case and decide it entirely aside from that fact. Of course, they did not take the stand. That, of course, is apparent before your eyes. But I say that is a right which the law gives them. They may decline to take the stand and no inference whatever is to be drawn against them by reason of the fact. A reason which is sufficient, so far as the law goes, conclusive, and which you have no right to speculate upon or inquire into, has prompted them to rest upon other evidence in the case.[81]

§ 1968(4). Mississippi

The jury are instructed that it does not devolve upon the defendant to account for or show the whereabouts of the infant in question, and the fact that he does not testify in this cause is not to be considered unfavorably to him by the jury.[82]

§ 1968(5). Montana

The court instructs the jury that a defendant in a criminal action or proceeding cannot be compelled to be a witness against himself, and if the defendant does not claim the right to be sworn and does not testify, this fact must not be used to his prejudice.[83]

§ 1968(6). New Mexico

The court instructs the jury that the defendant may, if he sees fit, become a witness in his own behalf; but the law imposes no obligation upon him to testify in his own behalf, or as to any material fact in the case, and the fact that the defendant may not take the stand and testify as a witness in his own behalf as to any material fact is not to be taken or considered by you in arriving at your verdict, and no presumption whatever is to be raised against him on account of the accused not testifying in his own behalf.[84]

[81] Commonwealth v. Farmer, 106 N. E. 150, 218 Mass. 507.

[82] Haynes v. State, 27 So. 601.

[83] State v. Fuller, 85 P. 369, 34 Mont. 12, 8 L. R. A. (N. S.) 762, 9 Ann. Cas. 648.

[84] Territory v. Donahue, 113 P. 601, 16 N. M. 17.

§ 1968(7). North Carolina

The jury are instructed that the defendant is not required to go upon the witness stand. The law permits a party to go on the witness stand. If he feels that the state has offered evidence against him, the law allows him to do it. If he wishes to rely upon the fact that the evidence is not to be believed and sees fit to stay off the stand, the law says that ought not to be used against him. If there are other facts that could be produced in order to clear up the matter, and if he failed to produce them, then those facts might be used against him. If you can see from the case, from the evidence that he could have explained his whereabouts, or whether he was with that negro or not, by other witnesses, then he should have offered them; but, if you can see he had no opportunity of offering any other witnesses to show he was not with him or had no whisky, then that would not be considered.[85]

§ 1968(8). Texas

The jury are instructed that the law allows a defendant to testify in his own behalf, but a failure to do so is not even a circumstance against him, and no presumption of guilt can be indulged in by the jury on account of such failure on his part, and the jury will not mention, discuss, or even refer to the fact that the defendant failed to testify.[86]

You are instructed that under the law of this state the failure of a defendant to testify in his own behalf cannot be considered as a circumstance against him, and in this case you will not consider as a circumstance against him, or for any purpose, the defendant's failure to testify.[87]

You are further charged that the defendant in a criminal case is permitted by law to testify in his own behalf; but he is not in any case required to do so, and, in the event that he elects to remain silent, the law is that his failure to testify shall not be alluded to by counsel in argument, nor taken as a circumstance against him. And so, in this case, in deliberating on your verdict, you must not, either directly or indirectly, verbally or mentally, take such failure to testify as a circumstance against the defendant, nor must you, either directly or indirectly, allude to, or refer to, or mention such failure.[88]

§ 1968(9). Washington

The jury are instructed that, while the statute of this state provides that a person charged with crime may testify in his own behalf, he is under no obligation to do so, and the statute expressly

[85] State v. Turner, 88 S. E. 523, 171 N. C. 803.

[86] Singleton v. State, 124 S. W. 92, 57 Tex. Cr. R. 560.

[87] King v. State, 109 S. W. 182, 53 Tex. Cr. R. 101.

[88] Parker v. State, 49 S. W. 80, 40 Tex. Cr. R. 119.

makes it the duty of the court to instruct the jury that no inference of guilt shall arise against the accused if the accused shall fail or refuse to testify as a witness in his own behalf, and the court so instructs the jury in this case.[89]

§ 1969. Presumption from fabrication of evidence

You are instructed that your first duty in the case is to reject all evidence that you may find to be false; all evidence that you may find to be fabricated, because it is worthless; and if it is purposely and intentionally invoked by the defendant it is evidence against him; it is the basis for a presumption against him, because the law says that he who resorts to perjury, he who resorts to subornation of perjury, to accomplish an end, this is against him, and you may take such action as the basis of a presumption of guilt.[90]

§ 1970. Inference from failure to establish alibi

The jury are instructed that, in weighing the testimony of an alibi, you must give it that same weight as you would any other material fact in the case. If the defendant should fail in any way or any manner in the proof of this alibi, it is a circumstance that may be weighed against the defendant in connection with the other evidence.[91]

The jury are instructed that, if the jury believe from the evidence, beyond a reasonable doubt, that the alibi set up in this case is simulated, false, and fraudulent, they may consider this as a circumstance against the defendant, in connection with all the other evidence in the case.[92]

§ 1971. Oral statements or admissions of defendant

§ 1971(1). Iowa

The jury are instructed that evidence has been introduced to show the defendant made certain admissions appearing in evidence. Verbal statements or admissions should be received by you with great caution, as they are subject to much imperfection and mistake, owing to the person speaking not having clearly expressed his own meaning, or the person spoken to not having clearly understood the speaker. It frequently happens, also, that the witness, by unintentionally altering a few words or expressions really used, gives an effect to the statement entirely at variance with what the speaker actually did say. But when such verbal statements are pre-

[89] State v. Deatherage, 77 P. 504, 35 Wash. 326.

[90] Allen v. U. S., 17 S. Ct. 154, 164 U. S. 492, 41 L. Ed. 528.

[91] Wray v. State, 57 So. 144, 2 Ala. App. 139.

[92] Crittenden v. State, 32 So. 273, 134 Ala. 145.

cisely given, and identified by intelligent and reliable witnesses, they are often entitled to great credit.[93]

§ 1971(2). Michigan

You are instructed that some evidence has been offered of statements made by defendant at the time of his arrest, and I charge you in relation thereto that such statements at the time of the arrest are to be received with great caution; for besides the danger of misapprehension of witness, or the misuse of words, the failure of the party to express his own meaning, and the infirmity of memory, it should be recollected that the mind of the prisoner himself is often oppressed by the calamity of his situation, and that he is often influenced by motive of hope or fear to make statements.[94]

§ 1971(3). Oregon

The court charges the jury that they should look upon the evidence of oral admissions or verbal statements made by a witness or party with caution, for the exact language might not have been correctly understood, or the party called to prove the same might not be able to remember the exact words spoken.[95]

§ 1972. Contradictory statements by defendant as to whereabouts at time crime committed

The jury are instructed that it is claimed by the prosecution that the defendant has made different and contradictory and inconsistent statements concerning his whereabouts for one or two hours immediately before the fire in question; but, even if defendant did make such contradictory statements, and they were partly or wholly false, that of itself would not be sufficient to convict the defendant; and you should very carefully consider what the average young men of his condition in life might do under like trying circumstances; and in this connection you should recall the fact that the young men ——— and ———, were both quickly ready to resort to falsehood for the purpose of warding away suspicion, notwithstanding their acknowledged innocence; and now, gentlemen, if you should believe that this defendant made contradictory statements, and that some of them, or all of them, were false, it will not be unnatural that such belief on your part may create a prejudice in your minds against this defendant. If such should be the case, it will be your duty to exercise great care that you do not permit that prejudice to take the place of and be substituted in your minds for actual evidence and proof of all the necessary and

[93] State v. Jackson, 137 N. W. 1034, 156 Iowa, 588.

[94] People v. McArron, 79 N. W. 944, 121 Mich. 1.

[95] State v. Hanna, 57 P. 629, 35 Or. 195.

material facts to constitute the chain necessary to establish the defendant's guilt.[96]

§ 1973. Confessions

Effect of confession in prosecution for burglary, see ante, § 1358.

§ 1973(1). Alabama

The jury are instructed that confessions of a defendant in cases of this kind are received with great caution. They are easily fabricated, and the detection and exposure of their fallacy is often difficult. But when confessions are deliberately and precisely identified, they are among the most satisfactory and effectual proofs of guilt. In consideration and determination of the credibility of confessions, or the effect and weight to which they are entitled, the jury must look to all the facts and circumstances under which the confessions are made; those which are introduced before the court, if shown to them, as well as any other that may be introduced.[97]

§ 1973(2). Delaware

The court instructs the jury that there has been admitted in evidence a confession alleged to have been made by one of the defendants, and it is proper that the court should instruct you that such confession can affect only the defendant who made it, and that it is not evidence against other defendants who were not present when the alleged confession was made.[98]

The court instructs the jury that a confession of guilt should not be considered, if it was not free and voluntary, but procured through the influence of threats or the promise of favor. But a free and voluntary confession is generally deserving of the highest credit, because it is against the interest of the person making it, and is presumed to flow from a sense of guilt. The degree of credit due to a confession is to be estimated by the jury under the facts of the particular case. The whole of what the accused said on the subject at the time of making the confession should be taken together. The jury may believe that part which criminates the accused and reject that which is in his favor, or credit so much as is in his favor and discard that which is against him, if they see sufficient ground, upon all the evidence, for so doing, for the jury are at liberty to judge of it, like any other evidence, from all the proven circumstances of the case.[99]

§ 1973(3). Georgia

The court instructs the jury that there is evidence in this case of some confession made by this defendant; that is, evidence which,

[96] People v. Stewart, 42 N. W. 662, 75 Mich. 21.

[97] Shelton v. State, 42 So. 30, 144 Ala. 106.

[98] State v. Prettyman, 100 A. 476, 6 Boyce, 452.

[99] State v. Prettyman, 100 A. 476, 6 Boyce, 452.

if you believe, you may consider in the light of the law that I now give you in charge. All admissions should be scanned with care, and confessions of guilt should be received with great caution. A confession alone, uncorroborated by other evidence, will not justify a conviction in a felony case, such as this. The jury would not be authorized to convict upon mere confessions; these confessions must be corroborated, and they must be corroborated by some fact or circumstance shown in the case that tends to connect the defendant with the offense charged.[1]

The jury are instructed that, if you find there was a confession, then the law says that proof that the crime was committed by some person would be sufficient to satisfy the jury of the guilt of the defendant.[2]

The jury are instructed that, if the accused made a confession under inducement of hope or fear previously held out by persons other than those to whom it was made, though not in the presence of those holding out the inducement, it should not be considered as evidence.[3]

§ 1973(4). Illinois

The court instructs the jury that, where a confession of the prisoner charged with a crime is offered in evidence, the whole of the confession so offered and testified to must be taken together, as well that part which makes in favor of the accused as that part which makes against him; and if the part of the statement which is in favor of the defendant is not disproved by other testimony in the case, and is not improbable or untrue, considered in connection with all the other testimony of the case, then that part of the statement is entitled to as much consideration from the jury as the parts which make against the defendant.[4]

The jury are instructed that, if they have any reasonable doubt as to whether or not the confession was obtained by threats or promises, they should not convict on such confession alone.[5]

§ 1973(5). Kentucky

The jury are instructed that the defendant P. cannot be convicted on the testimony or confession or statements made by him to the officer alone, unless such statements, if made, are corroborated by other evidence tending to connect the defendant with the commission of the offense, and the corroboration is not sufficient if it merely shows that the offense was committed and the circum-

[1] Walker v. State, 105 S. E. 717.

[2] Chancey v. State, 80 S. E. 287, 141 Ga. 54.

[3] Griner v. State, 49 S. E. 700, 121 Ga. 614.

[4] Burnett v. People, 68 N. E. 505, 204 Ill. 208, 66 L. R. A. 304, 98 Am. St. Rep. 206.

[5] Bartley v. People, 40 N. E. 831, 156 Ill. 234.

stances thereof; nor are such statements or confession to be accepted as testimony against the defendant J.[6]

§ 1973(6). Michigan

You are instructed that there has been some testimony introduced in this case from which it is claimed that this respondent has confessed in writing and admitted orally that she procured the firing of this building. As to this branch of the testimony it is necessary for you to inquire and determine, before you can consider it with reference to the guilt of respondent: First, whether or not such confession and statements, if you find any were made, were the free and voluntary confessions of the respondent; also whether or not there was such a loss of memory or disorder of memory or mental confusion that she did not realize that she confessed to committing a crime. If you find they were made, and you find they were not her free and voluntary statements, then they cannot be considered by you; or if you find they were made, and that they were not intelligently made—that is, that her memory or mind was so disordered and confused that she did not realize what she said —then they cannot be considered by you.[7]

I have said you must find whether or not they were free and voluntary. If you find that the claimed confessions were made, and were made under fear, compulsion, deceit, threat, or duress, or if they were made upon an inducement, promise, hope, or expectation that it would be better for her to make them, then they would not be the voluntary confessions of the respondent, and should not be considered by you.[8]

I have said you must find whether they were intelligently made —that is, whether or not she knew and understood what she was saying. If the condition of her mind was such, because of loss of memory, or disorder of memory, or mental confusion, and such impairment of memory had extended to that degree that she did not realize what she said, then it was not her intelligent statement, and could not be considered by you. But, if she did mentally appreciate and realize what she said there, then it would be her intelligent statement, and, so far as the question of her mind was concerned, it could be considered by you.[9]

"In determining the effect to be given to these claimed confessions you will also consider the testimony of the experts who have testified before you as to the effect of all these things upon

[6] Smith v. Commonwealth, 155 S. W. 1125, 153 Ky. 385.

[7] People v. Biossat, 172 N. W. 933, 206 Mich. 334.

[8] People v. Biossat, 172 N. W. 933, 206 Mich. 334.

[9] People v. Biossat, 172 N. W. 933, 206 Mich. 334.

her mental condition and upon her ability to make a voluntary statement at the time she did make it.[10]

You are instructed that, subject to these cautions in receiving and weighing evidence of confessions, it is generally agreed that deliberate, intelligent, and voluntary confessions of guilt are among the most effectual proofs. The degree of credit to be given to the claimed confessions in this case is for you, under the evidence in the case and the manner in which they were made. Look over the testimony, gentlemen, with reference to the confessions and statements, and determine if they were made, and, if made, whether or not they were made deliberately, intelligently, and voluntarily on the part of the respondent.[11]

Then, gentlemen of the jury, if you find these confessions and statements were the free and voluntary confession of the respondent, that is, she knew, understood, appreciated, and realized what she said, and they were voluntarily made, and made of her own free act, without fear, compulsion, deceit, threat, or duress, and without any inducement or promises, hopes, or expectations of favor, or that it would be better for her to do so, then they may be considered by you, under all the instructions I give you as to confessions, and upon which you are instructed that voluntary and intelligent confessions of a prisoner are received in evidence of guilt upon the presumption that a person will not make an untrue statement against his or her own interest. The evidence of confessions of guilt is to be received with great caution, because of the danger of mistakes from the misapprehension of the witness in detailing the confession, the failure of the witness to use the same words, the infirmity of memory, also because the prisoner may not have expressed the meaning which she intended to convey, and it should be remembered and considered that the prisoner is often oppressed by the calamity of the arrest, the fact of being in custody of the officers, the refusal of the officers to allow her to see her husband or an attorney, and also, as bearing upon this question, you will consider her physical condition, whether weak or strong, all that was said to her and done there, and the length of time she was in the room with the officers, the questions asked her and the statements by the prosecuting attorney that she and her husband were in a bad fix, and the statement made to her that ——— had confessed and claimed she had hired him to do it, and any other facts or circumstances that you find from the evidence bear upon her condition at that time.[12]

[10] People v. Blossat, 172 N. W. 933, 206 Mich. 334.

[11] People v. Blossat, 172 N. W. 933, 206 Mich. 334.

[12] People v. Blossat, 172 N. W. 933, 206 Mich. 334.

I further charge you that, if you find that these admissions or statements were made under such circumstances, under the instructions I have heretofore given you, that you cannot use them, I charge you that all such confessions or admissions which the people claim she made, you are not to consider—that is, if the original admissions or confessions are obtained under such circumstances as not to be evidence against the respondent, then all subsequent statements or confessions are impressed with the same infirmities.[13]

§ 1973(7). Mississippi

The court further instructs the jury, for the defendant, that, if they believe from the evidence that the prisoner made any confessions or admissions of guilt, such confessions or admissions are to be received by them with great caution, and, unless supported by other proof in the case, are not sufficient to convict.[14]

§ 1973(8). Oklahoma

You are instructed that in this case the state has offered testimony tending to show that the defendant made certain statements after his arrest and while he was in custody charged with the offense on which he is being tried, and which statements are relied on in part to establish the defendant's guilt of the offense charged against him, and the court instructs you that a confession by one charged with an offense should be carefully scrutinized and received with great caution, and when deliberately and voluntarily made may be considered as evidence for or against the person making it the same as any other evidence.[15]

§ 1973(9). Texas

You are instructed that a confession, in order to be admissible against a defendant in a case, must be shown by the evidence to have been freely and voluntarily made, without compulsion or persuasion; and in regard to the alleged confession of the defendant offered in evidence by the state in this case, the jury are charged that if they believe such confession was not freely and voluntarily made, or if they believe the same was induced by threats, coercion, or by persuasion, or by promise of immunity, or any other improper influence, or if the jury have a reasonable doubt as to whether such alleged confession was freely and voluntarily made, then they should wholly disregard it, and they should acquit the defendant, unless they believe from the other evidence in this case beyond a reasonable doubt that the defendant's guilt of the offense charged in the indictment has been established.[16]

[13] People v. Blossat, 172 N. W. 933, 206 Mich. 334.

[14] Haynes v. State, 27 So. 601.

[15] Almerigi v. State (Cr. App.) 188 P. 1094.

[16] Johnson v. State, 197 S. W. 995, 82 Tex. Cr. R. 82.

The jury are instructed that an alleged written confession purporting to have been made and signed by the defendant has been introduced in evidence before you, and as to the same you are instructed that, unless you believe from the evidence, beyond a reasonable doubt, that the defendant made the same and that he made it freely and voluntarily and without compulsion or persuasion or promises, you will reject the same and not consider it for any purpose whatever.[17]

The state has introduced in evidence before you two papers alleged to be and purporting to be statements or confessions of the said defendant, made by her before the grand jury of ——— county, state of ———. You are instructed that the confessions of a defendant may be used in evidence against her if it appear that the same were freely made and without compulsion or persuasion. Now, if you believe from the evidence in this case that such confessions, or either of them, were not freely and voluntarily made, or if you have a reasonable doubt thereof, or if you believe that said confessions, or either of them, were induced by force, threats, or coercion, or any other improper influence, or if you have a reasonable doubt thereof, then you should wholly disregard said confession or confessions made under such circumstances, and not consider it or them against the defendant. You are instructed that a defendant cannot be convicted on a confession alone, unless there is other testimony corroborating said confession, and tending to connect the defendant with the commission of the crime, and proof of the crime itself is not a sufficient corroboration of the confession. And you are further charged that when confessions of a party are introduced in evidence by the state, then the whole of the admissions or confessions are to be taken together, and the state is bound by them, unless they are shown by the evidence to be untrue. Such admissions or confessions are to be taken into consideration by the jury as evidence in connection with all the other facts and circumstances of the case, and you will so consider said confession or confessions in this case, unless you disregard one or both of them under the charge hereinbefore given you.[18]

You are instructed, that although you believe from the evidence that the defendant made admission or confession to ——— or to ———, relating to the alleged offense herein, yet, unless you further find, beyond a reasonable doubt, that such admission or confession, if any, was made voluntarily, and without being induced by any threats, or by promise of assistance in any case that might be pending or made against him, then you will disregard such con-

[17] Overstreet v. State, 150 S. W. 899, 68 Tex. Cr. R. 238.

[18] Goode v. State, 123 S. W. 597, 57 Tex. Cr. R. 220.

fession or admission, if any, and not consider the same for any purpose in this case.[19]

§ 1973(10). Washington

The jury are instructed that, if the jury believes from the evidence that the defendant made the confession as alleged and attempted to be proved in the case, the jury should treat and consider such confession precisely as they would any other testimony. Hence, if you believe the whole confession to be true, you should act upon the whole as true. But you may believe part of the testimony and reject the balance if you see sufficient grounds in the evidence for so doing. You are at liberty to act on it like other evidence in view of all the circumstances of the case as disclosed by the evidence.[20]

§ 1973(11). West Virginia

The court instructs the jury that, where a confession is received in evidence, the jury may believe that which charges the prisoner, and reject that which is in his favor, if they see sufficient grounds for so doing from the evidence in this case.[21]

The jury are instructed that, in considering extra-judicial confessions, they have the right to take into consideration the circumstances under which they were made, the credibility of the witness or witnesses by whom they are detailed, the condition and circumstancs of the party alleged to have made them, the probability or improbability of such confessions, and that you have the right to consider the same in connection with all the evidence in the case; that you are the sole judges of the credibility of all the witnesses and the weight of the evidence, and you may give to the evidence of the witnesses just such weight as you think it entitled to under the circumstances of the case.[22]

§ 1974. Necessity and sufficiency of proof of corpus delicti to warrant consideration of alleged confession

Corroboration of confession in prosecution for arson, see ante, § 837.

§ 1974(1). California

You are instructed in this case that, before you can convict the defendant, you must be convinced from the evidence beyond a reasonable doubt and to a moral certainty that a criminal homicide was in fact committed; and you must be so convinced by evidence other than or in addition to the statements or admissions of the defendant, and this evidence must be sufficient to establish

[19] Cross v. State (Cr. App.) 101 S. W. 213.

[20] State v. Barker, 106 P. 133, 56 Wash. 510.

[21] State v. Allen, 30 S. E. 209, 45 W. Va. 65.

[22] State v. Morgan, 13 S. E. 385, 35 W. Va. 260.

that the death of the deceased was produced by the criminal act of some person and was not the result of accident. The production of the dead body does not alone establish the criminal homicide; and proof of the dead body alone found, with the statements of the defendant, would not be sufficient to convict, for there must be some evidence tending to show the commission of a homicide before the statement of the defendant would be admissible for any purpose; and hence, if you believe in this case that the only evidence which shows that a crime was committed is the production of the dead body of the deceased, coupled with the admissions or statements of this defendant, then it is your duty to acquit this defendant.[23]

The jury are instructed that the alleged confession of defendant, and any other evidence the sole purpose and tendency of which is to connect, or to attempt to connect, the accused with the offense charged, cannot be considered by you until the corpus delicti has been proved to your satisfaction to a moral certainty and beyond a reasonable doubt.[24]

§ 1974(2). Oregon

The jury are instructed that, notwithstanding the admissions and confessions of a defendant may be given against him on his trial for crime, such admissions or confessions are not alone sufficient to warrant a conviction without some other proof that the crime has been committed.[25]

§ 1975. Distinction between admissions and confessions

The jury are instructed that the testimony of some witnesses has been offered by the state to show certain oral statements made by the defendant now on trial, after the death of ———. In criminal law a statement voluntarily made by a person of a fact only, which is as consistent with his innocence as with his guilt, and is made exculpatory, or in explanation of any suspicious or incriminating circumstances, is an admission; but when the statement carries with it a suggestion of guilt, either as to the character of his intent, or the quality of his act, and the statement is made inculpatory, such statement is in the nature of a confession.[26]

§ 1976. Considering admissions or confessions of defendant as a whole—Effect of statements in his favor

§ 1976(1). Kansas

The court instructs the jury that, where the verbal admission of a person charged with crime is offered in evidence the whole of the

[23] People v. Wagner, 155 P. 649, 29 Cal. App. 363.

[24] People v. Tapia, 63 P. 1001, 131 Cal. 647.

[25] State v. Caseday, 115 P. 287, 58 Or. 429.

[26] State v. Caseday, 115 P. 287, 58 Or. 429.

admission must be taken together, as well that part which makes for the accused as that which may make against him; and if the part of the statement which is in favor of the defendant is not disproved, and is not apparently improbable or untrue, when considered with all other evidence in the case, then such part of the statement is entitled to as much consideration from the jury as any other part of the statement.[27]

§ 1976(2). Missouri

You are instructed that, if verbal statements of the defendant have been proven in this case, you may take them into consideration, with all the other facts and circumstances proven. What the proof may show you, if anything, that defendant has said against himself, the law presumes to be true, because against himself; but anything you may believe from the evidence the defendant said in his own behalf you are not obliged to believe, but you may treat the same as true or false, just as you believe it true or false, when considered with a view to all the other facts and circumstances in the case.[28]

The court further instructs the jury that, if they believe and find from the evidence that the defendant made any statement or statements in relation to the homicide charged by this indictment after said homicide is alleged to have been committed, the jury must consider such statement or statements all together. The defendant is entitled to the benefit of what he said for himself, if true, and the state is entitled to the benefit of anything he said against himself in any statement or statements proved by the state. What the defendant said against himself the law presumes to be true because said against himself. What the defendant said for himself the jury are not bound to believe because it was said in a statement or statements proved by the state, but the jury may believe or disbelieve it as it is shown to be true or false by the evidence in this cause. It is for the jury to consider under all the circumstances how much of the whole statement or statements of the defendant proved by the state the jury from the evidence in this cause deem worthy of belief.[29]

§ 1976(3). Texas

You are further instructed that, when the admissions or confessions of a party are introduced in evidence by the state, then the whole of the admissions or confessions are to be taken together, and the state is bound by them, unless they are shown to be un-

[27] State v. Johnson, 50 P. 907, 6 Kan. App. 119.

[28] State v. Hudspeth, 60 S. W. 136, 159 Mo. 178.

[29] State v. Howell, 23 S. W. 263, 117 Mo. 307.

true by the evidence. Such admissions or confessions are to be taken into consideration by the jury as evidence in connection with the other facts and circumstances of the case.[30]

§ 1977. Admissibility against defendant of acts and declarations of alleged co-conspirators

In prosecution for homicide, see post, § 3051.

§ 1977(1). United States

The court instructs the jury that the acts and declarations of a conspirator after an offense is committed may be received against the party making them, but not against his co-conspirators; and that if the jury believes from the evidence that the alleged conspiracy between defendant and M. had terminated at the time of the alleged confession of the said M. to W., in ———, on ———, and as detailed by said W., then the admissions and confessions of the said M. implicating the defendant cannot be considered as evidence against said defendant in this case.[31]

§ 1977(2). Missouri

The court instructs the jury that if you believe from the evidence that a conspiracy existed between defendant and J. to kill H., then you may take into consideration in this case any acts or declarations you may find from the evidence to have been done or made by any coconspirator in furtherance of the common purpose during the existence of such conspiracy, but you should not take into consideration in this case acts or declarations of said J. not done or made during the existence of such conspiracy, nor can you take into consideration the acts or declarations of said J. made or done after the death of said H.[32]

The court instructs the jury that "conspiracy," as used in these instructions, is a combination of two or more persons by concerted action to accomplish some criminal or unlawful purpose.[33]

The court instructs the jury that "common design" means community of intention between two or more persons to do an unlawful act, and it may be established by circumstances or by direct evidence of an express agreement, but before the conspiracy can be established by circumstances, the facts and circumstances tending to show such common design, conspiracy and the connection of the defendant therewith, must be established beyond a reasonable doubt by the evidence in the case, and when so established, such facts and circumstances must not only be consistent with

[30] Pratt v. State, 109 S. W. 138, 53 Tex. Cr. R. 281.

[31] Hauger v. United States (C. C. A. W. Va.) 173 F. 54, 97 C. C. A. 372.

[32] State v. Hill, 201 S. W. 58, 273 Mo. 329.

[33] State v. Hill, 201 S. W. 58, 273 Mo. 329.

each other and with the defendant's guilty connection therewith, but also absolutely inconsistent with any other reasonable theory.[34]

You are instructed that, in determining whether there was or was not a conspiracy, agreement, or common design between the defendant and J. to kill H., you have no right to consider any declarations or acts made or done by said J. in the absence of the defendant, but can only consider such declarations or acts as were made or done in the presence or hearing of this defendant. The jury cannot consider such declarations or acts of said J. made and done in the absence of this defendant in order to determine whether said conspiracy or common design existed. If you shall be satisfied beyond a reasonable doubt from the other evidence in the case that such conspiracy or common design did exist between defendant and J. before the death of H., then and not until then do the acts or declarations of said J. become evidence against the defendant in this case, and then only such acts and declarations of said J. as you may find and believe from the evidence were done and made during the pendency of such conspiracy and in furtherance thereof.[35]

§ 1977(3). Texas

Gentlemen of the Jury: You are instructed that you cannot consider the acts and declarations of ——— and ———, made in the absence of defendant, for the purpose of proving a conspiracy; but you must find from the evidence beyond a reasonable doubt that a conspiracy was formed before you would be permitted to consider said acts and declarations of said ——— and ——— for any purpose whatever.[36]

§ 1978. Declarations of codefendant

The court instructs the jury that, when arriving at your verdict in this case, you may consider all the facts and circumstances in evidence before you, but you cannot consider, as evidence against either one of the defendants, the statements of the other made out of his presence and hearing, if any such statements were made; but you may consider, as evidence against either of the defendants, any statement made by himself, if any such statement was made.[37]

§ 1979. Accomplice testimony—Who are accomplices

§ 1979(1). Arkansas

The court instructs the jury that an accomplice is one who in any manner participates in the criminality of an act, whether he

[34] State v. Hill, 201 S. W. 58, 273 Mo. 329.

[35] State v. Hill, 201 S. W. 58, 273 Mo. 329.

[36] Holland v. State (Cr. App.) 206 S. W. 89.

[37] Martin v. State (Tex. Cr. App.) 41 S. W. 620.

is considered, in strict legal propriety, as principal, or merely as an accessory before or after the fact.[38]

§ 1979(2). Texas

You are charged that if you believe and find from the evidence that the witness R. knew that the goods offered in evidence before the jury were stolen from ———, and that, after ascertaining that said goods were stolen property, she (the said R.) concealed the said goods or aided and abetted any other person in concealing the said goods, knowing them to be stolen, then you are charged that said R. would, in law, be an accomplice, and you could not convict the defendant in this case upon her testimony alone; and in this connection you are further charged that the witness J. is an accomplice, and that the testimony of one accomplice in law cannot corroborate the testimony of another accomplice.[39]

§ 1980. Right to convict on uncorroborated testimony of accomplice

In prosecution for forgery, see post, § 2628.

§ 1980(1). United States

You are instructed that, in weighing the evidence of those defendants who are testifying for the government, you should have due regard to the fact that they have each pleaded guilty to the indictment, as well as to the fact of their being defendants, though not on trial. You are directed to weigh carefully their testimony, and cautioned against placing too firm a reliance upon it, unless the same should be corroborated by testimony of witnesses other than principals, or by other facts and circumstances that verify their testimony in material particulars.[40]

§ 1980(2). Arkansas

You are instructed that the accused could not be convicted on the uncorroborated testimony of an accomplice, and that the testimony must be corroborated by other evidence, direct or circumstantial, tending to connect the defendant with the commission of the offense charged, and unless the state does so prove you will acquit the defendant.[41]

§ 1980(3). Florida

The jury are instructed that the evidence of an accomplice should be received by the jury with great caution, but if the testimony carries conviction, and the jury, after careful consideration of all the evidence, are convinced of its truth, they should give to it

[38] Spencer v. State, 194 S. W. 863, 128 Ark. 452.

[39] Guiterrez v. State, 173 S. W. 1025, 76 Tex. Cr. R. 189.

[40] Orear v. United States (C. C. A. Tex.) 261 F. 257.

[41] Bartlett v. State, 216 S. W. 33, 140 Ark. 553.

the same effect as would be allowed to that of a witness who is in no respect implicated in the offense.[42]

The jury are instructed that the testimony of an accomplice is competent evidence, and the credibility of such accomplice is for the jury to pass upon as they do upon any other witness; and, while the testimony of an accomplice will sustain a verdict when uncorroborated, yet the testimony of an accomplice must be received with great caution; but if the testimony carries conviction, and the jury are convinced of its truth, they should give to it the same effect as would be allowed to a witness who is in no respect implicated in the offense.[43]

§ 1980(4). Illinois

The court instructs you that the testimony of an accomplice is competent evidence, and the credibility of such an accomplice is for the jury to pass upon as they pass upon the credibility of any other witness. The testimony of an accomplice must be received with great caution, but if the testimony carries conviction and the jury are convinced of its truth they should give it the same weight as would be given to the testimony of a witness who is in no respect implicated in the offense.[44]

The jury are instructed that the witnesses ——— and ——— are what is known in law as accomplices, and that, while it is a rule of law that a person accused of crime may be convicted upon the uncorroborated testimony of an accomplice, still a jury should always act upon such testimony with great care and caution, and subject it to careful examination, in the light of all other evidence in the case; and the jury ought not to convict upon such testimony alone, unless, after a careful examination of such testimony, they are satisfied beyond a reasonable doubt of its truth, and that they can safely rely upon it.[45]

§ 1980(5). Kansas

The jury are instructed that the degree of credit which ought to be given to the testimony of an accomplice is a matter exclusively within the province of the jury; but great caution should be used in weighing such testimony, and the jury should not convict upon the testimony of an accomplice alone, unless his testimony is corroborated by other evidence in some material point in issue, but such corroboration need not be as to everything to which the accomplice testified.[46]

[42] Myers v. State, 31 So. 275, 43 Fla. 500. In this case no witness was sworn on behalf of defendant who could be claimed to be an accomplice.

[43] Shiver v. State, 27 So. 36, 41 Fla. 630.

[44] People v. Rees, 109 N. E. 473, 268 Ill. 585.

[45] Hoyt v. People, 30 N. E. 315, 140 Ill. 588, 16 L. R. A. 239.

[46] State v. Greenburg, 53 P. 61, 59 Kan. 404.

§ 1980(6). Missouri

The court instructs the jury that the testimony of an accomplice in crime (that is, a person who actually commits or participates in a crime) is admissible, yet the evidence of an accomplice in a crime, or of a witness who claims by his testimony to be an accomplice in a crime, when not corroborated by some other person or persons not implicated in the crime, as to matters material to the issue (that is, matters connecting the defendant with the commission of the crime charged against him), ought to be received with great caution by the jury, and the jury ought to be fully satisfied of the truth of such evidence before they should convict the defendant on such testimony. In this case, gentlemen, the state seeks to convict the defendant upon the uncorroborated evidence of ———, who, by his testimony, declares himself to have been an accomplice in the commission of the offense charged against this defendant in the indictment read to you; and while you may, on the uncorroborated evidence of ——— alone, find this defendant guilty, yet you should receive his evidence with great caution in all matters connecting the defendant with the commission of said crime, and should be fully satisfied of the truth of his testimony before you should convict the defendant upon it alone.[47]

The court instructs the jury that they are at liberty to convict the defendant on the uncorroborated testimony of an accomplice alone, if they believe the statements, as given by such accomplice in his testimony, are true in fact, and sufficient in proof to establish the guilt of defendant. But the jury are instructed that the testimony of an accomplice in crime, when not corroborated by some person or persons not implicated in the crime, as to matters material to the issues—that is, matters connecting the defendant with the commission of the crime charged against him, and identifying him as the perpetrator thereof—ought to be received with great caution by the jury, and they ought to be fully satisfied of its truth before they should convict the defendant on such testimony.[48]

§ 1980(7). New York

The jury are instructed that the testimony of ——— must be corroborated; that is, other evidence must tend to corroborate him, else there can be no conviction under the provisions of the Code. He must be corroborated by such other evidence as tends to connect the defendant with the commission of the crime. Now, as a matter of law, I charge you that there is other evidence which tends to corroborate him, if you shall believe it to be true.[49]

[47] State v. Sprague, 50 S. W. 901, 149 Mo. 409.

[48] State v. Cummins, 213 S. W. 969, 279 Mo. 192; State v. Donnelly, 32 S. W. 1124, 130 Mo. 642.

[49] People v. Hummel, 104 N. Y. S. 308, 119 App. Div. 153.

§ 1980(8). Oregon

I instruct you that, if you find that ——— was an accomplice in the commission of the crime charged against the defendant, then you cannot find the defendant guilty, unless you also find that her testimony is corroborated by other evidence which of itself tends to connect the defendant with the commission of the crime, and, if you do not find that there is such other evidence, then you must find the defendant not guilty, even though you believe the testimony of ———, and are by it alone satisfied beyond a reasonable doubt of the defendant's guilt, for the law does not allow a person to be convicted on the uncorroborated testimony of an accomplice and the corroboration must be of the character I have mentioned.[50]

§ 1980(9). Texas

The jury are instructed that "an accomplice," as the word is here used, means any one connected with the crime charged, either as principal, accomplice, or accessory. It includes all persons who are connected with the crime by unlawful act or omission on their part transpiring either before, at the time of, or after the commission of the offense, and whether or not they were present and participated in the commission of the crime. Now, if you are satisfied from the evidence that the witness ——— was an accomplice, or you have a reasonable doubt as to whether he was or not, as that term is defined in the foregoing instructions, then you are instructed that you cannot convict the defendant upon his testimony, unless you first believe that the testimony of said ——— is true, and that it connects the defendant with the offense charged in the indictment, and unless you further believe that there is other testimony in the case, corroborative of the testimony of said ———, tending to connect the defendant with the commission of the offense charged.[51]

The jury are instructed that a conviction cannot be had upon the testimony of an accomplice, unless corroborated by other evidence tending to connect the defendant with the offense committed, and the corroboration is not sufficient if it merely shows the commission of the offense. An "accomplice," as the word is here used, means any one connected with the crime committed, either as principal offender, as an accomplice, as an accessory, or otherwise. It includes all persons who are connected with the crime by unlawful act or omission on their part, transpiring either about, at the time, or after the commission of the offense, and whether or not he was present and participated in the commission of the crime. Now, if you are satisfied from the evidence that the witness ——— was an accomplice, or you have a reasonable doubt as to whether he was,

[50] State v. Wong Si Sam, 127 P. 683, 63 Or. 266.

[51] Goldstein v. State, 166 S. W. 149, 73 Tex. Cr. R. 558.

or not, as that term is defined in the foregoing instructions, then you are further instructed that you cannot find the defendant guilty upon his testimony, unless you are satisfied beyond a reasonable doubt that the testimony of said witness is true, and you are further satisfied by other evidence beyond a reasonable doubt that the testimony of said witness has been corroborated by other evidence tending to establish beyond a reasonable doubt that the defendant did in fact commit the offense charged as charged.[52]

§ 1980(10). Washington

The jury are instructed that the witness ———, who has testified in this case, is an accomplice; and an accomplice is one who is associated with others in the commission of crime, all being principals. ——— has testified that he was associated with the defendant in stealing the cattle mentioned in the information, and that, in law, would make him an accomplice. The court instructs you that the testimony of an accomplice comes from a polluted source, and that, while the rule of law is that a defendant may be convicted on the uncorroborated testimony of an accomplice, where the honest judgment is satisfied beyond a reasonable doubt, still a jury should act upon such testimony with great care and caution, and subject it to a careful examination in the light of other evidence in the case; and the jury should not convict upon such testimony alone, unless, after a careful examination of it, they are satisfied beyond all reasonable doubt of its truth. In many, if not in most, cases, the evidence of an accomplice, uncorroborated in material matters, will not satisfy the honest judgment beyond a reasonable doubt, and it is clearly insufficient to authorize a verdict of guilty. Where an accomplice has been impeached by showing that he has testified differently at some other time with reference to the facts in issue, then in such case the jury cannot convict upon his uncorroborated testimony.[53]

In regard to the testimony of the witness ———, the court instructs you that, while it is a rule of law that a person may be convicted upon the uncorroborated testimony of an accomplice, still a jury should always act upon such testimony with great care and caution, and subject it to careful examination in the light of all other evidence in the case; and the jury ought not to convict upon such testimony alone, unless, after a careful examination of such testimony, you are satisfied beyond all reasonable doubt of its truth, and that you can safely rely upon it.[54]

[52] Davis v. State, 117 S. W. 159, 55 Tex. Cr. R. 495.

[53] State v. Pearson, 79 P. 985, 37 Wash. 405.

[54] State v. Coates, 61 P. 726, 22 Wash. 601.

§ 1981. Sufficiency of corroboration of accomplice testimony

Corroboration of accomplice in prosecution for larceny, see post, § 3332.

§ 1981(1). Alabama

You are instructed that the slightest corroboration of the testimony of an accomplice is sufficient, if it tend to connect the defendant with the commission of the offense.[55]

You are instructed that a confession by the defendant, if one was made, is admissible as corroborating evidence of that of an accomplice, and may be taken by the jury as a sufficient corroboration to authorize a conviction.[56]

§ 1981(2). Arkansas

You are instructed that, while the defendant cannot be convicted on the uncorroborated testimony of an accomplice, the amount of such corroborating evidence which should be required is a question solely for the jury and it is sufficient, if there is any such evidence, to warrant you in convicting the defendant, provided, it, taken with all the other evidence in the case, convinces you of his guilt beyond a reasonable doubt.[57]

You are instructed that the defendant cannot be convicted on the uncorroborated testimony of ———, ———, and ———, but their testimony must be corroborated by other evidence, direct or circumstantial, tending to connect defendant with the commission of the offense charged. If there is such corroboration, and you are satisfied beyond a reasonable doubt that defendant is guilty, you will convict; otherwise you should acquit. It is not necessary that the corroborating evidence shall be sufficient of itself, without the testimony of ———, ———, and ———, to convict the defendant. It is sufficient if there be such evidence independent of theirs, either direct or circumstantial, tending to connect defendant with the commission of the offense, and that that evidence, together with the testimony of ———, ———, and ———, convince your minds beyond a reasonable doubt that defendant is guilty. The corroborating evidence must tend to connect defendant with the commission of the offense. Evidence only that the offense was committed by somebody, and the circumstances thereof, without tending to connect defendant with the commission of the offense, is not sufficient.[58]

§ 1981(3). California

You are instructed that, while corroborating evidence must create more than a mere suspicion, it is not required that it be of itself sufficient to convict, nor need it extend to every fact and detail

[55] Crittenden v. State, 32 So. 273, 134 Ala. 145.

[56] Crittenden v. State, 32 So. 273, 134 Ala. 145.

[57] Kennedy v. State, 171 S. W. 878, 115 Ark. 480.

[58] Celender v. State, 109 S. W. 1024, 86 Ark. 23.

covered by the statements of the accomplice. It is sufficient if, standing alone, it tends to connect the defendants with the crime. It is sufficient if it tends to connect the defendants with the commission of the offense, though of itself, standing alone, it would be entitled to but little weight.[59]

§ 1981(4). Georgia

The jury are instructed that usually the testimony of a single witness is sufficient to establish a fact. There are certain exceptions to this rule. One of these exceptions obtains in cases of felony; and this is a felony charged against the defendant in this case. The jury would not be authorized to convict upon the testimony of an accomplice alone, unless that accomplice's testimony is corroborated by other evidence in the case, either direct or circumstantial. While it is true that the sufficiency of the circumstances for the purpose of corroboration is a matter for the determination of the jury, and the law cannot lay down a rule to measure the extent of corroboration necessary, still, when the only witness is an accomplice, the corroborating circumstances referred to must be such as to connect the defendant with the perpetration of the crime and tend to show his participation therein.[60]

The jury are instructed that the corroborating circumstances which will dispense with another witness in a felony case, where the only witness is an accomplice, must be of that character of corroboration which is not as to the time and place and manner and circumstances of the transaction in question, but must be circumstances which corroborate the testimony of the accomplice as to the fact that the defendant on trial was the perpetrator of the offense, or so concerned in the perpetration as that he would be guilty under the law of the crime charged in the indictment. If, therefore, in your investigation of the evidence you find that there is testimony of one who is an accomplice in the crime, before you would be authorized to convict you must find that there are corroborating circumstances which have been brought to your attention through the evidence, which, in connection with the testimony of the accomplice, will satisfy you beyond a reasonable doubt that the defendant on trial was either the perpetrator or one of the perpetrators of the offense charged in the indictment, or was so concerned in the perpetration of the offense as would make him guilty as a principal in the crime. What these circumstances are which appear in the evidence, if any do appear, is a matter for your consideration and determination, and the extent to which the testimony of the accomplice may or may not be corroborated is a matter for your consid-

[59] People v. Blunkall, 161 P. 997, 31 Cal. App. 778.

[60] Calloway v. State, 106 S. E. 577.

eration and determination. But you must be satisfied beyond a reasonable doubt, after giving due consideration to the testimony of the accomplice, that the testimony of the accomplice and the corroborating circumstances are such as to satisfy you beyond a reasonable doubt of the identity of the accused as one of the perpetrators of the offense. If you find in the evidence no circumstances which are, in your opinion, sufficient to corroborate the testimony of the accomplice, then the case would stand alone on the testimony of the accomplice, and you would not be authorized to find the defendant guilty. But, on the other hand, if you find in the evidence circumstances which are sufficient to satisfy you beyond a reasonable doubt of the guilt of the accused, then you would be authorized to find a verdict of guilty upon the testimony of the accomplice and the corroborating circumstances which are sufficient to satisfy you of the truth of the fact that is in question, and as to whether the defendant is guilty of the crime charged.[61]

§ 1981(5). Idaho

You are instructed that a conviction cannot be had on the testimony of an accomplice, unless he is corroborated by other evidence, which in itself, and without the aid of the testimony of the accomplice, tends to connect the defendant with the commission of the offense; and the corroboration is not sufficient, if it merely shows the commission of the offense, or the circumstances thereof.[62]

§ 1981(6). Minnesota

The jury are instructed that, if the state's claim was found true that R. killed ———, and that defendant directly or indirectly induced and procured him to do the killing, then R. and M. were accomplices, and the defendant cannot be convicted on their testimony unless they are corroborated by such other evidence as tends to convict defendant of the commission of the offense. The corroboration is not sufficient if it merely shows the commission of the offense and the circumstances thereof. The corroborating evidence must independently of the testimony of R. and other accomplices, tend in some degree to establish the guilt of the defendant, but it need not be sufficient, standing alone, to justify a conviction.[63]

§ 1981(7). Oregon

I further instruct you that, if you find from the evidence in this case that the defendant was seen talking with the witness ——— while she was confined in the city jail, such evidence, if any, is not alone such a corroboration of the testimony of an accomplice as the law contemplates, and cannot alone be the basis of corroboration

[61] Almand v. State, 99 S. E. 795, 149 Ga. 182.

[62] State v. Grimmett, 193 P. 380.

[63] State v. Dunn, 168 N. W. 2, 140 Minn. 308.

upon which you can find the defendant guilty. But if the evidence in the case, outside of the testimony of ———, including the fact that the defendant was seen talking to ——— while confined in the city jail, if you find that the defendant was seen talking to ——— while she was confined in the city jail, tends to connect the defendant with the commission of the crime set forth in the indictment, then this is a sufficient corroboration of the testimony of ———, and if from the testimony of ——— and such corroborative evidence, if any, you are satisfied of the guilt of the defendant, as charged in the indictment, beyond a reasonable doubt, you should find defendant guilty.[64]

§ 1981(8). Texas

You are instructed that the witness ——— is an accomplice. Now, you cannot convict the defendant upon his testimony alone unless you first believe his testimony is true, and that it connects the defendant with the offense charged, and even then you cannot convict the defendant upon said testimony unless you further believe there is other testimony in the case corroborative of the accomplice's testimony tending to connect the defendant with the offense charged; and the corroboration is not sufficient if it merely shows the commission of the offense, but it must tend to connect the defendant with its commission, and then from all the evidence you must believe, beyond a reasonable doubt, that the defendant is guilty.[65]

You are instructed that it is not necessary that the testimony of the accomplice be corroborated circumstantially and in detail, but the corroboration is sufficient if the corroborative evidence of itself, and without the aid of the accomplice testimony, in any material matter tends to connect defendant with the commission of the offense for which he is charged; but it need not be sufficient of itself to establish defendant's guilt.[66]

§ 1981(9). Washington

The jury are instructed that, if you find that the witness ——— has testified concerning the facts in issue in this case differently at another time from his testimony in this case, then you cannot find the defendant guilty on his uncorroborated testimony. The corroboration that the law requires for the testimony of an accomplice ought to be sufficient to satisfy the jury of the truth of the accomplice's testimony, and the corroboration must be as to some fact connecting the defendant with the commission of the offense,

[64] State v. Turnbow, 193 P. 485, 99 Or. 270.

[65] Oates v. State, 149 S. W. 1194, 67 Tex. Cr. R. 488. See Campbell v. State, 123 S. W. 583, 57 Tex. Cr. R. 301.

[66] Wilkerson v. State (Tex. Cr. App.) 57 S. W. 956.

and is not sufficient if it merely shows that the offense was committed, and the circumstances thereof.[67]

§ 1982. Sufficiency of evidence outside of testimony of accomplice

The jury are instructed that, if they believe from the evidence, beyond a reasonable doubt, that in this county and within ——— years before the finding of this indictment, ——— had ——— or any number of cows feloniously taken and carried away, and that the defendant confessed that he was one of the persons engaged in such felonious taking and carrying away of said cows, this is sufficient to authorize the conviction of the defendant, without regard to the testimony of the accomplice.[68]

§ 1983. Circumstantial evidence

§ 1983(1). United States

Some say we cannot determine the condition of the mind of the defendant by circumstantial evidence, because it is cruel and criminal, they say, to convict a man upon circumstantial evidence. This is a declaration of either fools or knaves, sympathetic criminals, or men who have not ability enough to know what circumstantial evidence is, or to perform the ordinary duties of citizenship. When you consider that these two mental conditions—the fact that the act was done willfully, and done with malice aforethought—can never in any case be found in any other way than by circumstantial evidence, you can see the potency in every case of that class of testimony. Circumstantial evidence means simply that you take one fact that has been seen, that is produced before you by evidence, and from that fact you reason to a conclusion.[71]

You are instructed that, where a case is dependent entirely upon circumstantial evidence, as is the case in this case, the evidence must be of that degree of strength to exclude every other reasonable doubt save that of the guilt of the accused. The true question in every criminal case is whether the evidence is sufficient to convince you beyond a reasonable doubt of the defendant's guilt. If the evidence is of that degree of strength, then it would be your duty to convict. On the other hand, if it does not approach that degree of strength, then it would be equally your duty to acquit him.[72]

The jury are instructed that the law in regard to circumstantial evidence is this: In order to justify a jury in finding a verdict of guilty based entirely on circumstantial evidence, the circumstances must not only be consistent with the guilt of the defendant, but

[67] State v. Pearson, 79 P. 985, 37 Wash. 405.

[68] Crittenden v. State, 32 So. 273, 134 Ala. 145.

[71] Hickory v. United States, 14 S. Ct. 334, 151 U. S. 303, 38 L. Ed. 170.

[72] Lamb v. United States (C. C. A. Ga.) 264 F. 660.

they must be inconsistent with any other reasonable hypothesis that can be predicated on the evidence; or, stated in another form, it is not sufficient that the circumstances proved coincide with, account for, and therefore render probable, the hypothesis of guilt asserted by the prosecution, but they must exclude to a moral certainty and beyond a reasonable doubt, every other hypothesis but the single one of guilt, or the jury must find the defendant not guilty. In order to warrant a conviction of crime on circumstantial evidence, each fact necessary to the conclusion sought to be established must be proved by competent evidence beyond a reasonable doubt. All the facts necessary to the conclusion must be consistent with each other and with the main fact sought to be proved; and the circumstances, taken together, must be of a conclusive nature, leading on the whole to a satisfactory conclusion, and producing, in effect, a reasonable and moral certainty that the defendant, and no other person, committed the offense charged; and unless the evidence does so it will be your duty to acquit the defendant. So, gentlemen, you will observe that there is nothing very peculiar or hard to understand about this doctrine of circumstantial evidence. The jury, in the first place, must determine from the testimony of the witnesses what are the facts and circumstances in the case—the facts and circumstances which you believe have been established by the testimony; and then you simply apply your common sense and judgment to a consideration of what deductions or inferences or conclusions ought to be drawn from those facts. And if, on consideration of all the facts which you may believe to have been established by the evidence, you are satisfied in your own minds, beyond all reasonable doubt, that the defendant is guilty, then it is your duty to so declare; but, if you are not so satisfied, it will be your duty to render a verdict of not guilty.[73]

§ 1983(2). Alabama

The jury are instructed that the test of the sufficiency of circumstantial evidence in a criminal case is whether the circumstances, as proven, are capable of explanation upon any reasonable hypothesis consistent with the defendant's innocence, and, if they are capable of such explanation, then the defendant should be acquitted.[74]

The jury are instructed that the evidence against the defendant is circumstantial, and before you can convict him on such testimony, the proof must be very strong and cogent, so much so as to exclude every reasonable doubt and probability of his innocence.[75]

The jury are instructed that, to justify a conviction of crime on

[73] Dimmick v. United States (C. C. A. Cal.) 135 F. 257, 70 C. C. A. 141.

[74] Bowen v. State, 37 So. 233, 140 Ala. 65.

[75] Pickens v. State, 22 So. 551, 115 Ala. 42.

circumstantial evidence alone, it must be inconsistent with any reasonable theory of innocence.[76]

§ 1983(3). Arkansas

The jury are instructed that, before you can convict defendant, all the facts and circumstances, when taken together, must be inconsistent with any reasonable hypothesis except that he is guilty. In other words, if all the facts and circumstances proved may be true, and they can be explained in any reasonable way consistent with defendant's innocence, he is entitled to an acquittal. But if they cannot be explained in any reasonable way consistent with the defendant's innocence, he should be convicted.[77]

§ 1983(4). California

The jury are instructed that, where circumstantial evidence is solely relied upon for the proof of an accused's connection with the commission of a crime, any fact essential to sustain the hypothesis of guilt and exclude the hypothesis of innocence, and any single fact from which the inference of guilt is to be drawn, must be proved by evidence which satisfies the minds and conscience of the jury to the same extent that they are required to be satisfied of the facts in an issue in cases where the evidence is direct.[78]

§ 1983(5). Delaware

You are instructed that circumstantial evidence, like direct evidence, when it establishes the guilt of the accused, may be relied upon for a conviction. Whenever circumstantial evidence is relied upon, it must be of such a character and strong enough to exclude any reasonable inference or conclusion other than that the accused is guilty of the crime charged. It must be such as (1) to enable the jury to find the crime proved beyond a reasonable doubt; (2) that the circumstances proven are in all respects consistent with the theory of the guilt of the accused; and (3) that such circumstances are inconsistent with any other reasonable theory than the guilt of the accused.[79]

§ 1983(6). Florida

The jury are instructed that the value of circumstantial evidence depends upon the conclusive nature and tendency of the circumstances relied on to establish any controverted fact. They must not only be consistent with guilt, but inconsistent with innocence. Such evidence is insufficient where, assuming all to be proved which the evidence tends to prove, some other reasonable hypothesis of

[76] Pickens v. State, 22 So. 551, 115 Ala. 42.

[77] Lowery v. State, 203 S. W. 838, 135 Ark. 159.

[78] People v. Martinez, 160 P. 868, 31 Cal. App. 413.

[79] State v. White, 97 A. 231, 6 Boyce, 86.

innocence may still be true, for it is the actual exclusion of every other reasonable hypothesis but that of guilt which invests mere circumstances with the force of proof. What circumstances will amount to proof can never be matter of general definition; the legal test is the sufficiency of the evidence to satisfy the understanding and conscience of the jury. Absolute, metaphysical, and demonstrative certainty is not essential to proof by circumstances; it is sufficient if they, with all the other evidence, produce moral certainty, to the exclusion of every reasonable doubt.[80]

The court instructs the jury that in cases of circumstantial evidence it is not necessary that the proof shall be conclusive; that it is sufficient if the jury believe, from all the facts and circumstances of the case, that the accused are guilty, and that they have no reasonable doubt in their minds of this fact. If the jury think that the facts in this case are all consistent with the supposition that the prisoners are guilty, and cannot reconcile the circumstances produced in evidence with any other supposition than that of their guilt, it is their duty to find them guilty. All that can be required is, not absolute and positive proof, but such proof as convinces them that the crime has been made out against the accused.[81]

§ 1983(7). Georgia

The jury are instructed that in every criminal case the burden is on the state to prove the guilt of the accused beyond a reasonable doubt. In this case, where the state relies for a conviction on circumstantial evidence, the proved facts and circumstances must not only convince you beyond a reasonable doubt, but must be inconsistent with his innocence, and be of that strength and character which removes from the minds of the jurors every reasonable hypothesis, save that of his guilt.[82]

§ 1983(8). Illinois

The jury are instructed that, while the jury must be convinced of the guilt of the defendant beyond a reasonable doubt, from the evidence, the proof need not be the direct evidence of persons who saw the offense committed, and that the acts constituting the crime may be proved by circumstances.[83]

The court instructs the jury, as a matter of law, that, where a conviction for a criminal offense is sought upon circumstantial evidence alone, the people must not only show, by a preponderance of the evidence and beyond a reasonable doubt, that the alleged facts and circumstances are true, but they must be such facts

[80] Myers v. State, 31 So. 275, 43 Fla. 500.

[81] Jenkins v. State, 18 So. 182, 35 Fla. 737, 48 Am. St. Rep. 267.

[82] Johnson v. State, 107 S. E. 780.

[83] People v. Cotton, 95 N. E. 283, 250 Ill. 338.

and circumstances as are absolutely incompatible with any reasonable hypothesis other than that of the guilt of the accused.[84]

The court instructs the jury that, in order to warrant a conviction for crime on circumstantial evidence, the circumstances, taken together, should be of a conclusive nature and tendency, leading, on the whole, to a satisfactory conclusion, and producing, in effect, a reasonable and moral certainty that the accused, and no one else, committed the offense charged; and it is the invariable rule of law that, to warrant a conviction upon circumstantial evidence alone, such facts and circumstances must be shown as are consistent with the guilt of the party charged, and as cannot, upon any reasonable theory, be true, and the party charged be innocent; and in this case, if all the facts and circumstances relied upon by the people to secure a conviction can be reasonably accounted for upon any theory consistent with the innocence of the defendant, then the jury should acquit the defendant.[85]

§ 1983(9). Indiana

The jury are instructed that if any one fact, necessary to a conclusion of guilt, is wholly inconsistent with the hypothesis of the guilt of the accused, it breaks the chain of circumstantial evidence upon which the inference of guilt of the accused depends, and, however plausible or apparently conclusive all other circumstances may be, the charge must fail and you should acquit the defendant.[86]

The jury are instructed that, where a conviction for a criminal offense is sought upon circumstantial evidence, the state must show beyond a reasonable doubt that the alleged facts and circumstances are true, and that such facts and circumstances are absolutely incompatible, upon any reasonable hypothesis, with the innocence of the accused, and incapable of explanation upon any rational conclusion or reasonable hypothesis, other than that of the guilt of the accused.[87]

§ 1983(10). Iowa

You are instructed that in no case is it necessary, in order to establish the crime charged, that there should be direct proof of defendant's guilt by eyewitnesses who were present and saw him commit the crime, but in criminal as well as civil cases the evidence may be, and frequently is, not direct, but circumstantial; in fact in criminal cases the guilt of the defendant, if shown at all, is most generally shown by the latter kind of evidence; that is, by the proof of such facts and circumstances as establishes the guilt of

[84] Everett v. People, 75 N. E. 188, 216 Ill. 478.

[85] Marzen v. People, 50 N. E. 249, 173 Ill. 43.

[86] Dunn v. State, 78 N. E. 198, 166 Ind. 694.

[87] Koerner v. State, 98 Ind. 7.

the defendant. And when the evidence in a case consists of a chain of well-authenticated and proven circumstances it is often more convincing and satisfactory, and gives a stronger ground of assurance of the defendant's guilt than the direct testimony of witnesses unconfirmed by circumstances. But to justify the inference of guilt from circumstantial evidence the facts proven from which it is asked that the guilt of the defendant be inferred must be consistent with each other, and must not only clearly point to his guilt, but must be inconsistent with any other reasonable hypothesis upon which his innocence may be maintained. And where the prosecution relies upon circumstantial evidence alone to establish the conviction of a person of a crime charged, the jury must be satisfied from the evidence beyond a reasonable doubt that the crime charged has been committed by some one in the manner and form as charged in the indictment, and further that all the circumstances proven are consistent with defendant having committed the crime, and that the facts and circumstances proven are such as to be inconsistent with any other rational conclusion than that the defendant is the person who committed said act.[88]

You are instructed that circumstantial evidence is to be regarded by the jury in all cases, and is many times quite as conclusive in its convincing power as direct and positive evidence of eyewitnesses. When it is strong and satisfactory, the jury should so consider it, neither enlarging or belittling its force; it should have its just and fair weight with you; and if, when it is all taken as a whole, and fairly and candidly weighed, it convinces the guarded judgment, you should convict, and on such conviction you are not to fancy situations or circumstances which do not appear in the evidence, but you are to make those just and reasonable inference from circumstances proven, which the guarded judgment of a reasonable man would ordinarily make under like circumstances. You are not artificial beings, governed by artificial or finespun rules, but you should bring to the consideration of the evidence before you, your everyday common sense and judgment as reasonable men, and those just and reasonable inferences and deductions which you, as men, would ordinarily draw from facts and circumstances proven in the case you should draw and act on as jurors.[89]

You are instructed that, to warrant a conviction on circumstantial evidence, each fact in the chain of circumstances necessary to be established to prove the guilt of the accused must be proven by competent evidence beyond a reasonable doubt, and all the facts and circumstances necessary to prove guilt must be connected with each other and with the main fact sought to be proved; and all

[88] State v. Moss, 168 N. W. 164, 185 Iowa, 158.

[89] State v. Hassan, 128 N. W. 960, 149 Iowa, 518.

the circumstances, taken together, must be of a conclusive nature, leading to a satisfactory conclusion and producing a moral certainty that the crime charged was committed, and that the accused committed it. It is not sufficient that they coincide with and render probable the guilt of the accused, but they must exclude every other reasonable hypothesis.[90]

The jury are instructed that circumstantial evidence is to be regarded by the jury in all cases. It is many times quite as conclusive in its convincing power as direct and positive evidence of eyewitnesses. When it is strong and satisfactory, the jury should so consider it, neither enlarging nor belittling its force. It should have its just and fair weight with the jury; and if, when it is all taken as a whole, and fairly and candidly weighed, it convinces the guarded judgment, the jury should act on such conviction. You are not to fancy situations or circumstances which do not appear in the evidence, but you are to make those just and reasonable inferences from circumstances proven as the guarded judgment of a reasonable man would ordinarily make under like circumstances.[91]

§ 1983(11). Kansas

You are instructed that, when the state relies upon circumstantial evidence alone for proof, the rule is that all the links in the chain of evidence must be established by the evidence beyond a reasonable doubt. This does not mean, however, that every particular fact going to make up a link in the chain of evidence must be established beyond a reasonable doubt, but you must be satisfied from the whole evidence, beyond a reasonable doubt, of the truth of the several links, and each of the several links in the chain of circumstances.[92]

The jury are instructed that a few facts or a multitude of facts proved, all consistent with the supposition of guilt, are not enough to warrant a verdict of guilty. In order to convict on circumstantial evidence, not only the circumstances must all concur to show that the defendant committed the crime, but they must be inconsistent with any other rational conclusion.[93]

§ 1983(12). Michigan

The jury are instructed that, in cases of circumstantial evidence, each circumstance necessary to constitute a chain of evidence of guilt should, to justify conviction, be established by proof beyond a reasonable doubt; and, if you can reconcile the circumstances in

[90] State v. Blydenburg, 112 N. W. 634, 135 Iowa, 264, 14 Ann. Cas. 443.

[91] State v. Elsham, 31 N. W. 66, 70 Iowa, 531.

[92] State v. Pack, 186 P. 742, 106 Kan. 188.

[93] State v. Andrews, 61 P. 808, 62 Kan. 207.

evidence on any other theory than than of guilt on the part of respondent, your duty would be to acquit.[94]

§ 1983(13). Minnesota

I charge you that the evidence upon which the state is seeking to convict the defendant in this case consists largely of what is known in law as "circumstantial evidence." In order to warrant a conviction upon circumstantial evidence it is not alone sufficient that said evidence is consistent with the guilt of defendant but it must exclude every other reasonable hypothesis.[95]

§ 1983(14). Mississippi

The jury are instructed that, in the application of circumstantial evidence to the determination of the case, the utmost caution and vigilance should be used. It is always insufficient when, assuming all to be proved which the evidence tends to prove, some other reasonable hypothesis, arising and growing out of the evidence in the cause, than the one sought to be established by the evidence, may be true. It is the result based on the exclusion of every other reasonable hypothesis arising and growing out of the evidence in the case than that sought to be established by it, that will authorize the jury to act upon it, and give the circumstances the force of truth in the particular case.[96]

§ 1983(15). Missouri

The court instructs the jury that the guilt of the defendant cannot be presumed, but must be proved by direct or circumstantial evidence, and the court instructs the jury that there is no direct evidence of the guilt of the defendant in this case. Before you can convict the defendant on circumstantial evidence alone, the facts and circumstances must all form a complete chain, and all point to his guilt, and must be irreconcilable with any reasonable theory of his innocence; and before the jury can convict the defendant on circumstantial evidence alone the circumstances must not only be consistent with his guilt and point directly thereto, but must be absolutely inconsistent with any reasonable theory of his innocence.[97]

Gentlemen of the jury, the state in this case seeks to some extent to convict the defendant of the crime charged on circumstantial evidence; that is, there is no evidence by any witness that saw the fatal blow struck. Evidence is of two kinds—direct and circumstantial. Circumstantial evidence is proof of certain facts and circumstances in a certain case in which the jury may infer other and connected facts which usually and reasonably follow according to

[94] People v. Wells, 71 N. W. 176, 112 Mich. 648.

[95] State v. Rickmire, 174 N. W. 529, 144 Minn. 32.

[96] Petty v. State, 35 So. 213, 83 Miss. 260.

[97] State v. Thompson, 222 S. W. 789.

the common experience of mankind. Crime may be proved by circumstantial evidence as well as by direct testimony of eyewitnesses, but the facts and circumstances in evidence should be consistent with each other, and with the guilt of the defendant, and inconsistent with any reasonable theory of defendant's innocence.[98]

The court instructs the jury that the guilt of the defendant cannot be presumed, but must be proved, either by direct or circumstantial evidence. Before you can convict the defendant on circumstantial evidence alone, the facts and circumstances must all form a complete chain, and all point to his guilt, and must be irreconcilable with any reasonable theory of his innocence; and before the jury can convict the defendant on circumstantial evidence alone, the circumstances must not only be consistent with his guilt and point directly thereto, but must be absolutely inconsistent with any reasonable theory of his innocence.[99]

The court instructs the jury that in this case the evidence of facts and circumstances must be such as to exclude, to a moral certainty, every hypothesis but that of guilt of the offense imputed; or, in other words, the facts and circumstances must not only all be consistent with and point to the guilt of the accused, but they must be inconsistent with his innocence. And unless the facts and circumstances in evidence are sufficient to satisfy your minds and consciences beyond a reasonable doubt that the defendant is guilty, you should acquit.[1]

You are instructed that it is not necessary to prove the defendant is guilty by the testimony of witnesses who may have seen the offense committed. Guilt may be shown by proof of the facts and circumstances from which it may be reasonably and satisfactorily inferred. In determining whether the defendant is guilty or not, you should take into consideration all the facts and circumstances in evidence, the acts and conduct of the defendant, and his motive, if any, for doing or not doing the act charged as shown by the evidence; and if you find from all the facts and circumstances in evidence that there is no other reasonable conclusion than that he is guilty, you will so find; but to convict the defendant on circumstantial evidence alone the circumstances proved must be consistent with one another, and must, taken together, point so conclusively to his guilt as to exclude every reasonable hypothesis of his innocence.[2]

The jury are instructed that in criminal cases circumstantial evidence is legal and competent to establish the guilt or inno-

[98] State v. Shelton, 122 S. W. 732, 223 Mo. 118.

[99] State v. Sharpless, 111 S. W. 69, 212 Mo. 176.

[1] State v. Sharpless, 111 S. W. 69, 212 Mo. 176.

[2] State v. Heusack, 88 S. W. 21, 189 Mo. 295.

cence of the defendant; that if, in this case, the evidence be such that upon a full and fair examination of all the facts and circumstances you are satisfied of the guilt of the defendant as charged beyond a reasonable doubt, it is your duty to find the defendant guilty.[3]

The court instructs the jury that it is not sufficient to justify them in convicting the defendant upon circumstantial evidence that the facts proved coincide with, account for, and even render probable the hypothesis sought to be established; but they must exclude to a moral certainty every other hypothesis but the one sought to be established, viz. the guilt of defendant. And unless all the facts and circumstances proved are consistent with each other and with the guilt of the defendant, and absolutely inconsistent with and unexplainable upon any other reasonable theory than that of defendant's guilt, the jury under the law would not be justified in convicting the defendant upon such evidence, but ought to acquit him.[4]

The jury are instructed that where the prosecution relies upon circumstantial evidence alone for a conviction, as in this case, the jury must be satisfied beyond a reasonable doubt that the crime has been committed by some one in manner and form as charged in the indictment, and they must not only be satisfied that all the circumstances proved are consistent with defendant's having committed the act, but they must also be satisfied that the facts are such as to be inconsistent with any other reasonable conclusion than that the defendant is the guilty person; and if the material facts necessary to constitute a chain of circumstances sufficient to authorize the jury in convicting the defendant under the other instructions herein are wanting in a single link in such chain so as to raise a reasonable doubt, the jury should acquit the defendant.[5]

§ 1983(16). Montana

The jury are instructed that, when a criminal charge is to be proved by circumstantial evidence, the proof ought to be, not only consistent with the prisoner's guilt, but inconsistent with any other rational conclusion.[6]

§ 1983(17). Nebraska

The jury are instructed that circumstantial evidence is to be regarded by the jury in all cases. It is many times quite as conclusive in its convincing power as direct and positive evidence of eyewitnesses. When it is strong and satisfactory, the jury should so consider it, neither enlarging nor belittling its force. It should

[3] State v. Howell, 23 S. W. 263, 117 Mo. 307.

[4] State v. Howell, 23 S. W. 263, 117 Mo. 307.

[5] State v. Howell, 23 S. W. 263, 117 Mo. 307.

[6] State v. Blaine, 124 P. 516, 45 Mont. 482.

have its just and fair weight with the jury; and if, when it is all taken as a whole, and fairly and candidly weighed, it convinces the guarded judgment, the jury should act on such conviction. You are not to fancy situations and circumstances which do not appear in evidence, but you are to make those just and reasonable inferences from circumstances proved which the guarded judgment of a reasonable man would ordinarily make under like circumstances.[7]

The court instructs the jury that circumstantial evidence is legal and competent in criminal cases; and, if it is of such a character as to exclude every reasonable hypothesis other than that the defendant is guilty, it is sufficient to authorize a conviction.[8]

The court further instructs the jury that what is meant by circumstantial evidence in criminal cases is the proof of such facts or circumstances connected with or surrounding the commission of the crime charged as tend to show the guilt or innocence of the party charged; and, if these facts and circumstances are sufficient to satisfy the jury of the guilt of the defendant beyond a reasonable doubt, then such evidence is sufficient to authorize the jury in finding a verdict of guilty.[9]

You are instructed that the next consideration is that each fact which is necessary to the conclusion [of guilt] must be distinctly and independently proved by competent evidence. I say every fact necessary to the conclusion, because it may and often does happen that, in making out a case on circumstantial evidence, many facts are given in evidence, not because they are necessary to the conclusion sought to be proved, but to show that they are consistent with, and not repugnant, and go to rebut any contrary presumption; but not being necessary to the establishment of the main fact, if the witness was mistaken in the time, or in the fact itself, such failure of proof would not prevent the inference from other facts, if of themselves sufficient to warrant it. The failure of such proof does not destroy the chain of evidence. It only fails to give it that particular corroboration which the fact, if proved, might afford.[10]

§ 1983(18). New Mexico

The jury are instructed that in a case of circumstantial evidence, the evidence against the accused must be such as to exclude, beyond a reasonable doubt, every hypothesis or theory other than that he is guilty as charged; and if there remains in the case, all the evidence considered, any reasonable theory, aris-

[7] Smith v. State, 85 N. W. 49, 61 Neb. 296.

[8] Cunningham v. State, 77 N. W. 60, 56 Neb. 691.

[9] Cunningham v. State, 77 N. W. 60, 56 Neb. 691.

[10] Morgan v. State, 71 N. W. 788, 51 Neb. 672.

ing out of the evidence, which raises in the mind of the jury a reasonable uncertainty of defendant's guilt, such a state of evidence would justify an acquittal.[11]

The court instructs the jury that, where circumstances alone are relied upon by the prosecution for a conviction, the circumstances must be such as to apply exclusively to the defendant, and such as are reconcilable with no other hypothesis than the defendant's guilt, and they must satisfy the minds of the jury of the guilt of the defendant beyond a reasonable doubt.[12]

§ 1983(19). New York

The jury are instructed that no greater degree of certainty is required where the evidence is circumstantial than where it is direct, for in either case the jury must be convinced of the prisoner's guilt beyond a reasonable doubt. You are bound by your oath to render a verdict upon all of the evidence, and the laws make no distinction between direct evidence of a fact and evidence of circumstances from which the existence of a fact may be inferred. In drawing conclusions and inferences from the established facts in this case, if you reach the conclusion that the accused was guilty of the crime charged against him, your judgment rests upon a foundation fully as secure and reliable as though it rested upon the testimony of eyewitnesses.[13]

§ 1983(20). North Carolina

The jury are instructed that the law says that circumstantial evidence is a recognized and accepted instrumentality in the ascertainment of truth; and it is essential and when properly understood and applied is highly satisfactory in matters of the gravest moment. The facts, relations, connections, and combinations between the circumstances should be natural, clear, reasonable, and satisfactory. When such evidence is relied upon to convict, it should be clear, convincing, and conclusive in all its combinations and should exclude all reasonable doubt as to guilt. In passing upon such evidence, it is the duty of the jury to consider all circumstances relied upon to convict and to determine whether they have been established beyond a reasonable doubt. If not so established, the circumstance should be excluded from further consideration and have no weight in reaching a verdict. The state puts up a witness here, and undertakes to prove a circumstance; you will first determine in your mind: Is this circumstance established beyond a reasonable doubt? If you say that circumstance has been established beyond a reasonable doubt, you take that into consid-

[11] Territory v. Padilla, 46 P. 346, 8 N. M. 510.

[12] Territory v. Lermo, 46 P. 16, 8 N. M. 566.

[13] People v. Smith, 72 N. E. 931, 180 N. Y. 125.

eration in determining what verdict you will find. After considering the evidence in this way, and determining the circumstances which are established beyond a reasonable doubt, the next thing for the jury is to determine: Do these circumstances exclude every other reasonable conclusion, except that of guilt? If so, the evidence is sufficient to convict; otherwise, not.[14]

The jury are instructed that in this case the state relies upon both direct and circumstantial evidence, and, before the state can rely upon circumstantial evidence, it is necessary for the state to establish every circumstantial fact upon which it relies beyond a reasonable doubt.[15]

§ 1983(21). Oklahoma

You are instructed that the state relies for a conviction in this case upon what is known as circumstantial evidence, and in this matter you are instructed that, to warrant a conviction upon circumstantial evidence, each fact necessary to the conclusion sought to be established (that is, the guilt of the defendant) must be proved by competent evidence, beyond a reasonable doubt, and that all the facts and circumstances proven should not only be consistent with the guilt of the accused, but consistent with each other, and inconsistent with any other reasonable hypothesis or conclusion than that of his guilt, and sufficient to produce in your minds the reasonable moral certainty that the accused committed the offense charged against him. And you are instructed that, when the circumstances are sufficient under this rule herein given you, they are competent and are to be regarded by the jury as competent for your guidance as direct evidence.[16]

§ 1983(22). South Carolina

The jury are instructed that the test of the sufficiency of circumstantial evidence in a criminal case is not whether it produces as full a conviction as would be produced by the positive testimony of a single credible witness, but whether it satisfies the minds of the jury to the exclusion of every reasonable doubt. It is not necessary that it should demonstrate the guilt of the accused beyond the possibility of innocence, but it must exclude to a moral certainty every other hypothesis but that of guilt. I charge you that to be the test—the rule—with reference to circumstantial evidence. Each fact in the chain of circumstances must be proved by competent evidence, and each fact must be consistent with other facts in the case, and with the main fact sought to be proved. Now, for instance, the facts proved must be consistent with each other,

[14] State v. Plyler, 69 S. E. 269, 153 N. C. 630.

[15] State v. Flemming, 41 S. E. 549, 130 N. C. 688.

[16] Baldwin v. State, 144 P. 634, 11 Okl. Cr. 228.

and point directly to the guilt of the accused. If they point to the guilt of some one else, then the chain of circumstantial evidence would not hold, because it must point to the guilt of the accused; and if it points to the guilt of the accused, although circumstantial, with such certainty that satisfies you, to a moral certainty, of the fact sought to be proved, then it is your duty to act upon circumstantial evidence and find a verdict accordingly. Now, the chain of circumstantial evidence has been compared to an ordinary chain. For instance, suppose that chandelier is suspended from a chain. The strength of that chain is tested by the weakest link in it. In other words, the chain will hold up just so much weight as the weakest link in that chain will bear, and as soon as it gives way the chain gives way. And so will the chain of circumstantial evidence. The sufficiency of it is tested by the weakest circumstance which is necessary to make out the theory of the state. Now, the question you will ask yourselves is this: Do these facts and circumstances point so directly to the guilt of the accused as not to admit of any reasonable doubt but that he is the guilty party? Are you morally certain, morally satisfied, that these facts and circumstances which have been discussed in your presence so ably point so directly to the guilt of the accused as not to admit of any other reasonable hypothesis than that of his guilt? If so, the theory of the state has been made out, and it would be your duty to convict. If you have got a reasonable doubt, the theory of the state would not be made out, and it would be your duty to acquit.[17]

As I have said, this case turns upon circumstantial evidence, and, if the circumstances are sufficient to satisfy you, you will find a verdict accordingly. We can act upon circumstantial evidence in the gravest issues; otherwise, our lives, our property, would not be safe, unless we could rely upon circumstantial evidence in the very gravest issues which can be submitted. If we could not rely upon circumstantial evidence, it is very evident that he who succeeded in being perfectly secret about a crime would escape, for the circumstances which led to the detection of the crime would not be relied on by the jury.[18]

§ 1983(23). South Dakota

The jury are instructed that the evidence in this case is what is known as "circumstantial" that is, no person who has testified was an eyewitness of the alleged crime, and the state seeks to connect the defendant with the crime by showing a chain of circumstances leading up to it, and connected with it and the de-

[17] State v. Aughtry, 26 S. E. 619, 49 S. C. 285.

[18] State v. Milling, 14 S. E. 284, 35 S. C. 16.

fendant; and this is circumstantial evidence. And I will say to you that the evidence which has been received in this case is legal and competent, and if it is, in your mind, of such a character as to exclude every reasonable theory or hypothesis other than that of the defendant's guilt, beyond a reasonable doubt, then and in that event it should be given the same weight by you as would direct evidence of the fact alleged. Circumstantial evidence, when competent, and when complete and satisfying to your minds, as has been charged, is entitled to the same weight that direct evidence is.[19]

§ 1983(24). Tennessee

The jury are instructed that, if the proof in this case convinces and directs your understanding and satisfies your reason and judgment of the defendant's guilt, you will convict him of the degree of crime, of which you are satisfied that he is guilty; if it does not, you will acquit him. The defendant may be convicted or acquitted upon the proof of circumstances tending to show his guilt or innocence, as well as by direct and positive testimony showing his guilt or innocence. However, when circumstances alone are relied upon by the state to convict the defendant, then the proof of the circumstances must be so cogent, powerful, and well connected as to satisfy you, beyond a reasonable doubt, of the defendant's guilt, and to exclude every other reasonable hypothesis than that of defendant's guilt. If the circumstances proved, tending to show defendant's guilt, are so powerful, cogent, and well connected as to exclude every reasonable hypothesis than that of defendant's guilt, you should convict him; if they fail, when all taken together, to exclude every reasonable hypothesis than that of defendant's guilt, you should acquit him.[20]

§ 1983(25). Texas

In this case the state relies for a conviction on circumstantial evidence alone. You are instructed that, in order to warrant a conviction of a crime on circumstantial evidence, each fact, necessary to the conclusion sought to be established, must be proved by competent evidence, beyond a reasonable doubt; all the facts (that is the necessary facts to the conclusion) must be consistent with each other and with the main facts sought to be proved, and the circumstances, taken together, must be of a conclusive nature, leading, on the whole, to a satisfactory conclusion, and producing in effect a reasonable and moral certainty that the accused, and no other person, committed the offense charged. But in such case it is not sufficient that the circumstances coincide with, account

[19] State v. Coleman, 98 N. W. 175, 17 S. D. 594.

[20] Dietzel v. State, 177 S. W. 47, 132 Tenn. 47.

for, and therefore render probable, the guilt of the defendant. They must exclude, to a moral certainty, every other reasonable hypothesis except the defendant's guilt, and, unless they do so beyond a reasonable doubt, you will find the defendant not guilty.[21]

The jury are instructed that the facts on which the state relies for a conviction must be proved beyond a reasonable doubt, that such facts should not only be consistent with the guilt of the accused, but inconsistent with any other reasonable hypothesis or conclusion than that of his guilt, and must produce in the minds of the jury a reasonable and moral certainty that the accused, and no other person, committed the offense charged.[22]

§ 1983(26). Virginia

The court further instructs the jury that circumstantial evidence is legal and competent in criminal cases, and, if it is of such a character as to exclude every reasonable hypothesis other than that the defendant is guilty, is entitled to the same weight as direct testimony.[23]

§ 1983(27). Washington

The jury are instructed that the state is not required to prove these facts by direct and positive evidence. It may do so by circumstantial evidence. Circumstantial evidence is legal and competent evidence in criminal cases, and where it is all consistent with the hypothesis of the guilt of the person accused of crime, and is not consistent with the hypothesis of his innocence, and where it establishes his guilt beyond a reasonable doubt—where all the evidence can be reconciled with the assumption of his guilt, and cannot be reconciled with the assumption of his innocence, and produces in the minds of the jury an abiding conviction to a moral certainty of his guilt—it is the imperative duty of the jury, under the law and under their several oaths, to render a verdict finding him guilty, and they would violate their oaths if they should fail to do so, just as they would if it were all direct and positive evidence. Nor is it necessary that they should be absolutely certain of his guilt. This is impossible, in the nature of things, and the law does not require it. If it did, few crimes, perhaps, would be punished. Moral certainty of guilt, therefore, satisfies the law in this respect. But, before rendering a verdict of guilty in any criminal case, a jury should, after a consideration of all the evidence, feel morally certain—have an abiding conviction to a moral certainty—of the guilt of the accused. And if in this case, gentlemen, the evidence, though in part circumstantial, all considered,

[21] Brown v. State, 169 S. W. 437, 74 Tex. Cr. R. 356; Earnest v. State, 152 S. W. 638, 68 Tex. Cr. R. 542. See Harris v. State, 148 S. W. 1074.

[22] Porch v. State (Cr. App.) 99 S. W. 102, 50 Tex. Cr. R. 335.

[23] Longley v. Commonwealth, 37 S. E. 339, 99 Va. 807.

appears to your minds to be consistent with the supposition that the defendant is guilty of this charge, and inconsistent with the supposition that he is innocent of it, and you feel morally certain, though not absolutely certain, that he is guilty of it—if you have a firm conviction abiding in your mind that he is guilty of this charge—you will fail in your duty and violate your oath if you do not return a verdict declaring him guilty as charged. But if, on the other hand, the whole evidence in the case, as you view it, is just as consistent with the assumption of his innocence as with the assumption of his guilt, or if you do not feel morally certain of his guilt—if you have a substantial, a sensible, a reasonable doubt, resting upon the unsatisfactory character of the evidence to establish his guilt—your duty is just as imperative to acquit him.[24]

§ 1983(28). West Virginia

The court instructs the jury that, if the state relies for a conviction in this case upon evidence in whole or in part circumstantial, then it is essential that the circumstances should, to a moral certainty, actually exclude every hypothesis but the one proposed to be proved, and that unless they do, to a moral certainty, actually exclude every hypothesis but the one proposed to be proved, then they should find the prisoner not guilty.[25]

§ 1983(29). Wisconsin

You are instructed that all the evidence produced by the state is circumstantial. There is no direct or positive evidence that the defendant committed the crime charged. And to warrant a conviction on circumstantial evidence each fact necessary to the conclusion sought to be established must be proved by competent evidence beyond a reasonable doubt, and all the facts necessary to such conclusion must be consistent with each other and with the main fact sought to be proved, and the circumstances, taken together, must be of a conclusive nature, leading, on the whole, to a satisfactory conclusion, and producing, in effect, a reasonable and moral certainty that the accused, and no other person, committed the offense charged. The mere union of a limited number of independent circumstances, each of an imperfect and inconclusive character, will not justify a conviction. They must be such as to generate and justify full belief according to the standard rule of certainty. It is not sufficient that they coincide with and render probable the guilt of the accused, but they must exclude every other reasonable hypothesis. No other conclusion but that of the guilt of the accused must fairly and reasonably grow out of

[24] State v. Harras, 65 P. 774, 25 Wash. 416.

[25] State v. Allen, 30 S. E. 209, 45 W. Va. 65.

the evidence, but the facts must be absolutely incompatible with innocence, and incapable of explanation upon any other reasonable hypothesis than that of guilt.[26]

§ 1984. Acts of blood hounds as evidence

The court instructs the jury that the evidence in the case relating to the work of the dogs should be cautiously weighed with discriminating judgment, and unless they believe from the facts and circumstances in the case, beyond a reasonable doubt, that the alleged trail at the place where the dogs finally ceased their work was connected with and pointed to the defendant as the person who made it, then all evidence in relation to such work and to the alleged trail should be rejected and entirely disregarded. And unless the jury believe from the evidence beyond a reasonable doubt that the alleged trail, at the point where the dogs were laid onto it, and the alleged trail, at the point where they finally quit their work, had been made by a human being who was one and the same person, then all evidence in relation thereto should be rejected and ignored by the jury. And unless it clearly appears from the testimony that by the breeding, nature, training, and experience of the dogs, when they are removed for an hour or so from a trail of some person or thing which they had been pursuing, they will not, on resuming work at a distant place, voluntarily pursue the trail or scent of any other person or thing, then their work under such conditions would be of no evidential value; and in this case, if the evidence does not show the dogs possessed such qualities, and yet did their work in such manner, then the jury must eliminate from their consideration all evidence relating to the dogs or their work.[27]

The jury are instructed that if they believe from the evidence, beyond a reasonable doubt, that the dogs, by their nature, prior training, and experience were capable of tracking or trailing a human being without aid or suggestion in the progress of their work, and that unaided they did so, in the surroundings disclosed by the evidence in this case, and if they further believe from the evidence that the dogs possessed the power to, and in their work aforesaid did, discriminate between the alleged trail on which they first had been laid, and the trail, track, or scent (if any) of any other person or thing which came within their range during the progress of their work, and did pursue from the beginning to the final close of their work a trail or trails made by one and the same person, and no other, if made by a person, and if the jury believe from the evidence, beyond a reasonable doubt, that the immediate surroundings and conditions existing at the time and place when and where the

[26] Colbert v. State, 104 N. W. 61, 125 Wis. 423.

[27] State v. Rasco, 144 S. W. 449, 239 Mo. 535.

dogs finally terminated their work, as shown by the testimony, clearly pointed to the defendant as the person who had made the trail (if any), then the jury may consider the work of the dogs as a circumstance in the case, provided they further believe from the testimony that the alleged trail in its origin was made at the time the alleged homicide was committed by the person who committed it.[28]

§ 1985. Evidence of defendant's good character

Good character of defendant as evidence on issue of self-defense, see post, §§ 3055, 3056.

§ 1985(1). Alabama

The court charges the jury that the defendant may offer proof of his good character, and that such proof, taken in connection with all the evidence in the case, may be sufficient to create a reasonable doubt of the guilt of the defendant.[29]

The court charges the jury that proof of good character, in connection with all the other evidence, may generate a reasonable doubt, which entitles the defendant to an acquittal, even though without such proof of good character the jury would convict.[30]

§ 1985(2). Arizona

The court instructs the jury that proof of good character in connection with all the other evidence may generate a reasonable doubt, which entitles the defendants to an acquittal, even though without such proof of good character the jury would convict.[31]

§ 1985(3). Arkansas

The court instructs the jury that, in regard to the evidence given of the defendant's character for peace and quietude, this is always admissible in behalf of a defendant accused of crime, and is not to be ignored; but such good character, if proved, is not, of itself and alone, a defense or justification or excuse for committing a crime, but should be considered by the jury along with the other evidence in the case in determining whether or not the defendant is, in fact, guilty as charged.[32]

§ 1985(4). California

The jury are instructed that the defendant has introduced evidence before you tending to show his good character for peace and quietness. If, in the present case, the good character of the defendant for these qualities is proven to your satisfaction, then such fact

[28] State v. Rasco, 144 S. W. 449, 239 Mo. 535.

[29] Taylor v. State, 42 So. 996, 149 Ala. 32.

[30] Taylor v. State, 42 So. 996, 149 Ala. 32.

[31] Apodaca v. State, 187 P. 581, 21 Ariz. 273.

[32] Rhea v. State, 147 S. W. 463, 104 Ark. 162.

is to be kept in view by you in all your deliberations, and it is to be considered by you in connection with the other facts in the case; and if after a consideration of all the evidence in the case, including that bearing upon the good character of the defendant, the jury entertain a reasonable doubt as to defendant's guilt, then I charge you it is your duty to acquit him. But if the evidence convinces you, beyond a reasonable doubt, of defendant's guilt, you must so find, notwithstanding his good character.[33]

§ 1985(5). Colorado

You are instructed that the prisoner has introduced evidence of his good character as a quiet, peaceable citizen. This evidence is as proper for your consideration as any other fact in the case, but the rule of law is that if the jury, upon consideration of all the evidence in the case, are satisfied beyond a reasonable doubt of the guilt of the prisoner, they must so find, notwithstanding his good character.[34]

§ 1985(6). Georgia

You are instructed that there is proof offered here as to the good character of the defendant. I charge you that good character is a substantive fact in the case to be considered along with the other facts in the case; and although the other facts in the case may not leave a reasonable doubt in the minds of the jury as to the guilt of the defendant, still if the good character of the defendant that is established, or that may be, in the minds of the jury, established, has the effect to raise a reasonable doubt in the minds of the jury as to his guilt, as to the guilt of the defendant, it would be the duty of the jury to give him the benefit of the doubt and acquit him. If, however, the other proof in the case than that of good character leaves no reasonable doubt in the minds of the jury as to the defendant's guilt, and if the proof of good character leaves no reasonable doubt as to the guilt of the defendant, when considered in connection with the other evidence, it would be the duty of the jury to convict the defendant regardless of the proof of good character. Give the defendant's good character that is proved in the case in the opinion of the jury due weight, and such weight as you think it entitled to, as bearing upon the question as to whether or not the defendant is guilty or not guilty.[35]

I charge you that you are authorized to consider evidence as to the good character of the defendant. No matter how conclusive the other testimony may appear to be, the character of the accused may be such as to create a doubt in the minds of the jury and to

[33] People v. Mitchell, 62 P. 187, 129 Cal. 584.

[34] May v. People, 6 P. 816, 8 Colo. 210.

[35] Phillips v. State, 99 S. E. 874, 149 Ga. 255.

lead them to believe, in view of the improbability that a person of such character would be guilty of the offense charged, that the other evidence is false, or the witnesses are mistaken, and you are authorized, if you believe that the defendant's character has been proved to be such and so good as to lead your minds to the belief that all of the testimony for the state is false, or such as to make you have a reasonable doubt of guilt, you should acquit him; but otherwise, if you do not find such proof of character as to justify this course.[36]

§ 1985(7). Illinois

The jury are instructed that, notwithstanding proof of the previous good character of the defendant, he may be convicted, if the jury, from all the evidence, are satisfied beyond a reasonable doubt of his guilt.[37]

§ 1985(8). Iowa

You are instructed that the defendant has introduced evidence before you with reference to his general moral character, and his character with reference to sexual matters, and his general reputation for general moral character in the community in which he lives. This testimony was introduced by him upon the theory that a man of good moral character, or of good character in sexual matters, or bearing a general reputation for good moral character in the community in which such person lives, would not be likely to commit a crime of the character charged in this indictment. In this connection you are instructed that, while good moral character or good reputation for good moral character are no defense when a crime is shown to have been committed, they are proper matters to be considered by the jury in determining whether or not a party did, in fact, commit the crime charged against him. And in this case, if you find from the evidence before you that the defendant, at the time it is claimed by the state that this crime was committed, was a man of good moral character, or of good character so far as relates to sexual matters, or at the time bore a good reputation for good moral character in the community in which he lived, then you should consider such good character and reputation, and give it such weight as you deem it entitled to, in arriving at your conclusion as to the guilt or innocence of the defendant of the charge contained in this indictment.[38]

The jury are instructed that defendant has introduced evidence as to his character as a man of humane and kindly disposition to-

[36] Howell v. State, 52 S. E. 649, 124 Ga. 698. The specific objection to this instruction was that it did not permit the jury to consider the evidence of good character, unless they believed that the evidence of the state was false and the court simply held that the objection was not well taken.

[37] People v. Anderson, 87 N. E. 917, 239 Ill. 168.

[38] State v. Pelser, 163 N. W. 600, 182 Iowa, 1.

wards children. In passing on the question of his guilt or innocence, and if you find him guilty, in passing on the grade of his offense, this evidence as to his character constitutes an ingredient to be considered by you, without reference to the apparently conclusive or inconclusive character of the other evidence; and it is for you to consider this evidence throughout your deliberations on the facts of the case, and give it such weight as you think it justly entitled to.[39]

The jury are instructed that, if you find good character established by the evidence, you should consider it, and allow it such weight as you believe it fairly entitled to as tending to show that men of such character would not be likely to commit the crime charged in the case.[40]

The jury are instructed that it is competent for a person accused of crime to prove, as a circumstance in his defense, that his previous character as to the trait involved in the charge was good. Previous good character is not of itself a defense, but is a circumstance which should be considered by the jury in connection with all the other evidence, and it may be sufficient to turn the scale in his favor; but its value as defensive evidence in any given case is to be determined by the jury.[41]

§ 1985(9). Kansas

The court instructs the jury that evidence of previous good character is competent evidence in favor of the party accused, as tending to show that he would not be likely to commit the crime charged against him; and in this case, if the jury believe from the evidence that prior to the commission of the crime the defendant had always borne a good character for being law-abiding among his acquaintances and in the neighborhood in which he lived, then this is a fact proper to be considered by the jury, with all the other evidence in the case, in determining the question whether the witnesses who have testified to facts tending to criminate him have been mistaken, or have testified falsely or truthfully; and if after careful consideration of all the evidence in the case, including that bearing upon his previous good character, the jury entertain a reasonable doubt of the defendant's guilt, then it is your sworn duty to acquit; but if, considering all the evidence, including that of previous good character, you believe beyond a reasonable doubt that the defendant committed the offense, it is equally your sworn duty to convict.[42]

[39] State v. Cunningham, 82 N. W. 775, 111 Iowa, 233.

[40] State v. Ormiston, 23 N. W. 370, 66 Iowa, 143.

[41] State v. Donovan, 16 N. W. 130, 61 Iowa, 278.

[42] State v. Johnson, 50 P. 907, 6 Kan. App. 119.

§ 1985(10). Louisiana

The jury are instructed that good character is to be considered just as any other fact in the case, is to be weighed and considered as any other evidence, and to have such weight as the jury should deem it entitled to under all the evidence in the case.[43]

§ 1985(11). Massachusetts

You are instructed that good character, like all other facts in the case, should be considered by the jury, and if therefrom a reasonable doubt is generated in the mind of the jury as to the guilt of the accused, it is your duty to acquit.[44]

§ 1985(12). Minnesota

The jury are instructed that evidence of defendant's reputation for honesty, integrity, and truthfulness was competent, as tending to show that he would not be likely to commit the crime charged against him; and if you believe from the evidence that defendant had previously borne a good reputation for honesty, integrity, and truthfulness among his acquaintances and neighbors, that fact is proper to be considered by you in connection with all the other evidence in the case in determining the question of his guilt or innocence.[45]

§ 1985(13). Missouri

The jury are instructed that the previous good character of the defendant, if proved to their reasonable satisfaction, ought to be considered by the jury in passing upon the guilt or innocence of the defendant, because the law presumes that a man whose character is good is less likely to commit a crime than one whose character is bad; but if all the evidence in the case, including that which had been given touching the previous good character of the defendant showed him to be guilty of the charge, then his previous good character could not justify, excuse, palliate, or mitigate the offense.[46]

You are instructed that, in determining as to the guilt or innocence of the defendant, you should take into account the testimony in relation to his character for honesty, integrity, and veracity, and you should give to such testimony such weight as you deem proper; but if, from all the evidence before you, you are satisfied beyond a reasonable doubt, as defined in these instructions, that the defendant is guilty, then his previous good character, if shown, cannot justify, excuse, palliate, or mitigate the offense, and you cannot

[43] State v. Nicholls, 23 So. 980, 50 La. Ann. 699.

[44] Commonwealth v. Leonard, 4 N. E. 96, 140 Mass. 473, 54 Am. Rep. 485.

[45] State v. Ames, 96 N. W. 330, 90 Minn. 183.

[46] State v. Maupin, 93 S. W. 379, 196 Mo. 164.

acquit him merely because you may believe he has been a person of good repute.[47]

You are instructed that, in determining as to the guilt or innocence of the defendant, you should take into account the testimony in relation to his character as a moral man, and you should give to such testimony such weight as you deem proper; but if, from all the evidence before you, you are satisfied beyond a reasonable doubt, as defined in these instructions, that the defendant is guilty, then his previous good character, if shown, cannot justify, excuse, palliate, or mitigate the offense, and you cannot acquit him merely because you believe he has been a person of good repute.[48]

The court instructs the jury that, in making up their verdict as to the guilt or innocence of defendant, they must consider the evidence offered in his behalf as to his previous good character just like any other fact in this case; and if, after duly weighing and considering such evidence of good character along with the other evidence in this case, it does not appear to the jury that defendant is guilty of the charge preferred against him beyond all reasonable doubt, then the jury should acquit the defendant.[49]

The court instructs the jury that, if the jury believe beyond a reasonable doubt from all the facts and circumstances as detailed in evidence in this case that the defendant is guilty of the crime as charged in the indictment, then in that case it is the duty of the jury to find the defendant guilty, even though the jury may be satisfied from the evidence that the defendant sustained a good character and reputation previous to and up to the time of the commission of the crime charged.[50]

§ 1985(14). Nebraska

The jury are instructed that, while previous good character does not constitute an excuse or justification for the commission of a crime, still evidence of good character is allowed by law as substantive proof, and either of itself, or in connection with other evidence may be sufficient to produce an acquittal by the creation of a reasonable doubt in the minds of the jurors. It is to be considered by you with all the other evidence in the case in determining the general question of guilt or innocence, and is to be given by you such weight as, under all the facts and circumstances, it is entitled to in the sound judgment of the jury.[51]

[47] State v. Darragh, 54 S. W. 226, 152 Mo. 522.

[48] State v. Knock, 44 S. W. 235, 142 Mo. 515.

[49] State v. Howell, 23 S. W. 263, 117 Mo. 307.

[50] State v. Howell, 23 S. W. 263, 117 Mo. 307.

[51] McDougal v. State, 181 N. W. 519.

§ 1985(15). Nevada

The jury are instructed that, while evidence of the general reputation of the defendant in and about the neighborhood in which he lived at or about the time of the commission of the alleged offense is admissible, and is a circumstance to be considered by the jury in connection with all the other facts in the case, the opinion or opinions of individual witnesses as to the character of the defendant are not to be considered for the purpose of proving the existence of or the character of his general reputation; and in this case evidence of the character last mentioned should not be considered by the jury in determining any issue of this case.[52]

§ 1985(16). New Jersey

The jury are instructed that you should consider all of the relevant testimony, including that relating to the defendant's good character or reputation, and if, on such consideration, there exists a reasonable doubt of his guilt, even though that doubt be engendered merely by his previous good repute, he is entitled to an acquittal; but if from the entire evidence, including that relating to good character, you believe the defendant guilty beyond a reasonable doubt, he should be convicted, and the evidence of good character should not alter the verdict.[53]

§ 1985(17). New York

The jury are instructed that you are to consider the question of good character in arriving at your verdict, and if, after considering it, it is sufficient to raise a reasonable doubt, you should not convict.[54]

The jury are instructed that in this case the defendant has offered direct evidence that he has a good character. It is the law that evidence of good character may of itself create a reasonable doubt when without it none would exist. It is for you as jurors to say what weight the evidence relating to the character of the defendant should be given in determining the question of his guilt of the crime charged, or of any lesser degree or of any lesser crime. No matter how conclusive the testimony may be, the law is that the character of the accused may be such as to create a doubt in view of the improbability that a person of such character would be guilty of the offense charged and that the other evidence that is being urged against him is false or the witnesses who stated those facts are mistaken. It is for you to say, in view of what the ——— witnesses from ——— have said about the defendant's character, whether that evidence as to his character leads you to a reasonable doubt as to the truth of the testimony that is claimed to have es-

[52] State v. Huber, 148 P. 562, 38 Nev. 253.

[53] State v. Randall, 113 A. 231.

[54] People v. Trimarchi, 131 N. E. 910, 231 N. Y. 263.

tablished that the defendant is guilty beyond a reasonable doubt. If you are satisfied beyond a reasonable doubt of the defendant's guilt, after considering all the evidence, including that of character, then evidence of the defendant's good character is of no importance whatever.[55]

The jury are instructed that evidence of good character may of itself create a reasonable doubt where otherwise no reasonable doubt would exist; and, in relation to that, you can give such testimony that consideration that you think it is entitled to, and no more, taking it into consideration with all the other facts and circumstances of the case.[56]

The jury are instructed that the character of the accused may be such as to create a doubt in the minds of the jury, and lead them to believe, in view of the improbability of a person of such character being guilty, that the other evidence is false.[57]

The jury are instructed that, if they believe the defendant's character up to the time of this charge has been good, they have the right to, and should, take that into consideration in his behalf in arriving at their verdict.[58]

§ 1985(18). Oklahoma

The jury are instructed that evidence of previous good character is competent in favor of the defendant as tending to show that he would not be likely to commit the crime charged against him, but that if, from all the evidence, the jury are satisfied beyond a reasonable doubt of the guilt of the defendant, then it is their duty to find him guilty, notwithstanding he has previously borne a good reputation as a quiet, peaceable, and law-abiding citizen. One always having lived an honest, upright life, a peaceable, law-abiding citizen, is not likely to commit crime, especially that of taking life; and proof of good character may in many cases be sufficient to create a reasonable doubt of guilt, although no such doubt could have existed except for the good character. But evidence of good character can only be considered in connection with all the other evidence, facts, and circumstances appearing in the trial, and if, after considering all of the evidence, including that as to good character, the jury entertain no reasonable doubt of guilt, they should convict, and that notwithstanding the evidence of former good character.[59]

[55] People v. Gilbert, 92 N. E. 85, 199 N. Y. 10, 20 Ann. Cas. 769.

[56] People v. Jackson, 74 N. E. 565, 182 N. Y. 66.

[57] People v. Childs, 90 App. Div. 58, 85 N. Y. S. 627.

[58] People v. McGraw, 72 N. Y. S. 679, 66 App. Div. 372.

[59] Wells v. Territory, 78 P. 124, 14 Okl. 436.

§ 1985(19). Oregon

The jury are instructed that there has been testimony offered in this case upon the question of the reputation of the defendant as a quiet, peaceable, and law-abiding citizen. The defendant has a right to show his previous good character as a circumstance tending to show the improbability of his guilt, or that he would commit such a crime. If, however, you believe from all of the evidence beyond a reasonable doubt that the defendant committed the crime in question as charged in the indictment, then it would be your duty to find the defendant guilty, even though the evidence satisfied your minds that the defendant previous to the crime in question had borne a good reputation as a quiet, peaceable, and law-abiding citizen.[60]

§ 1985(20). Pennsylvania

The jury are instructed that evidence of good character is substantive and positive proof in the prisoner's behalf, and may give rise to a reasonable doubt, which would not otherwise exist, by making it improbable that a man of such character would commit the offense charged.[61]

The jury are instructed that all persons have at some time been persons of good character, and many defendants in courts of justice, up to the time of the commission of the offense of which they are convicted, had a good character, and you will take this into consideration when you come to determine upon the weight and applicability of the testimony as to the good character of defendant.[62]

§ 1985(21). Utah

The jury are instructed that evidence has been given as to the good character of defendant for peace and quietude. Such good character when proved is a circumstance to be considered by you in connection with all the other evidence in the case, in determining the guilt or innocence of the said defendant; and is of value, not only in doubtful cases, but also when the testimony tends strongly to establish the guilt of the accused. When such character is proved, it is a fact in the case, and should not be put aside by the jury in order to ascertain if the other facts and circumstances, considered in themselves, do or do not establish the guilt of the said ———, but should be considered by you in connection with all the other testimony in the case, and not independently thereof. When so considering it, you have the right to give such weight to it as you may think it entitled to, and it may be

[60] State v. Selby, 144 P. 657, 73 Or. 378.

[61] Commonwealth v. Harmon, 49 A. 217, 199 Pa. 521, 85 Am. St. Rep. 799.

[62] Commonwealth v. Griffin, 42 Pa. Super. Ct. 597.

sufficient, if so regarded by you, in connection with all the other evidence in the case, to create a reasonable doubt in your minds as to the guilt of defendant, though no such doubt might exist, but for such evidence of good character.[63]

§ 1985(22). Virginia

The court instructs the jury that the character of the accused, when proved in a case, whether good or bad, is a fact to be considered by them, and if the jury from the evidence have any reasonable doubt as to the guilt of the accused, you should acquit him.[64]

§ 1986. Evidence of defendant's bad character

§ 1986(1). Michigan

You are instructed that, however bad defendant may be, or however guilty of other offenses, the question for you to determine here is whether she is guilty of the offense charged, and has that guilt been shown beyond a reasonable doubt.[65]

§ 1986(2). Mississippi

The court instructs the jury that no person should be convicted upon his reputation, character, or former convictions, but must be convicted by the evidence in the case; and the evidence must exclude any and every reasonable doubt, and to a moral certainty.[66]

§ 1986(3). Oregon

The jury are instructed that, even though you should find from the evidence that the defendant's reputation as a quiet, peaceable, and law-abiding citizen is bad, you should not find him guilty, unless you are satisfied of his guilt from the evidence before you beyond a reasonable doubt.[67]

§ 1987. Method of proving character of defendant

The jury are instructed that, while evidence of the general reputation of the defendant in and about the neighborhood in which he lived at or about the time of the commission of the alleged offense is admissible, and is a circumstance to be considered by the jury in connection with all the other facts in the case, the opinion or opinions of individual witnesses as to the character of the defendant are not to be considered for the purpose of proving the existence of or the character of his general reputation, and in this case evidence of the character last mentioned should not be considered by the jury in determining any issue of this case.[68]

[63] State v. Harris, 199 P. 145.

[64] Lufty v. Commonwealth, 100 S. E. 829, 126 Va. 707.

[65] People v. Wells, 71 N. W. 176, 112 Mich. 648.

[66] McVay v. State, 26 So. 947.

[67] State v. Selby, 144 P. 657, 73 Or. 378.

[68] State v. Huber, 148 P. 562, 38 Nev. 253.

§ 1988. Evidence of other offenses

§ 1988(1). Indiana

The court instructs the jury that it is the law of this state that a defendant may never be proved guilty of one offense by proving the commission of other crimes. Evidence has been introduced in this trial as to certain alleged payments which the state claims to have been made by the defendant to B., while said B. was township trustee of ———, and while said defendant had a contract with the said B. for the repair of the heating plants in the High School Building at ———. The court instructs you that the defendant is upon trial on an affidavit charging but one crime, namely, that on or about the ——— day of ———, while having a contract with B., township trustee, to repair certain furnaces in the said High School Building, said defendant paid B. $——— as a percentage, reward, drawback, premium, or profit on said contract. You are to bear in mind, gentlemen of the jury, that this is the sole and only crime with which the defendant is charged in this case, and in arriving at a verdict in this case you are in no wise to determine or consider the guilt or innocence of the defendant with reference to the two other alleged payments that have been offered in evidence in this cause by the state. I further instruct you, gentlemen of the jury, that you are only permitted to consider the evidence with reference to these two transactions in case you first find as a fact beyond every reasonable doubt from the other evidence in the cause that said defendant had a contract with B. as charged, and that while having such contract, on or about the ——— day of ———, he paid B. the $——— as alleged in the affidavit, then and then only are you permitted to consider the testimony with reference to the other two alleged payments, and in the consideration of them you are instructed that the evidence of such payments is to be weighed by you only for the purpose of determining the guilty knowledge, intent, motive, or purpose of said defendant in paying B. the said $———, if you find the same to have been paid as alleged beyond every reasonable doubt.[69]

§ 1988(2). New Mexico

You are instructed that proof of other crimes is not to be taken and considered by you as evidence of the crime charged in the indictment, but proof of similar crimes committed at the same time and committed with the crime charged in the indictment, and so connected therewith that one cannot be shown without showing the other, if you find a crime was committed, is admissible, although it may incidentally prove, or tend to prove, some crime not charged in the indictment; and evidence of similar crimes committed about

[69] Clevenger v. State, 125 N. E. 41, 188 Ind. 592.

the same time is also evidence which is admissible as proof of the intent of the parties charged therewith and of the guilty knowledge of such parties.[70]

§ 1988(3). Oklahoma

You are instructed, gentlemen of the jury, that there has been submitted for your consideration testimony relative to other trades entered into by the defendant in conjunction with others, wherein certain property was alleged to have been obtained by fraud or stealth. This evidence, gentlemen of the jury, is submitted to you for your consideration as the same may or may not tend to aid you in determining whether or not the defendant obtained the property described in the information from the prosecuting witness by fraud or stealth, with the intent to deprive the owner thereof, and for said purpose only.[71]

You are instructed, gentlemen of the jury, if you believe from the evidence in this case beyond a reasonable doubt that the defendant, acting in conjunction with others, by fraud or stealth and with the intent to deprive the owner thereof obtained possession of property of parties other than the prosecuting witness, and that the same constituted a part of a plan of the defendant in obtaining possession of said property, with the intent to deprive the true owner thereof, then you might consider such fact as a circumstance in arriving at the intent of the defendant at the time of obtaining possession of the property for which he is prosecuted, and as to the guilt or innocence of the defendant of the crime charged.[72]

§ 1989. Limiting effect of evidence of other crimes

§ 1989(1). Oregon

The jury are instructed that the state has introduced in evidence in this case the judgment roll in the case of the State against ———, wherein the defendant therein was charged with the crime of assault with a dangerous weapon, and, upon a plea of guilty to simple assault, was adjudged to pay a fine of $———; and the state has also offered the testimony of the clerk of this court to the effect that ———, named in the judgment roll, is the identical and same person as ———, the defendant in this case. I instruct you, gentlemen of the jury, that you can only consider this judgment roll for the purpose of determining the credit to be given to the testimony of the defendant. You cannot consider this record as a circumstance from which you might infer guilt of the defendant in this case, but only as a matter affecting the credibility of

[70] Territory v. Caldwell, 98 P. 167, 14 N. M. 535.

[71] Glaze v. State, 165 P. 211, 13 Okl. Cr. 431.

[72] Glaze v. State, 165 P. 211, 13 Okl. Cr. 431.

——— as a witness in his own behalf in this case upon the witness stand.[73]

§ 1989(2). Texas

The jury are instructed that the evidence brought out on cross-examination of defendant with reference to former charges against defendant can be considered by the jury only as affecting—if you believe the same does affect—her credibility as a witness in the case, and not as showing, nor tending to show, that defendant committed the offense for which she is now on trial.[74]

§ 1990. Instructions to disregard certain evidence—Conduct of bloodhounds

In the opening statement of counsel for the state he was permitted to detail at length the evidence which the state proposed to prove, if the court should hold such evidence admissible, concerning the actions and conduct of a bloodhound upon which the state relied for the conviction of the defendant. The court has held such evidence not to be admissible, and has excluded the same from your consideration. You will therefore wholly disregard the statement of the attorney for the state upon this subject, and determine this case upon the evidence introduced in connection with the presumptions referred to in other instructions. You will not consider as evidence of guilt any testimony as to the conduct of such bloodhound which has incidentally crept into the case in proving other facts.[75]

§ 1991. Sufficiency of evidence in general

§ 1991(1). Alabama

The jury are instructed that, before they should convict the defendant, the hypothesis of his guilt should flow naturally from the facts proven and be consistent with all the facts in the case.[76]

The court charges you, gentlemen of the jury, if the evidence is not so convincing as to lead the minds of the jury to the conclusion that the defendants are guilty, you must find them not guilty.[77]

The jury are instructed that the defendant cannot be convicted, unless the evidence is inconsistent with any reasonable theory of innocence.[78]

The jury are instructed that the state is not required to prove guilt of defendant to a mathematical certainty.[79]

[73] State v. Reyner, 91 P. 301, 50 Or. 224.

[74] Jasper v. State (Cr. App.) 61 S. W. 392.

[75] Ruse v. State, 115 N. E. 778, 186 Ind. 237, L. R. A. 1917E, 726.

[76] Neilson v. State, 40 So. 221, 146 Ala. 683.

[77] Carter v. State, 40 So. 82, 145 Ala. 679.

[78] Sanford v. State, 39 So. 370, 143 Ala. 78.

[79] Hicks v. State, 26 So. 337, 123 Ala. 15.

The jury are instructed that, if the evidence in the case convinces the jury that there is a probability of the innocence of the defendant, then your verdict should be "Not guilty." [80]

§ 1991(2). California

The jury are instructed that you are not bound to decide in conformity with the declarations of any number of witnesses which do not produce conviction in your mind, against a less number, or against a presumption of law or other evidence satisfying your mind; in other words, it is not the greater number of witnesses that should control you where their testimony is not satisfactory to your minds, against a less number whose testimony does satisfy your minds, and produces moral conviction that they are telling the truth. It is upon the quality of the testimony, rather than the quality or the number of witnesses, that you should act, providing it produces in your minds this moral conviction, and satisfies you of its truthfulness.[81]

§ 1991(3). Colorado

You are instructed that, if the prisoner's guilt appears from the evidence, to the exclusion of any reasonable hypothesis upon which his innocence may be maintained, you must find him guilty. If not, he must be acquitted.[82]

§ 1991(4). Georgia

The jury are instructed that the state is not required to demonstrate to a mathematical certainty defendant's guilt, but it does have to show to a moral and reasonable certainty his guilt. If the state has succeeded in doing this, then this presumption in his favor is removed, and it is your duty to convict. If the state has failed to do this, then it is your duty to acquit the defendant.[83]

§ 1991(5). Illinois

The jury are instructed by the court that, if they can reconcile the evidence in this case upon any other reasonable theory or hypothesis than that of this defendant's guilt, it is your duty to do so and acquit the defendant.[84]

§ 1991(6). Indiana

The jury are instructed that, to authorize you to find the defendant guilty as charged in the indictment in this case, the material facts proved must be susceptible of explanation upon no reasonable hypothesis consistent with his innocence.[85]

[80] Bones v. State, 23 So. 138, 117 Ala. 138.

[81] People v. Botkin, 98 P. 861, 9 Cal. App. 244.

[82] May v. People, 6 P. 816, 8 Colo. 210.

[83] Jackson v. State, 45 S. E. 604, 118 Ga. 780.

[84] Larrance v. People, 78 N. E. 50, 222 Ill. 155.

[85] Binns v. State, 66 Ind. 428.

§ 1991(7). Mississippi.

The jury are instructed that, if the evidence in the case leaves it indifferent which of several hypotheses arising and growing out of the evidence in the case is true, or merely establishes some finite probability in favor of the hypothesis of guilt, rather than another, such evidence cannot amount to legal proof of guilt, however great the probability may be.[86]

§ 1991(8). North Carolina

The jury are instructed that, where the act or language of a person may be attributed to two motives, one criminal, the other not, the law will ascribe it to that which is innocent. This is a general rule, and applies in this case, unless the testimony convinces the jury the criminal motive is the true one.[87]

§ 1991(9). West Virginia

The court further instructs the jury that, if any one of the facts necessary to show the guilt of the defendant is consistent with his innocence, then the jury must acquit.[88]

§ 1992. Effect of discrepancies in testimony on immaterial matters

The jury are instructed that, if you should find that there are discrepancies or inconsistencies existing in the testimony of any witness, or between the testimony of any witnesses, or if you should find yourselves disagreeing over various issues, real or apparent, you should then ascertain whether or not such discrepancies or inconsistencies, or such points of difference, affect the main issue in this case. Examine such discrepancies or inconsistencies and such disputed points, look at the same squarely, and ask yourselves these questions: How does the decision of this, or that, or the other discrepancy, or matter in dispute, affect the main issue in this case? Regardless of what may be the truth of such discrepancy or issue, did or did not the defendant accept a bribe from ———? Is such discrepancy or such disputed point material to establish this main and material fact? If they are not material, if the decision of the same is not necessary to enable you to arrive at the truth of this main issue, then such discrepancies or disputed points are immaterial and minor matters, and do not waste further time in discussing or considering them. Spend no time in the discussion of minor matters which, whether true or false, do not affect and are not necessary to enable you to answer the important question: Did defendant accept a bribe from ———?[89]

[86] Petty v. State, 35 So. 213, 83 Miss. 260.

[87] State v. Jackson, 40 S. E. 41, 129 N. C. 558.

[88] State v. Kerns, 34 S. E. 734, 47 W. Va. 266.

[89] State v. Wappenstein, 121 P. 989, 67 Wash. 502. This is proper,

§ 1993. Reasonable doubt

§ 1993(1). United States

The jury are instructed that the defendant in this case is presumed to be innocent until his guilt is established by legal and competent evidence beyond a reasonable doubt, and if you have a reasonable doubt of his guilt you should acquit him. By reasonable doubt you will understand that the court does not mean fanciful conjecture which an imaginative man may conjure up, but the doubt which reasonably flows from the evidence, or the want of evidence, and a doubt for which the sensible man could give a good reason, which reason must be based on the evidence, or the want of evidence, such a doubt as a sensible man would act upon or decline to act upon in his own concerns. If you have such a doubt, the defendant is entitled to the benefit of that doubt and you should acquit him; but if you are satisfied from the evidence that he is shown to have committed the offense with which he is charged, you should find him guilty.[90]

The jury are instructed that in criminal cases guilt must be established beyond a reasonable doubt, and the burden of establishing such guilt rests upon the government. The law does not require of the defendant that he prove himself innocent, but the law requires the government to prove the defendant guilty, in the manner and form as charged in the indictment, beyond a reasonable doubt, and unless they have done so, the jury should acquit. Before a verdict of guilty can be rendered, each member of the jury must be able to say, in answer to his individual conscience, that he has in his mind arrived at a fixed opinion, based upon the law and the evidence of the case, and nothing else, that the defendant is guilty.[91]

The court further charges you that a reasonable doubt is a doubt based on reason, and which is reasonable in view of all the evidence. And if, after an impartial comparison and consideration of all the evidence, or from a want of sufficient evidence on behalf of the government to convince you of the truth of the charge, you can candidly say that you are not satisfied of the defendant's guilt, you have a reasonable doubt; but if, after such impartial comparison and consideration of all the evidence, you can truthfully say that you have an abiding conviction of the defendant's guilt, such as you would be willing to act upon in the more weighty and im-

in connection with other instructions defining the issues and telling the jury that they are the exclusive judges of the credibility of the witnesses.

[90] Sotello v. United States (C. C. A. Tex.) 256 F. 721, 168 C. C. A. 67. Of this instruction the reviewing court says that as a whole it was such that the defendant could not have been prejudiced by it.

[91] Shepard v. United States (C. C. A. Cal.) 236 F. 73, 149 C. C. A. 283.

portant matters relating to your own affairs, you have no reasonable doubt.[92]

The jury are instructed that the burden of proving the guilt of the defendant rests upon the government, and that the proof must satisfy the jury of such guilt beyond any reasonable doubt that may arise upon all the evidence in the case, in order to warrant a conviction.[93]

The jury are instructed that in a case of this kind you cannot find the defendant guilty, unless you are satisfied of his guilt beyond a reasonable doubt. You must remember that in a criminal case the amount of proof that is required on the part of the government is different from the amount of proof that is required of the successful party in a civil suit. In a civil suit the verdict goes in favor of the party who has the preponderance of proof. That means the party who has more proof than the other side. But in a criminal case you start out with the presumption that the man brought to the bar of the court is an innocent man, and the jury sit in their seats, and await the time, if it ever comes, when the government convinces them beyond a reasonable doubt that the man is guilty. Whenever that condition of things is produced in your minds, then it is your bounden duty to find the defendant guilty, regardless of what the consequences may be; and if you are satisfied beyond a reasonable doubt that the defendant is guilty, then you have no right to withhold that verdict simply because of some question of sentiment on your part, or some question of mercy, or some question of prejudice. While I have said to you that you must be convinced beyond a reasonable doubt, do not make the mistake to believe that you must be satisfied beyond all possible doubt, because that is not the law, and it would not be reasonable, either, that you must be satisfied beyond every possible doubt. There is nothing certain except in the domain of mathematics. I do not know what could be proved beyond all possible doubt. All that you are called upon to do is to determine whether or not this defendant has been proved to you to be guilty in such a way that there is no reasonable doubt arising in your minds. Of course, if the doubt arising in your minds is an unreasonable doubt, you should pay no attention to that doubt. But if, as reasonable men, considering a matter of grave importance, you should come to the conclusion that a certain amount of proof establishes that conclusion in such a manner that you have no reasonable doubt about it, then that is the condition of mind in which you must

[92] Shepard v. United States, 236 F. 73, 149 C. C. A. 283.

[93] Cook v. United States (C. C. A. Pa.) 159 Fed. 919, 87 C. C. A. 99, certiorari denied 28 S. Ct. 761, 209 U. S. 551, 52 L. Ed. 922.

be before you find this man guilty; but you are not required to go beyond that and be convinced beyond every possible doubt.[94]

§ 1993(2). Alabama

The court charges the jury that, if after a full consideration of all the evidence the guilt of defendant is not proven to a moral certainty, then the jury must find defendant not guilty.[95]

The court charges the jury that the innocence of defendant is presumed until his guilt is established by the evidence in all the material aspects of the case beyond a reasonable doubt, to a moral certainty, and it may also be said that evidence of guilt must be strong and cogent, and, unless it is so strong and cogent as to show that defendant is guilty to a moral certainty, defendant should be acquitted.[96]

The court charges the jury that the law presumes the defendant to be innocent of the commission of the offense charged in the indictment, and this presumption continues to go in favor of the defendant until the evidence convinces the jury, beyod a reasonable doubt, of his guilt; and you cannot find the defendant guilty of any offense charged in the indictment until the evidence in the case satisfies you, beyond all reasonable doubt, of his guilt; and, so long as you, or any of you, have a reasonable doubt as to the existence of any of the elements necessary to constitute the offense, you should not find the defendant guilty.[97]

The jury are instructed that it is not every doubt that justifies an acquittal, because everything pertaining to human affairs may be subject to some doubt. A doubt must be reasonable, such as grows out of the sufficiency of the evidence to convince the jury to a moral certainty of the defendant's guilt.[98]

The jury are instructed that the state is not required to prove the defendant's guilt to an absolute or mathematical certainty, but only to a moral certainty. If the jury is morally certain of the defendant's guilt, they should find him guilty.[99]

I charge you, gentlemen of the jury, that, if there is one single fact proved to the satisfaction of the jury which is inconsistent with defendant's guilt, this is sufficient to raise a reasonable doubt, and the jury should acquit.[1]

The court charges the jury that in whatever form the question of a reasonable doubt may be couched, and however it may be

[94] Alexis v. United States (C. C. A. La.) 129 F. 60, 63 C. C. A. 502.

[95] Yorty v. State, 65 So. 914, 11 Ala. App. 160.

[96] Davis v. State, 62 So. 1027, 8 Ala. App. 147.

[97] Parker v. State, 59 So. 518, 5 Ala. App. 64.

[98] Simmons v. State, 48 So. 606, 158 Ala. 8.

[99] Simmons v. State, 48 So. 606, 158 Ala. 8.

[1] Simmons v. State, 48 So. 606, 158 Ala. 8.

twisted by words, a reasonable doubt is no more than a reasonable doubt, and that, in considering the case, you are not to go beyond the evidence to hunt up doubt, nor must you entertain such doubts as are merely imaginary or conjectural. A doubt, to justify an acquittal, must be reasonable, and it must arise from a candid and impartial investigation of all the evidence in the case, and if, after considering all the evidence, you can say that you have a fixed conviction of the truth of the charge, you are satisfied beyond a reasonable doubt.[2]

The court charges the jury that a reasonable doubt must be an actual and substantial doubt, not a mere possibility or speculation. It is not a mere possible doubt, because everything relating to human affairs and depending upon moral evidence is open to some possible or imaginary doubt.[3]

The court charges the jury that the expressions that the jury must find the defendant not guilty "unless the evidence against him should be such as to exclude to a moral certainty every hypothesis but that of his guilt of the offense imputed to him," and that "the evidence for the state should be so convincing as to lead the minds of the jury to the conclusion that the accused cannot be guiltless," are but strong expressions of the full measure of proof which the law exacts before it will sanction a conviction of a criminal offense, all of which only means that the jury must be convinced beyond a reasonable doubt.[4]

I charge you, gentlemen of the jury, that the doubt that would justify an acquittal must be actual and substantial, not a mere possible doubt, because everything relating to human affairs and depending on moral testimony is open to some possible or imaginary doubt.[5]

I charge you, gentlemen of the jury, that a reasonable doubt that would justify an acquittal must grow out of the evidence after the consideration of the whole of the evidence in the case.[6]

The jury are instructed that, if the evidence is reasonably consistent with the defendant's innocence, you should promptly acquit him.[7]

The jury are instructed that, if you find from all the evidence in the case that there is a probability of defendant's innocence, you should acquit him.[8]

[2] Bluett v. State, 44 So. 84, 151 Ala. 41.

[3] Bluett v. State, 44 So. 84, 151 Ala. 41; Smith v. State, 40 So. 957, 145 Ala. 17; Jimmerson v. State, 32 So. 141, 133 Ala. 18.

[4] Smith v. State, 40 So. 957, 145 Ala. 17.

[5] Tribble v. State, 40 So. 938, 145 Ala. 23.

[6] Tribble v. State, 40 So. 938, 145 Ala. 23.

[7] Neilson v. State, 40 So. 221, 146 Ala. 683.

[8] Neilson v. State, 40 So. 221, 146 Ala. 683.

The jury are instructed that the burden is on the state to convince you of defendant's guilt to the exclusion of every reasonable doubt, and by evidence that overcomes the presumption of fact, that the law surrounds the defendant with, that he is innocent of crime.[9]

The court charges you, gentlemen of the jury, that if the evidence, or any part thereof, after a consideration of the whole of such evidence, generates a well-founded doubt of defendants' guilt, the jury must find the defendants not guilty.[10]

The court charges you, gentlemen of the jury, that if, upon considering all the evidence, you have a reasonable doubt about the guilt of the defendants, arising out of any part of the evidence, you must find the defendants not guilty.[11]

The court charges the jury that a reasonable doubt of defendant's guilt is not the same as a probability of his innocence. A reasonable doubt of defendant's guilt may exist when the evidence fails to convince the jury that there is a probability of defendant's innocence.[12]

I charge you, gentlemen of the jury, that if, after considering all of the evidence, you have a fixed conviction of the truth of the charge, you are satisfied beyond a reasonable doubt, and it is your duty to convict the defendant.[13]

I charge you, gentlemen of the jury, if you believe from the evidence beyond a reasonable doubt that the defendant is guilty, though you also believe it possible that he is not guilty, you must convict him.[14]

I charge you, gentlemen of the jury, that the doubt must be, that will justify an acquittal, actual and substantial, not a mere possible doubt. Because everything relating to human affairs and depending on moral evidence is open to some possible or imaginary doubt.[15]

The jury are instructed that it is not an imaginary or possible doubt that authorizes an acquittal. The doubt which authorizes an acquittal must be a reasonable doubt.[16]

I charge you, gentlemen of the jury, if you believe the defend-

[9] Neilson v. State, 40 So. 221, 146 Ala. 683.

[10] Carter v. State, 40 So. 82, 145 Ala. 679.

[11] Carter v. State, 40 So. 82, 145 Ala. 679.

[12] Carter v. State, 40 So. 82, 145 Ala. 679; Stewart v. State, 31 So. 944, 133 Ala. 105.

[13] Gregory v. State, 37 So. 259, 140 Ala. 16; Jackson v. State, 34 So. 188, 136 Ala. 22.

[14] Gregory v. State, 37 So. 259, 140 Ala. 16; Jackson v. State, 34 So. 188, 136 Ala. 22.

[15] Jackson v. State, 34 So. 188, 136 Ala. 22.

[16] Hall v. State, 32 So. 750, 134 Ala. 90.

ant is guilty, from the evidence, to a moral certainty, you must convict the defendant.[17]

You are instructed that, if any individual juror is not convinced of defendant's guilt beyond all reasonable doubt and to a moral certainty, the jury cannot convict.[18]

The court charges the jury, if the jury are not satisfied beyond all reasonable doubt, to a moral certainty, and to the exclusion of every other reasonable hypothesis but that of defendant's guilt, they should find him not guilty, and it is not necessary, to raise a reasonable doubt, that the jury should find from all the evidence a probability of defendant's innocence in the testimony, but such a doubt may arise even when there is no probability of his innocence in the testimony; and if the jury have not an abiding conviction to a moral certainty of his guilt, it is the duty of the jury to find the defendant not guilty.[19]

I charge you, gentlemen, that a "moral certainty" means nothing more than a reasonable doubt.[20]

The jury are instructed that a reasonable doubt is simply such a doubt as a reason can be given for. Therefore, before the jury can acquit the defendant on the ground that they have a reasonable doubt of defendant's guilt, they must be able to give a reason for so finding, from the evidence.[21]

The jury are instructed that, before you can convict the defendant, each of you must be satisfied, to a moral certainty, not only that the proof is consistent with the defendant's guilt, but that it is wholly inconsistent with every other rational conclusion; and, unless each of you are so convinced by the evidence of the defendant's guilt that you would each venture to act upon that decision in matters of highest concern and importance to your own interest, then you must find the defendant not guilty.[22]

The jury are instructed that, if you would not be willing to act upon the evidence in this case if it was in relation to matters of the most solemn importance to your own interest, then you must find the defendant not guilty.[23]

The jury are instructed that if the jury are not satisfied beyond all reasonable doubt, to a moral certainty, and to the exclusion of every other reasonable hypothesis but that of the defendant's guilt, they should find him not guilty. And it is not necessary, to raise

[17] Kelly v. State, 32 So. 56, 133 Ala. 195, 91 Am. St. Rep. 25.

[18] Hale v. State, 26 So. 236, 122 Ala. 85.

[19] Rogers v. State, 23 So. 82, 117 Ala. 192.

[20] Pickens v. State, 22 So. 551, 115 Ala. 42.

[21] Pickens v. State, 22 So. 551, 115 Ala. 42.

[22] Pickens v. State, 22 So. 551, 115 Ala. 42.

[23] Pickens v. State, 22 So. 551, 115 Ala. 42.

a reasonable doubt, that the jury should find from all the evidence a probability of the defendant's innocence, but such a doubt may arise even when there is no probability of his innocence in the testimony; and, if the jury have not an abiding conviction to a moral certainty of his guilt, it is the duty of the jury to find the defendant not guilty.[24]

The court charges the jury that, although there may be no probability of the defendant's innocence, yet, if there is in the minds of the jury a reasonable doubt of his guilt, it is the duty of the jury to give him the benefit of such doubt, and acquit him.[25]

§ 1993(3). Arkansas

You are instructed by the court, that in this case the burden of proof rests upon the prosecution to make out and prove to the satisfaction of the jury, beyond a reasonable doubt, every material allegation in the indictment, and unless that has been done you should find the defendant not guilty.[26]

You are instructed that a reasonable doubt is not a mere possible doubt, or imaginary doubt, because everything relating to human affairs and depending upon moral evidence is open to some possible or imaginary doubt; but it is such a doubt as arises from such a candid and impartial consideration of all the evidence in the case as would cause a reasonable and prudent man to pause and hesitate in the graver transactions of life; and a juror is satisfied beyond a reasonable doubt if, from a candid consideration of all the evidence, he has an abiding conviction of the truth of the charge.[27]

You are instructed that the burden is on the state to prove that the defendant is guilty as charged in the indictment, and, if the evidence fails to satisfy your minds beyond a reasonable doubt of the guilt of the defendant, then it is your duty to give him the benefit of such doubt and acquit. If any reasonable view of the evidence is or can be adopted which admits of a reasonable doubt of the guilt of the defendant, then it is your duty to adopt such view and acquit.[28]

§ 1993(4). California

You are instructed that the accused, under our system, is presumed to be innocent until the contrary is proven, and in case of a reasonable doubt where his guilt is satisfactorily shown, defendant is entitled to an acquittal. If you are satisfied beyond all

[24] Bell v. State, 22 So. 526, 115 Ala. 25.

[25] Bell v. State, 22 So. 526, 115 Ala. 25.

[26] Taylor v. State, 169 S. W. 341, 113 Ark. 520.

[27] Dempsey v. State, 102 S. W. 704, 83 Ark. 81.

[28] Tanks v. State, 75 S. W. 851, 71 Ark. 459.

reasonable doubt that the defendant here is guilty of the crime charged against him in the information, that is, ———, you will so declare by your verdict; and, on the other hand, if you are not so satisfied you should return a verdict finding him not guilty.[29]

The jury are instructed that the term "reasonable doubt" as applied to the evidence in criminal cases means an actual and substantial doubt arising from the unsatisfactory nature of the evidence of the case. It does not mean a doubt which may arise from some mere whim or vagary or from any groundless surmise or guess.[30]

You are instructed that a defendant in a criminal case is never required or expected to prove his innocence, but the burden is on the prosecution to prove the defendant guilty of the crime with which he is charged, and to prove every fact essential to constitute that crime, beyond all reasonable doubt and to a moral certainty; and, if the jury cannot say, after a careful consideration of all of the evidence in this case, that the guilt of the defendant has thereby been established beyond all reasonable doubt and to a moral certainty, it is their sworn duty to acquit the defendant.[31]

The court instructs you that under the law no jury should, nor has it the right to, convict the defendant of a crime upon mere suspicion, however strong, nor simply because there may be a preponderance of all of the evidence in the case against him, nor merely because there is or may be strong reason to suspect that he is guilty, but before a jury can lawfully convict they must be convinced of the defendant's guilt beyond all reasonable doubt.[32]

I further instruct you that mere probabilities are not sufficient to warrant a conviction (nor is it sufficient that a greater weight of evidence supports the allegations of the information, if it does), nor is it sufficient upon the doctrine of chances that it is more probable that the defendant is guilty. To warrant a conviction of the defendant he must be proven to be guilty clearly and conclusively beyond all reasonable doubt, so that there is no reasonable theory upon which he can be innocent when all of the case is considered together.[33]

You are instructed that it is not necessary that every fact and circumstance given in evidence should be proven beyond a reasonable doubt, but only that every fact and circumstance necessary to the conclusion of guilt should be so established. It is for

[29] People v. Carnes (App.) 192 P. 1088.

[30] People v. T. Wah Hing (App.) 190 P. 662.

[31] People v. Bickerstaff (App.) 190 P. 656.

[32] People v. Bickerstaff (App.) 190 P. 656.

[33] People v. Bickerstaff (App.) 190 P. 656.

you to decide whether or not any particular fact or circumstance is a necessary link in the chain of evidence; and if you decide that such fact or circumstance is a necessary link, then it must be proved to your satisfaction, beyond a reasonable doubt.[34]

The jury are instructed that all the presumptions of law, independent of evidence, are in favor of innocence, and every person accused of crime is presumed to be innocent until his guilt is established to a moral certainty and beyond all reasonable doubt. This presumption attaches at every stage of the case and to every fact essential to a conviction. By the term "reasonable doubt" is not meant every possible doubt or conjecture that may suggest itself to your minds. A reasonable doubt is not a mere guess or surmise, because everything relating to human affairs and depending on moral evidence is open to some possible or imaginary doubt. As I have said before, such possible doubts or imaginary doubts are not reasonable doubts. A reasonable doubt is that state of the case, which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge.[35]

The jury are instructed that moral certainty only is required, or that degree of proof which produces conviction in an unprejudiced mind.[36]

The jury are instructed that, while the defendant cannot be convicted unless his guilt is established beyond a reasonable doubt, still the law does not require demonstration, that is, such a degree of proof as, excluding possibility of error, produces absolute certainty, because such proof is rarely attainable.[37]

The jury are instructed that by this term "reasonable doubt" is not meant every possible or fanciful doubt or conjecture that may suggest itself or be suggested to your minds. It is not a mere guess or surmise, because everything relating to human affairs and dependent upon moral evidence is open to some fanciful doubt or conjecture. A reasonable doubt is a doubt based upon reason, and growing out of the testimony and evidence in the case. A reasonable doubt is that state of the case, which, after an entire comparison and consideration of all the evidence, leaves your minds in that condition that you cannot say you feel an abiding conviction, to a certainty, that the accused committed the offense.[38]

[34] People v. Wilt, 160 P. 561, 173 Cal. 477.

[35] People v. Ah Lee, 128 P. 1035, 164 Cal. 350.

[36] People v. Chutuk, 124 P. 566, 18 Cal. App. 768.

[37] People v. Chutuk, 124 P. 566, 18 Cal. App. 768.

[38] People v. Yun Kee, 96 P. 95, 8 Cal. App. 82.

§ 1993(5). Colorado

You are further instructed that while you are not to find the defendant guilty if you entertain a reasonable doubt of his guilt, you are not to search for a doubt. The doubt referred to must be such a doubt as would naturally arise in the mind of a reasonable man upon review of all the evidence in the case. It means a serious, substantial, and well-founded doubt, and not a mere possibility of a doubt. It is such a doubt as in the important transactions of life would cause a reasonable and prudent man to hesitate and pause, and when you can say, after considering all the evidence in the case, that you have an abiding conviction of the truth of the charge, then you are the more satisfied beyond a reasonable doubt.[39]

You are instructed that the burden of proof is upon the people to establish every material fact necessary to constitute the prisoner's guilt. A mere preponderance is not sufficient to produce a conviction in a criminal case, and every one is presumed to be innocent until his guilt is made to appear. And the evidence must be of such character and weight as to produce in your minds a conviction of guilt beyond a reasonable doubt. A reasonable doubt must be an honest and conscientious difficulty in believing. It is not merely a possible doubt, but a doubt that arises out of the evidence; not a fanciful doubt, nor one conjured up to escape consequences. It must be such a doubt as shakes the mind with such force as to compel it to pause in yielding belief.[40]

§ 1993(6). Connecticut

The jury are instructed that a doubt which entitles the accused to an acquittal must be a real, substantial doubt, not a mere possible or imaginary one. The proof is sufficient if it establishes guilt to a moral certainty, such a certainty as firmly and fully convinces the understanding of prudent men.[41]

§ 1993(7). Florida

As jurors charged with the solemn duty in hand, you must carefully, impartially, and conscientiously consider, compare, and weigh all the testimony; and if, after doing this, you find that your understanding, judgment, and reason are satisfied and convinced by it to the extent of having a full, firm, and abiding conviction to a moral certainty that the charge is true, then you should find the defendants guilty. If, however, after carefully considering, comparing, and weighing all the testimony, both for the state and the defense, there is not an abiding conviction to a reasonable and

[39] Minich v. People, 9 P. 4, 8 Colo. 440.

[40] May v. People, 6 P. 816, 8 Colo. 210.

[41] State v. Long, 48 A. 493, 72 Conn. 39.

moral certainty as to the truth of the charge, or if, after having a conviction, it is yet one which is not abiding or stable, but wavers and vacillates, or is one of which there is not a moral certainty, then the truth of the charge is not made out beyond a reasonable doubt, and you should find a verdict of not guilty.[42]

The court instructs the jury that defendant is presumed by the law to be innocent; that the burden is upon the state to establish his guilt beyond a reasonable doubt; that a "reasonable doubt" is a doubt for which you can give a reason; in other words, if the evidence of defendant's guilt satisfies you to such an extent as to leave you without a doubt that he may be innocent, for which you can give an intelligent reason, then it would be your duty to convict. Such a doubt may arise either from affirmative evidence tending to show the defendant's innocence, or from the lack of evidence sufficient to establish his guilt.[43]

You are instructed that the accused is always presumed to be innocent of the offense charged until he is proved guilty; and to overcome this presumption, and establish his guilt, it is not sufficient to furnish a mere preponderance of evidence tending to prove his guilt, nor to prove a mere probability of his guilt, but proof of his guilt to the exclusion of or beyond a reasonable doubt is indispensable. The burden of such proof is upon the state; and it is to the evidence introduced upon the trial, and to it alone, that the jury are to look for such proof. Keeping this in mind, as jurors charged with the solemn duty in hand, they must carefully, impartially, and conscientiously consider, compare, and weigh all the testimony, and if, after doing this, they find that their understanding, judgment, and reason are satisfied and convinced by it to the extent of having a full, firm, and abiding conviction to a moral certainty that the charge is true, then the charge has been proved, to the exclusion of any reasonable doubt, and it is their duty to convict. A doubt which is a mere possible doubt, or a speculative, imaginary, or forced doubt, is not a reasonable, but an unreasonable, doubt; and for the reason that everything relating to human affairs is open to doubt of this character, and such a doubt ought not to control or influence the jury to render a verdict of acquittal where they have an abiding conviction of the truth of the charge as indicated above. On the other hand, if, after carefully considering, comparing, and weighing all the testimony, there is not an abiding conviction to a reasonable and moral certainty of the truth of the charge, or if, having a conviction, it is yet one which is not abiding or stable, but wavers or vacillates, or is one of which there is not a moral certainty, then

[42] Bassett v. State, 33 So. 262, 44 Fla. 2.

[43] Wallace v. State, 26 So. 713, 41 Fla. 547.

the truth of the charge is not made out beyond a reasonable doubt, and there must be an acquittal, because the doubt is reasonable.[44]

You are instructed that a doubt which is not suggested by or does not arise from the testimony is not a reasonable doubt, and should never be considered; or, in other words, if the testimony produces a conviction of the character indicated above as being sufficient to prove the charge to the exclusion of a reasonable doubt, the jury have no right to go outside of the testimony for doubts of any kind.[45]

§ 1993(8). Georgia

The jury are instructed that the defendant comes before you with the presumption of innocence in his favor; that presumption should remain with him until it is removed by proof—by proof sufficient to satisfy you beyond a reasonable doubt. A reasonable doubt is a doubt that grows out of the evidence, either the want of sufficient evidence to satisfy, or the conflicts in the evidence. It is a doubt that leaves the mind of the jury, seeking the truth, wavering and unsettled, not satisfied from the evidence, unable to come to a conclusion as to what the truth is, and when you have such a doubt as that, you should give it to the defendant and acquit him.[46]

The jury are instructed that a reasonable doubt is not any doubt which may visit the mind of a juror during the investigation of a case, and in making up his verdict. A mere passing hesitation of the mind, if it is not of such gravity [as] to amount to a reasonable doubt, will not justify a juror in finding the defendant not guilty. If the testimony satisfies him of the guilt of the defendant beyond a reasonable doubt, he should [find] the defendant guilty. A reasonable doubt is one that is based upon some ground in the testimony or the want of testimony in the case. When a juror has that sort of a doubt, he ought to acquit. But if he has not a doubt of that gravity, he ought to convict, if the testimony satisfies him of his guilt beyond a reasonable doubt.[47]

The jury are instructed that by a reasonable doubt is not meant some vague or fanciful doubt, but such a doubt as arises from the testimony in the mind of a reasonable man, and leaves it hesitating, unsettled, and undecided.[48]

The jury are instructed that the doubt must be a reasonable doubt, not a conjured-up doubt, such a doubt as you might conjure up to acquit a friend, but one that you could give a reason for.[49]

[44] Lovett v. State, 11 So. 550, 30 Fla. 142, 17 L. R. A. 705.

[45] Lovett v. State, 11 So. 550, 30 Fla. 142, 17 L. R. A. 705.

[46] Mapp v. State, 106 S. E. 801.

[47] O'Dell v. State, 47 S. E. 577, 120 Ga. 152.

[48] Barnard v. State, 46 S. E. 644, 119 Ga. 436.

[49] Vann v. State, 9 S. E. 945, 83 Ga. 44.

§ 1993(9). Illinois

You are instructed that it is not necessary that the jury should believe that every incriminating fact or circumstance in evidence before them has been proven beyond a reasonable doubt, but that it is sufficient if the jury believe from the evidence in the case that every material allegation in the indictment, in manner and form as therein charged, has been proven beyond a reasonable doubt.[50]

The jury are instructed that the rule requiring the jury to be satisfied of the guilt of the defendant from the evidence, beyond a reasonable doubt, in order to warrant a conviction, is complied with, if taking the testimony altogether, the jury are satisfied, beyond a reasonable doubt, that the defendant is guilty. The reasonable doubt that the jury is permitted to entertain must be as to the guilt of the accused on the whole evidence, and not as to any particular fact in the case not material to the issue in the case.[51]

The jury are instructed that the indictment in this cause is no evidence of guilt, but every material allegation alleged therein—and I mean by that every allegation necessary to constitute the crime charged—must be proved beyond a reasonable doubt and to a moral certainty. The defendant is presumed to be innocent, and this presumption of innocence continues until, taking the evidence all together, there remains no reasonable doubt as to his guilt. Nor will mere probabilities or a mere preponderance of evidence against him satisfy the requirements of the law. Before you can find him guilty you must establish his guilt, as I have said, beyond a reasonable doubt; and this presumption of the law is not an idle form to be disregarded at pleasure, but is a substantial right of the defendant, and such doubt may arise from the evidence actually offered or from a lack of evidence. The doubt, however, must be real—not chimerical or fanciful, not a doubt which is sought for, but one which arises naturally from the case and which is not a doubt produced by undue sensibilities on the part of the jurors as to the consequence of their verdict. Taking the case altogether, if there remains any reasonable hypothesis consistent with the innocence of the defendant, you must acquit him.[52]

The jury are instructed that the meanings of the phrases "reasonable doubt" and "moral certainty" are difficult to put in words. It will be observed that in order to sustain a conviction it is not necessary to establish the guilt of a defendant to an absolute certainty, but only to a moral certainty. Absolute certainty is seldom

[50] People v. Steinkraus, 126 N. E. 202, 291 Ill. 283.

[51] People v. Scarbak, 92 N. E. 286, 245 Ill. 435.

[52] People v. Buettner, 84 N. E. 218, 233 Ill. 272, 13 Ann. Cas. 235.

obtainable in any case where there is a conflict of proof. Nor is it necessary that the guilt of the defendant be established beyond all doubt, but only beyond all reasonable doubt, for it is seldom, in matters of serious controversy, that a question can be decided beyond every kind of doubt. Nor will the fact itself, if such be the fact, that the question of guilt or innocence submitted to you is difficult of solution, constitute a reasonable doubt, if by a careful consideration and deliberation that solution may, in fact, be established according to law. But if, after a careful scrutiny of the whole case, including a careful weighing of the testimony of the witnesses according to the rules given you in these instructions and a conscientious consideration of the law there arises in your mind, spontaneously and naturally, without being sought after, an uncertainty concerning the guilt or innocence of the defendant, which uncertainty is of the weight and quality that if interposed in any of the graver transactions of life it would check your final judgment, causing you to pause and hesitate, then such uncertainty amounts to a reasonable doubt. In other words, unless you have an abiding conviction of the guilt of the defendant, you must acquit him. But, on the other hand, if you believe the defendant has been proven guilty under the law and the evidence, beyond a reasonable doubt, you must convict him, even though doubts remain in your minds which do not amount to reasonable doubts. So, also, you must convict him if his guilt be established to a moral certainty, though it be not established to an absolute certainty.[53]

The court instructs the jury, as law, that, if you have a reasonable doubt of the guilt of the defendant of the offense charged against him, you should find him not guilty.[54]

The court instructs the jury that the law does not require that the jury shall believe that every fact in a criminal case has been proved beyond a reasonable doubt before they can find accused guilty. The reasonable doubt the jury is permitted to entertain must be as to the guilt of the accused on the whole of the evidence and not as to any particular fact in the case.[55]

§ 1993(10). Indiana

You are instructed that it is not every doubt that is a reasonable one. You are not warranted in considering as reasonable those doubts that may be merely speculative or products of the imagination. A reasonable doubt arises, or exists in the mind, naturally, as a result of the evidence or lack of evidence.[56]

You are instructed that the rule of law touching reasonable doubt

[53] People v. Buettner, 84 N. E. 218, 233 Ill. 272, 13 Ann. Cas. 235.

[54] Trask v. People, 38 N. E. 248, 151 Ill. 523.

[55] Weaver v. People, 24 N. E. 571, 132 Ill. 536.

[56] Hinshaw v. State, 124 N. E. 458, 188 Ind. 447.

is a practical rule, intended to guide practical jurors when engaged in the serious and important duty of administering justice. There is nothing in it that is mysterious or fanciful. It does not furnish a shield for those actually guilty whereby to escape merited punishment. It does not contemplate absolute or mathematical certainty. Despite every precaution that may be taken to prevent it, there may be, in all matters depending on human testimony for proof, a mere possibility of error. But in this case, if you are so convinced by the evidence, of whatever class it may be, and considering all the facts and circumstances in evidence as a whole, of the guilt of this defendant as charged, that as prudent men you would feel safe to act upon such conviction in matters of the highest concern and importance to your own dearest and most important interest, under circumstances where there was no compulsion or coercion upon you to act at all, then you will have attained such a degree of certainty as excludes reasonable doubt and authorizes conviction.[57]

The jury are instructed that the doctrine of reasonable doubt, as a rule, has no proper application to mere matters of subsidiary evidence, taken item by item, but is applicable always to the constituent elements of the crime charged, and to any fact or group of facts which may constitute the entire proof concerning any of the constituent or elementary facts necessary to constitute guilt. If from the whole evidence, or the want of evidence, any material fact essential to a conviction has not been established to your satisfaction, beyond a reasonable doubt, as explained in these instructions, the defendant should be acquitted.[58]

The jury are instructed that the law presumes the defendant to be innocent of the commission of any crime, and this presumption continues in his favor throughout the trial of the cause, step by step; and you cannot find the accused guilty of any of the crimes covered by the indictment until the evidence in the cause satisfies you beyond a reasonable doubt of his guilt. And so long as you, or any one of you, have a reasonable doubt as to the existence of any of the several elements necessary to constitute the several crimes above defined, the accused cannot be convicted of such crime.[59]

§ 1993(11). Iowa

The jury are instructed that, if there is a reasonable doubt of the defendant being proved guilty, he must be acquitted. In criminal cases, full and satisfactory proof of guilt is required. No

[57] Hinshaw v. State, 124 N. E. 458, 188 Ind. 447.

[58] Hauk v. State, 46 N. E. 127, 148 Ind. 238.

[59] Aszman v. State, 24 N. E. 123, 123 Ind. 347, 8 L. R. A. 33.

mere weight of evidence will warrant a conviction, unless it be so strong and satisfactory as to remove from your minds all reasonable doubt of the guilt of the accused. In considering this case, you are not to go beyond the evidence to hunt for doubts. Nor should you entertain such doubts as are merely chimerical, or are based upon groundless conjecture. A doubt, to justify an acquittal, must be reasonable, and arise from a candid and impartial consideration of all the evidence in the case, and then it must be such a doubt as would cause a reasonable, prudent, and considerate man to hesitate and pause before acting in the grave and more important affairs of life. If, after a careful and impartial consideration of all of the evidence in the case, you can say and feel that you have a firm and abiding conviction of the guilt of the defendant, and are fully satisfied of the truth of the charge to a moral certainty, then you are satisfied beyond a reasonable doubt.[60]

§ 1993(12). Kansas

I further instruct you that you cannot convict the defendant of any crime, unless his guilt is proven to your satisfaction beyond a reasonable doubt. In the use of the term "reasonable doubt" I do not mean any possible doubt—a mere speculation or captious quibble suggested for the purpose of evading the performance of an honest duty—but I mean such a fair and reasonable uncertainty concerning the falsity or truth of any matter or thing as would naturally and honestly be suggested to the mind of any candid and conscientious man after a careful and impartial consideration of such matter if submitted to him for examination and determination; and, so long as there is such a reasonable doubt of guilt being satisfactorily proved by the evidence, the defendant must be acquitted.[61]

The jury are instructed that a reasonable doubt means a doubt which has some good reason for it arising out of the evidence or lack of evidence in the case. Such a doubt as you are able to find in the evidence or lack of evidence a reason for.[62]

§ 1993(13). Kentucky

The jury are instructed that, if you entertain a reasonable doubt, from the evidence, of the guilt of the accused, he is entitled to an acquittal.[63]

You are instructed that the law presumes the defendant to be innocent until proven guilty beyond a reasonable doubt, and if, up-

[60] State v. Elsham, 31 N. W. 66, 70 Iowa, 531.

[61] State v. Roberts, 147 P. 828, 95 Kan. 280.

[62] State v. Wolfley, 89 P. 1046, 75 Kan. 406, 11 L. R. A. (N. S.) 87, 12 Ann. Cas. 412.

[63] Commonwealth v. Stites, 227 S. W. 574, 190 Ky. 402.

on the entire case, the jury have a reasonable doubt of defendant's having been proven guilty, or a reasonable doubt as to any fact necessary to establish his guilt, then you will find the defendant not guilty.*

The jury are instructed that the law presumes the innocence of the defendant until his guilt has been proved beyond a reasonable doubt, and if, upon the whole case, the jury should have a reasonable doubt from all the evidence as to whether or not the defendant has been proved guilty, they will find him not guilty.[64]

§ 1993(14). Louisiana

The jury are instructed that the state must prove every ingredient of guilt beyond a reasonable doubt. This doubt must be a reasonable one; that is, one founded upon a real, tangible, substantial basis, and not upon a mere caprice, fancy, or conjecture. It must be such a doubt as would induce action without hesitation in an important matter by reasonable men in the exercise of an ordinary, yet prudent, judgment. It must be such a doubt as would make you feel you had not an abiding conviction as to the prisoner's guilt. If, after giving a fair and impartial consideration to all the facts in the case, you find the evidence unsatisfactory upon any point indispensably necessary to constitute the prisoner's guilt, this would give rise to such a reasonable doubt as would justify you in rendering a verdict of not guilty. You are not permitted to go beyond the evidence to seek for doubts, but must confine yourselves strictly to a dispassionate and impartial consideration of the testimony given upon the trial. You should not resort to extraneous facts or circumstances in reaching your verdict.[65]

§ 1993(15). Massachusetts

The jury are instructed that the term "reasonable doubt" is one often used, probably pretty well understood, but not easily defined. It is not mere possible doubt; because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge. The burden of proof is upon the prosecutor. All the presumptions of law independent of evidence are in favor of innocence, and every person is presumed to be innocent until he is proved guilty. If, upon such proof, there is reasonable doubt re-

* Harris v. Commonwealth, 174 S. W. 476, 163 Ky. 781.

[64] Minniard v. Commonwealth, 164 S. W. 804, 158 Ky. 210.

[65] State v. Nicholls, 23 So. 980, 50 La. Ann. 699.

maining, the accused is entitled to the benefit of it by an acquittal; for it is not sufficient to establish a probability, though a strong one arising from the doctrine of chances, that the fact charged is more likely to be true than the contrary, but the evidence must establish the truth of the fact to a reasonable and moral certainty, a certainty that convinces and directs the understanding, and satisfies the reason and judgment, of those who are bound to act conscientiously upon it. This we take to be proof beyond reasonable doubt, because, if the law, which mostly depends upon considerations of a moral nature, should go further than this, and require absolute certainty, it would exclude circumstantial evidence altogether.[66]

§ 1993(16). Michigan

You are instructed that the defendant is presumed to be innocent until proved guilty beyond a reasonable doubt, and a reasonable doubt is not a vain, possible, imaginary, or captious doubt, but a fair doubt founded on reason and common sense, growing out of the evidence or lack of evidence in the case. It is such a doubt that, after a careful review of all the testimony, you cannot say you have an abiding conviction to a moral certainty of the defendant's guilt. If you have, give him the benefit of it and acquit him. If not, you may convict him of the charge in the information.[67]

It has been said that a juror is satisfied beyond a reasonable doubt as to a matter in controversy when after a full and fair consideration of all the testimony given in a case he can say that he has an abiding conviction to a moral certainty that the charge made has been established as having been committed by the accused. And in that connection you should bear in mind that it is essential that each element of the offense charged must be proved by that measure of proof beyond a reasonable doubt.[68]

You are instructed that a reasonable doubt, gentlemen, is a fair doubt, growing out of the testimony of the case. It is not a mere imaginary, captious, or possible doubt. There are very few things in this world outside of mathematics, gentlemen, that are capable of demonstration. But it is a fair doubt, based upon reason and common sense. It is such a doubt as may leave your minds, after a careful examination of all the evidence in the case, in that condition that you cannot say that you have an abiding conviction to a moral certainty, from the evidence in the case, of the truth of the charge here made against the respondent. Now, apply this rule to

[66] Commonwealth v. Webster, 5 Cush. 295. 52 Am. Dec. 711.

[67] People v. Williams, 175 N. W. 187, 208 Mich. 586.

[68] People v. Kenyon, 167 N. W. 997, 201 Mich. 647.

this case and to this respondent. If you should become satisfied from the evidence that he is guilty of murder, so that you can say: "There may be a possible doubt, but there is no reasonable doubt; I am morally satisfied and certain from the evidence in the case that the respondent is guilty"—then you should say so by your verdict.[69]

The jury are instructed that, to justify your conviction of the accused of any offense within the charge made in the information, it is the duty of the people, and on them rests the burden thereof, to satisfy you by competent evidence that the respondent is guilty beyond a reasonable doubt.[70]

The jury are instructed that a reasonable doubt is such a doubt arising out of the evidence that you cannot say, to a moral certainty, that the defendant is guilty; and, if there is any other reasonable explanation of the death of the stranger than the guilt of the defendant, you are bound to acquit.[71]

§ 1993(17). Missouri

You are instructed that if, upon the whole case the jury entertain a reasonable doubt of defendant's guilt, you will acquit the defendant, but to justify an acquittal upon the ground of doubt alone it must be a substantial doubt of defendant's guilt, based upon and arising out of all the facts and circumstances given in evidence, and not a mere possibility of his innocence.[72]

The court instructs the jury that if, upon consideration of all the evidence, you have a reasonable doubt of the defendants' guilt, you should acquit; but a doubt, to authorize an acquittal on that ground, ought to be a substantial doubt touching the defendants' guilt, and not a mere possibility of their innocence.[73]

You are instructed that the law presumes the innocence, and not the guilt, of the defendants; and this presumption attends them throughout the trial, and at the end entitles them to an acquittal unless the evidence in the case when taken as a whole satisfies you of their guilt beyond a reasonable doubt. You are, however, instructed that a reasonable doubt of the guilt of the defendants which would warrant you in acquitting them on the ground of your having such reasonable doubt of their guilt should be a substantial doubt of their guilt upon a full and fair consideration by you of all the evidence, facts, and circumstances in the case, and not a mere possibility that they may be innocent.[74]

The jury are instructed that the law presumes the defendant to

[69] People v. Swartz, 76 N. W. 491, 118 Mich. 292.

[70] People v. Willett, 62 N. W. 1115, 105 Mich. 110.

[71] People v. Stewart, 42 N. W. 662, 75 Mich. 21.

[72] State v. Arnett, 210 S. W. 82.

[73] State v. Lewis, 201 S. W. 80, 273 Mo. 518.

[74] State v. Spaugh, 98 S. W. 55, 200 Mo. 571.

be innocent of the offense charged. It devolves upon the state to prove him guilty beyond a reasonable doubt. If you have a reasonable doubt of his guilt, you should acquit him; but a doubt, to authorize an acquittal on that ground, should be a substantial doubt founded upon the evidence, and not a mere possibility of "innocence." [75]

The jury are instructed that to authorize an acquittal on the ground of reasonable doubt alone such doubt should be a substantial doubt arising out of the evidence, and not a mere possibility that the defendant is innocent.[76]

The court instructs the jury that the indictment preferred against the defendant in this case is a mere formal accusation, and is of itself no evidence whatever of his guilt. Before the jury can find the defendant guilty they must believe and find from the evidence before them, and that beyond all reasonable doubt, that he, the said defendant, and in the manner and by some of the means mentioned in the said indictment, willfully, intentionally, deliberately, and premeditatedly, on purpose, and with malice aforethought, did kill the said ———. And the court further instructs the jury that by the term "reasonable doubt" is meant that state of the case which, after the entire comparison and consideration of the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction to a moral certainty that the charge is true.[77]

The court instructs the jury that if the whole evidence in this case leaves their minds in such condition that they are neither morally certain of the defendant's innocence nor morally certain of his guilt, then a reasonable doubt exists, and the jury must give the defendant the benefit of such doubt, and acquit him.[78]

The jury are instructed that, if you have a reasonable doubt of the guilt of defendant, you should acquit him; but a doubt, to authorize an acquittal on that ground, ought to be a substantial doubt touching defendant's guilt, and not a mere belief in the possibility of his innocence.[79]

§ 1993(18). Montana

The jury are instructed that a reasonable doubt, within the meaning of the law, is not a mere imaginary or possible doubt, but a substantial doubt based upon reason and common sense, and induced

[75] State v. Fisher, 62 S. W. 690, 162 Mo. 169. This is substantially the instruction given in State v. Nueslein, 25 Mo. 111, which has frequently received the approval of the Missouri courts.

[76] State v. Howell, 23 S. W. 263, 117 Mo. 307.

[77] State v. Howell, 23 S. W. 263, 117 Mo. 307.

[78] State v. Howell, 23 S. W. 263, 117 Mo. 307.

[79] State v. Nueslein, 25 Mo. 111.

by the facts and circumstances attending the particular case and growing out of the evidence. It is such a doubt as leaves one's mind, after a careful examination of all the evidence, in such a condition that he cannot say that he has an abiding conviction to a moral certainty of the defendant's guilt as charged.[80]

§ 1993(19). Nebraska

The jury are instructed that a reasonable doubt, within the meaning of the law, is such a doubt as, if the same were interposed in the ordinary concerns and affairs of life, would cause an ordinarily prudent man to pause and hesitate before acting on the truth of the matter charged. A doubt, to justify an acquittal, must be reasonable, and it must arise from a candid and impartial investigation of all the evidence in the case, and unless it is such that, were the same kind of doubt interposed in the graver transactions of life, it would cause a reasonable and prudent man to hesitate and pause, it is not sufficient to authorize a verdict of not guilty. It must be a doubt which arises from the evidence or want of evidence in the case, and if it does not so arise it is not a reasonable doubt within the meaning of the law. If, upon consideration of all the evidence, you can say you have an abiding conviction of the truth of the charge against defendant, amounting to a moral certainty, then you are satisfied beyond a reasonable doubt.[81]

You are instructed that by the words "reasonable doubt" used in this charge is meant an actual, substantial doubt of guilt arising in your minds from the evidence or want of evidence in the case. If, after a careful and impartial consideration of all the evidence, the jury have an abiding conviction of the guilt of the defendant and are fully satisfied to a moral certainty of the truth of the charge made against him, then you are satisfied beyond a reasonable doubt.[82]

You are instructed that the law requires, before you can find the defendant guilty, the evidence must have established his guilt beyond a reasonable doubt. Mere suspicion of guilt, however strong, or a preponderance of all the evidence in the case against the defendant, will not do upon which to base a verdict of guilty. The doubt which the juror is allowed to retain in his own mind, and under which he should render his verdict of not guilty, must always be a reasonable one. A doubt produced by undue sensibility in the mind of any juror in view of the consequences of his verdict is not a reasonable doubt, and a juror is not allowed to create sources or material of doubt by resorting to trivial or fanciful suppositions, and re-

[80] State v. Harrison, 57 P. 647, 23 Mont. 79.

[81] McIntosh v. State, 180 N. W. 573. 12 A. L. R. 798.

[82] Johnson v. State, 130 N. W. 282, 88 Neb. 565, Ann. Cas. 1912B, 965.

mote conjectures as to possible states of fact different from that established by the evidence. You are not at liberty to disbelieve as jurors if from the evidence you believe as men. Your oath as jurors imposes on you no obligation to doubt where no doubt would exist if no oath had been administered. Hence, if, after a careful and impartial consideration of all the evidence, you can say that you feel an abiding conviction of the guilt of the defendant, and are satisfied to a moral certainty—a certainty that convinces and directs the understanding and satisfies the reason and judgment of those who are bound to act conscientiously on the truth of the charges made against the defendant—then and in that event you are, as jurors, satisfied beyond a reasonable doubt. A reasonable doubt does not consist of possible or conjectural doubt, but a doubt that would justify an acquittal must be reasonable, and it must arise from a candid and impartial investigation of all the evidence in the case; and unless it is such that, were the same kind of doubt interposed in the graver transactions of life, it would cause a reasonable and prudent man to hesitate and pause, it is insufficient to authorize a verdict of not guilty.[83]

You are instructed that the evidence, to justify a conviction, must be beyond all reasonable doubt, consistent with the hypothesis of guilt, and inconsistent with any hypothesis of innocence that can reasonably be drawn from the evidence.[84]

You are instructed that, in order to convict, the state must prove every essential ingredient of the crime charged, and every material allegation of the indictment, beyond a reasonable doubt. If this has been done, you should convict; but if it has not been done, you should acquit.[85]

You are instructed that a reasonable doubt, within the meaning of the law, is such a doubt as would cause a prudent and considerate man, in the graver and more important affairs of life, to pause and hesitate before acting upon the truth of the matters charged. It does not mean the possibility that the accused may be innocent, nor does it mean a chimerical doubt, or one based upon groundless conjecture; but it does mean actual, substantial doubt; and if, upon full consideration of all the evidence for the state, and for the defendant, your minds are in that condition that you cannot say that you feel a confidence, amounting to a moral certainty, from all the evidence in the case, that the defendant is guilty, then you have a reasonable doubt.[86]

[83] Davis v. State, 70 N. W. 984, 51 Neb. 301.

[84] Owens v. State, 49 N. W. 226, 32 Neb. 167.

[85] Owens v. State, 49 N. W. 226, 32 Neb. 167.

[86] Owens v. State, 49 N. W. 226, 32 Neb. 167.

§ 1993(20). New Jersey

The jury are instructed that, in order to warrant a conviction for any crime under this indictment, the state must prove the facts sufficient for that purpose by evidence beyond a reasonable doubt. A reasonable doubt would exist when the judgment of the jury, after a careful review of all the evidence, finds itself unconvinced of the guilt of the prisoner. If such a doubt exists you are bound to give the benefit of it to the prisoner, but you are not bound to give him the benefit of anything but such a reasonable doubt.[87]

§ 1993(21). New Mexico

The jury are instructed that a reasonable doubt is such a doubt as would cause a reasonable and prudent man to pause and hesitate to act in the graver and more important affairs of life; but a reasonable doubt is not merely a possibility of innocence, nor a speculation as to the innocence, of defendant, not arising out of the evidence in the case, or the want of it.[88]

§ 1993(22). New York

The jury are instructed that the defendant is entitled, as are all defendants in criminal cases, to have his guilt established to the satisfaction of a jury by competent evidence, and beyond a reasonable doubt. A reasonable doubt is such a doubt as a man of reasonable intelligence can give some good reason for entertaining if he is called upon to do so.[89]

§ 1993(23). North Carolina

The jury are instructed that a reasonable doubt in the jury box is exactly the same kind of reasonable doubt that an honest man meets up with in human life.[90]

§ 1993(24). Oklahoma

The court instructs the jury that by the term "reasonable doubt" is not meant a mere misgiving of the imagination, a fanciful conjecture, or a suggestion of sympathy for the defendant; but a reasonable doubt is an actual doubt, arising from the evidence or want of evidence in the case. The state is not required to prove the defendant's guilt to an absolute or mathematical certainty or beyond any possible or imaginary doubt. If, however, after considering, comparing, and weighing all the evidence in this case, your minds are left in that condition that you cannot say that you feel an abiding conviction to a moral certainty of the defendant's guilt, then you would have a reasonable doubt and it would be your duty to acquit the defendant. On the other hand, if the evidence in the

[87] State v. Leo, 77 A. 523, 80 N. J. Law, 21.

[88] State v. Ellison, 144 P. 10, 19 N. M. 428.

[89] People v. Lagroppo, 86 N. Y. S. 116, 90 App. Div. 219.

[90] State v. Pitt, 80 S. E. 1060, 166 N. C. 268, Ann. Cas. 1916C, 422.

case establishes in your minds the guilt of the defendant to a reasonable and moral certainty, such a certainty as convinces and directs the understanding and satisfies the reason and judgment of you, who are bound to act conscientiously upon it, then you would have no reasonable doubt, and it would be your duty to convict the defendant.[91]

You are instructed that by a reasonable doubt is meant a real, substantial, doubt of the guilt of the defendants existing or arising in your minds after a fair consideration of all the evidence in this case. It is more than a mere surmise, conjecture, or fanciful doubt. It is such a doubt as would cause a reasonable or prudent man to pause or hesitate before acting on matters of grave importance to himself. If, after considering all the evidence, your judgments or understandings are convinced and satisfied of the guilt of the defendants, if you have a fixed abiding conviction, amounting to a moral certainty, that they are guilty, then you have no reasonable doubt and must convict, and, unless your minds are in this condition, you will acquit.[92]

The jury are instructed that by reasonable doubt is meant an actual, substantial doubt, arising out of a fair, impartial, and deliberate consideration of all the evidence in the case. It does not mean a doubt based upon idle conjecture, mere supposition, or unwarranted speculation. Evidence is deemed sufficient to exclude all reasonable doubt when it is of such a satisfying character as to convince the minds of ordinarily prudent and cautious persons with such degree of certainty that they would feel free to act upon the same without hesitation in their own most important personal affairs. If after a full, fair, and impartial consideration of all the evidence in the cause, you can say and feel that you are satisfied to a moral certainty of the truth of the charge, and have an abiding conviction of the guilt of the accused, you are then in that state of mind which the law recognizes as convinced beyond a reasonable doubt, and should not hesitate to return a verdict of guilty.[93]

§ 1993(25). Oregon

The jury are instructed that a reasonable doubt is such a doubt as exists in the mind of a reasonable man after a full, free, and careful examination and comparison of all the evidence. It must be such a doubt as would cause a careful, considerate, and prudent man to pause and consider before acting in the grave and most important affairs of life.[94]

The jury are instructed that a reasonable doubt is that state of

[91] Brantley v. State, 175 P. 51, 15 Okl. Cr. 6.

[92] McDaniel v. State, 127 P. 358, 8 Okl. Cr. 209.

[93] Vance v. Territory, 105 P. 307, 3 Okl. Cr. 208.

[94] State v. Crockett, 65 P. 447, 39 Or. 76.

the case which, after an entire comparison and consideration of all the evidence, leaves the mind of the jury in that condition that they cannot say that they feel an abiding conviction, to a moral certainty, of the truth of the charge. A reasonable doubt is not every doubt. It is not a captious doubt. It is such a condition of mind, resulting from the consideration of the evidence before you, as makes it impossible for you, as a reasonable man, to arrive at a satisfactory conclusion. It is not a consciousness that the conclusion arrived at may possibly be erroneous, but it is such a state of mind as deprives you of the ability to reach a satisfactory conclusion. A reasonable doubt is a doubt which has some reason for its basis. It does not mean a doubt from mere caprice, or groundless conjecture.[95]

§ 1993(26). Pennsylvania

Gentlemen, it is the duty of the commonwealth before they can ask for a conviction in this case, as well as in every other case, which I have told you before, to satisfy the jury of the guilt of the defendant beyond a reasonable doubt. A reasonable doubt is a doubt which arises out of the evidence, which appeals to reasonable men, and causes them to hesitate to convict the defendant. If there is such a reasonable doubt in this case, then it is your duty to acquit. If there is no such reasonable doubt, it is just as much your duty to convict.[96]

§ 1993(27). South Dakota

The jury are instructed that the term "reasonable doubt" is pretty well understood, but not easily defined. It is no mere possibility of a doubt, not an imaginary doubt, not a doubt of the absolute certainty of the guilt of the defendant, because everything relating to human affairs and depending upon moral evidence is open to some conjectural or imaginary doubt, and because absolute certainty is not required by the law. It is not such a doubt as one might conjure or hatch up in order to acquit a friend without any reason therefor, but it must be a substantial doubt, and one which would ordinarily impress the judgment of a prudent man in the graver and more important affairs of human life. A reasonable doubt which entitles a defendant in a criminal case to an acquittal is a doubt of guilt reasonably arising from all the evidence in the case, or it may arise from lack of evidence in the case, and it must be such a doubt as the juror is able to give a reason for.[97]

The jury are instructed that the term "reasonable doubt" is pretty well understood, but not easily defined. It is not the mere

[95] State v. Morey, 36 P. 573, 25 Or. 241.

[96] Commonwealth v. Conroy, 56 A. 427, 207 Pa. 212.

[97] State v. Sonnenschein, 159 N. W. 101, 37 S. D. 585.

possibility of a doubt, not an imaginary doubt, not a doubt of the absolute certainty of the guilt of the defendant, because everything relating to human affairs and depending upon moral evidence is open to some conjectural or imaginary doubt, and because absolute certainty is not required by the law. It is not such a doubt as one might conjure or hatch up in order to acquit a friend, without any reason therefor; but it must be a substantial doubt, and one which would ordinarily impress the judgment of a prudent man in the graver and more important affairs of life. The reasonable doubt which entitles defendant in a criminal case to an acquittal is a doubt of guilt, reasonably arising from all the evidence in the case, and it must be such a doubt as the juror is able to give a reason for. A reasonable doubt is that state of a case which, after the entire comparison and consideration of all the evidence, leaves the mind of the juror in that condition that he cannot say and feel an abiding conviction to a moral certainty of the guilt of the defendant as charged in the information.[98]

§ 1993(28). Virginia

The court further instructs the jury that the law presumes the accused to be innocent until he is proved guilty beyond a reasonable doubt, and, if there is in the minds of the jury any reasonable doubt of the guilt of the accused, the law makes it their duty to acquit him; and mere suspicion or probability of his guilt, however strong, is not sufficient to convict, nor is it sufficient if the greater weight or preponderance of evidence supports the charge in the indictment. But, to warrant his conviction, his guilt must be proved so clearly, and the evidence thereof must be so strong, as to exclude every reasonable hypothesis of his innocence. But in this connection the court further tells the jury that in cases like this, where the prisoner sets up the defense of insanity or irresponsibility produced by voluntary intoxication, he cannot rely simply on having raised a rational doubt in the minds of the jury as to whether he was so drunk at the time he committed the crime as not to be responsible therefor, but the burden is upon him to prove this fact to the satisfaction of the jury, as fairly results from all evidence.[99]

§ 1993(29). Washington

The jury are instructed that the burden is on the state, and in order to convict the state must satisfy you beyond every reasonable doubt that the defendant accepted from ———, about the time

[98] State v. Grant, 105 N. W. 97, 20 S. D. 164, 11 Ann. Cas. 1017. See State v. Raice, 123 N. W. 708, 24 S. D. 111.

[99] Longley v. Commonwealth, 87 S. E. 339, 99 Va. 807.

mentioned, some amount of money as a reward or bribe as herein defined. Under our law, a person accused of crime is presumed to be innocent, and he is entitled to the benefit of this presumption throughout this trial until the same shall have been removed or overcome by proof of guilt beyond every reasonable doubt. Now, what is reasonable doubt? When is a doubt a reasonable doubt? Failure of jurors to understand this term sometimes results in conviction on insufficient evidence, and sometimes results in acquittal in spite of ample proof of guilt. It is not enough that the state satisfy you by a mere preponderance of the testimony—that is, it is not enough that you shall believe from the evidence—that in all probability the defendant is guilty. That is the rule in civil cases; but while you may believe the defendant in a criminal case to be in all probability guilty, yet there may be a reasonable doubt in your mind. On the other hand, a reasonable doubt does not mean a vague, conjectural doubt or a misgiving founded upon some mere possibility. You should understand and distinguish the difference between proof beyond a reasonable doubt and proof to the exclusion from the mind of a mere vague, imaginary, or possible doubt. The state is not required to satisfy you of guilt so conclusively and to such an absolute certainty that there is no possibility of any mistake whatever. But when you are morally satisfied, then you are satisfied beyond a reasonable doubt. You may be satisfied of a fact beyond every reasonable doubt and yet not satisfied to an absolute certainty. You may have no reasonable doubt in your mind of the truth of a matter, and yet there may be a possibility that such matter is not true. Very few facts in the domain of human knowledge are susceptible of proof to an absolute certainty. Hence you note a reasonable doubt is one that must arise from the evidence in the case, and must be such a substantial one as an honest, sensible, and fair-minded man might with reason entertain consistently with a conscientious desire to ascertain the truth. Use your common sense as men of experience possessing some knowledge of human nature and of worldly affairs, and if after examining carefully all the facts and circumstances in this case you cannot say and feel that you have a settled and abiding conviction of the guilt of defendant, then you have a reasonable doubt and should acquit; if you have such conviction, then you have no reasonable doubt, and should convict.[1]

The jury are instructed that only a reasonable doubt; a doubt based on reason, arising from the evidence or the want of evidence in the case as to the guilt of the defendant, only such doubt as a sensible, honest-minded man would reasonably entertain in an

[1] State v. Wappenstein, 121 P. 989, 67 Wash. 502.

honest investigation to ascertain the truth, should deter you from finding defendant guilty. A vague, whimsical, capricious, visionary, or other unreasonable doubt, a doubt based upon mere conjecture as to a remotely possible state of facts not disclosed by the evidence, does not entitle the defendant to an acquittal, where the evidence is such as to fully and firmly convince the candid judgment of an impartial and reasonable man of the truth of the charge. On the other hand, you are not to understand that all doubt is to be discarded by you. You are required to decide the question submitted to you, whether the defendant is guilty or not guilty as charged in this information, upon the strong probabilities of the case as disclosed to you by the evidence given before you, and the whole of it; and the probabilities of his guilt, to warrant conviction, need not be so strong as to exclude all doubt or possibility of error, but must be so strong as to exclude every reasonable doubt.[2]

§ 1993(30). West Virginia

The court instructs the jury that a reasonable doubt, such as is contemplated in law, is not a mere fanciful or imaginary doubt, but is a fair and substantial doubt, based on the evidence or lack of evidence in the case, and one for which a man who entertains such doubt should be able to give a good and substantial reason arising from the evidence or a lack of evidence in the case.[3]

The court instructs the jury that a reasonable doubt is not a vague or uncertain doubt.[4]

The court instructs the jury that if, upon the evidence in this case, such a doubt is raised as would cause a juror to hesitate and to refrain from acting, were it a grave business matter, then such doubt is a reasonable doubt, and such juror should give the defendant the benefit of that doubt.[5]

§ 1993(31). Wisconsin

You are instructed that in criminal cases the defendant enters upon the trial with the presumption of innocence in his favor, and the burden of proof is upon the state to establish his guilt, and the evidence must be sufficient to establish in your judgment his guilt beyond all reasonable doubt. As long as you have a reasonable doubt of the defendant's guilt, it is your duty to acquit him. A reasonable doubt which entitles an accused person to an acquittal is a doubt of guilt reasonably arising from all the evidence in the case. Proof is said to be deemed to be beyond all reasonable doubt when the evidence is sufficient to impress the judgment of ordinarily prudent men with a conviction on which they would act with-

[2] State v. Harras, 65 P. 774, 25 Wash. 416.

[3] State v. Dodds, 46 S. E. 228, 54 W. Va. 289.

[4] State v. Dickey, 37 S. E. 695, 48 W. Va. 325.

[5] State v. Dickey, 37 S. E. 695, 48 W. Va. 325.

out hesitation in their own most important concerns and affairs of life. And if you have any such reasonable doubt, you must give him the benefit thereof, and acquit him.[6]

You are instructed that all men are presumed to be innocent of crime. No man can rightfully be convicted of crime until the legal presumption of innocence just mentioned shall have been overcome, and his guilt affirmatively proved beyond a reasonable doubt. Such proof of guilt can be made only by the evidence given or received on the trial of the case, and must be, in the judgment of the jury, the just and reasonable logic and effect of the whole evidence. The "reasonable doubt" mentioned beyond which guilt must be affirmatively proved in order to justify a verdict of guilty means, as its name implies, a doubt resting in reason; and it must arise from the whole evidence fairly and rationally considered. When, after a full and impartial consideration of the whole evidence considered within the rules already stated, the judgment is convinced to a moral certainty that the accused is guilty, that there is no reasonable explanation of the facts proved except upon the hypothesis that the accused committed the crime charged, then every reasonable doubt is removed, and a verdict of guilty should follow. Mere fanciful or speculative doubt, such as a skeptical mind may suggest in any case, however strong and convincing that the accused is guilty the evidence, as a whole, may be to a reasonable and impartial mind, does not amount to a "reasonable doubt," within the meaning of the law. A doubt such as this—one that ignores a reasonable construction of the whole evidence, proceeds upon mere speculation or suspicion—is unreasonable; would acquit one proven guilty as easily as one not so proven; and does not justify a verdict of not guilty.[7]

§ 1994. Necessity that each juror be satisfied beyond a reasonable doubt

§ 1994(1). Alabama

The court charges you, gentlemen of the jury, that, if any individual juror is not convinced of the defendant's guilt beyond a reasonable doubt and to a moral certainty, you cannot convict.[8]

The court charges you, gentlemen of the jury, that each juror is required to be satisfied of guilt of defendant beyond a reasonable doubt before they are authorized to find a verdict of guilty, and each juror must be separately and segregately so satisfied to support a conviction.[9]

[6] Frank v. State, 68 N. W. 657, 94 Wis. 211.

[7] Emery v. State, 65 N. W. 848, 92 Wis. 146.

[8] Leonard v. State, 43 So. 214, 150 Ala. 89.

[9] Leonard v. State, 43 So. 214, 150 Ala. 89.

The court charges the jury that before they can convict the defendant the evidence must be so strong as to convince each juror of his guilt beyond reasonable doubt; and if, after considering all the evidence, a single juror has a reasonable doubt of the defendant's guilt, arising out of any part of the evidence, then they cannot convict him.[10]

§ 1994(2). California

The jury are instructed that if, after consideration of the whole case, any juror should entertain a reasonable doubt of the guilt of the defendant, it is the duty of such juror so entertaining such doubt not to vote for a verdict of guilty, nor to be influenced in so voting, for the single reason that a majority of the jury should be in favor of a verdict of guilty.[11]

§ 1994(3). Indiana

The jury are instructed that, if any one of the jury, after having duly considered all the evidence, and after having consulted with his fellow jurymen, entertain a reasonable doubt of the guilt of defendant, the jury cannot find him guilty.[12]

§ 1994(4). Mississippi

The court further instruct the jury, for the defendant, that each and every one of you is entitled to have his own conception of what constitutes a reasonable doubt of the guilt of the defendant; that before you can convict this defendant the evidence must be so strong that it convinces each juror of the defendant's guilt beyond every reasonable doubt; and if, after a consideration of the evidence, or the want of evidence, a single juror has a reasonable doubt of the defendant's guilt, then you cannot convict him under this charge.[13]

The court instructs the jury that it is the duty of each and every member of the jury in this case to decide the issues presented for himself, and if, after a careful consideration of all of the evidence in the case and the instructions of the court on the law and free consultation with his fellows, there is any single juror who has a reasonable doubt of defendant's guilt, it is his duty under his oath to stand by his conviction and favorable to a finding of not guilty. He should never yield his convictions simply because every other single one on the jury may disagree with him.[14]

[10] Mitchell v. State, 80 So. 348, 129 Ala. 23.

[11] People v. Dole, 55 P. 581, 122 Cal. 486, 68 Am. St. Rep. 50.

[12] Castle v. State, 75 Ind. 146.

[13] Bell v. State, 42 So. 542, 89 Miss. 810, 119 Am. St. Rep. 722, 11 Ann. Cas. 431. In Walford v. State, 63 So. 316, 106 Miss. 19, it is held that the refusal of this instruction will not constitute error, where the jury are fully instructed on the law of the presumption of innocence and reasonable doubt as applicable to the jury generally, the text case being overruled so far as it holds to the contrary.

[14] Ammons v. State, 42 So. 165, 89 Miss. 369.

§ 1995. Application of doctrine of reasonable doubt to subsidiary facts

You are instructed that the doctrine of reasonable doubt, as a general rule, has no application to subsidiary evidence taken item by item. It is applicable to the constituent elements of the crime charged, and to any fact or facts which constitute the entire proof of one or more of the constituent elements of the crime charged. That is to say, all the facts which must have existed in order to make out the guilt of the accused must be established beyond a reasonable doubt before you can convict. But the rule of reasonable doubt does not apply to subsidiary and evidentiary facts; that is to say, to such facts and circumstances in evidence, if there be any such, as are not essential elements of the crime charged, and not necessary to the proof thereof, and, when considered together and as a whole, tend to prove or disprove the existence of one or more of the primary facts necessary to make out the offense. Subsidiary and evidentiary facts may be considered by you in determining the necessary and essential facts, when established by clear and satisfactory proof.[15]

§ 1996. Sufficiency of evidence as to identity of person committing alleged offense

Sufficiency of evidence as to perpetrator of homicide, see post, § 3070.

§ 1996(1). Arizona

The court instructs the jury that the defendants, ——— and ———, are the only persons on trial before you for this alleged offense, and that if you find from a consideration of all the evidence that it points as clearly to some other person or persons as having committed the crime in question as it does to the defendants, or if, after a fair and full consideration of all the evidence, the jury entertain a reasonable doubt as to whether the said defendants or some other persons are the guilty parties, then it is your duty to acquit the defendants.[16]

§ 1996(2). Indiana

The jury are instructed that, if the proof shows positively that one of two or more persons committed the homicide set out in the indictment, but leaves it uncertain which of them, in fact, committed the act which caused the death, all such persons must be acquitted, unless it was committed by one of them under circumstances which in law makes the other equally guilty.[17]

[15] Hinshaw v. State, 47 N. E. 157, 147 Ind. 334.

[16] Apodaca v. State, 187 P. 581, 21 Ariz. 273. See People v. Hemple, 87 P. 227, 4 Cal. App. 120.

[17] Epps v. State, 1 N. E. 491, 102 Ind. 539.

§ 1997. Sufficiency of evidence of intent

Of intent to kill, see post, § 3071.

§ 1997(1). California

You are instructed that the intent must be proved; but it is never required of the prosecution to prove an unlawful intent by positive and direct evidence. In many cases such proof could not be made. Intent may be proved by all the facts and circumstances disclosed by the evidence and testimony taken in connection with the case.[18]

§ 1997(2). Nebraska

The court instructs the jury that the intent with which an act is done is a mental process, and as such generally remains hidden within the mind where it is conceived, and is rarely, if ever, susceptible of proof by direct evidence, but must be inferred or gathered from the outward manifestations by the words or acts of the party entertaining them, and the facts or circumstances surrounding or attendant upon the assault with which it is charged to be connected.[19]

§ 1998. Sufficiency of evidence of defenses

You are instructed that the defendant in a criminal case is not required to satisfy the jury of the existence of any fact which, if true, is a complete defense. It is sufficient if he creates in the minds of the jury a reasonable doubt of the existence of such fact.[20]

§ 1999. Sufficiency of evidence on issue of sanity or insanity

On issue of insanity of defendant in prosecution for murder, see post, § 3077.

§ 1999(1). California

The jury are instructed that, while the law insists and compels the prosecution to prove the guilt of a defendant of the crime charged beyond a reasonable doubt and to a moral certainty, the law only requires the defendant, whose insanity is one of his defenses, to prove his insanity at the time of the commission of the offense with which he is charged by a preponderance of evidence.[21]

The jury are instructed that the proof as to the defense of insanity is on the defendant; and this insanity must be established by a preponderance of evidence; that is to say, before the defendant can be acquitted on the ground of insanity, it must appear by a preponderance of the evidence that at the time the homicide was committed there was such a disordered or deranged condition of his

[18] People v. Bones, 170 P. 166, 35 Cal. App. 429.

[19] Clarey v. State, 85 N. W. 897, 61 Neb. 688. The word "must," in this instruction, means that the intent of a person is deducible from his words and conduct only, and not that the jury are obliged to infer unlawful intent.

[20] Hinshaw v. State, 47 N. E. 157, 147 Ind. 334. This is correct as applied to an affirmative defense.

[21] People v. Ashland, 128 P. 798, 20 Cal. App. 168.

mental faculties as to render him incapable of distinguishing between right and wrong in relation to the particular act with which he is charged. In this connection you are instructed that the defendant is entitled to the benefit of all evidence in his favor whether produced upon the people's case or upon his defense, and, if you believe that there is a preponderance of the evidence that defendant was insane at the time of the homicide, his act is excused, and it is your duty to acquit the defendant.[22]

§ 1999(2). Connecticut

The jury are instructed that if, upon the whole evidence, the jury entertain a reasonable doubt as to the prisoner's sufficient soundness of mind to be responsible for his acts, it will be their duty to give him the benefit of the doubt, and so render a verdict of acquittal.[23]

§ 1999(3). Illinois

The court instructs the jury that, if there is evidence in the case sufficient to raise a reasonable doubt as to the sanity of the defendant, then the jury will find the defendant not guilty.[24]

The jury are instructed that, to warrant a conviction in this case, it is incumbent on the people to establish, by evidence, to the satisfaction of the jury, beyond a reasonable doubt, the existence of every element necessary to constitute the crime charged; and if, after a careful and impartial examination of all the evidence in the case bearing upon the question of sanity or insanity, the jury entertain any reasonable doubt of the guilt of the defendant, at the time of the alleged offense, they should give the defendant the benefit of that doubt and acquit him.[25]

§ 1999(4). Iowa

You are instructed that every person is presumed to be sane and rational, unless the fact is proven otherwise by a preponderance of the evidence, and you are to treat the acts of the defendant at and subsequent to the fire, as shown by the evidence, as the acts of a sane and rational man, unless the evidence shows, not only a possibility that his mental condition was otherwise, but further shows, by a fair preponderance of the evidence in the case, that the defendant was then in fact irrational or suffering from mental aberration of the mind. You are not required to find that the defendant was irrational or insane at such time, unless the evidence clearly establishes such fact, and should only find him insane or irrational at the time of the fire and subsequent thereto, upon evidence of a reliable character, which con-

[22] People v. Carantan, 105 P. 768, 11 Cal. App. 561.

[23] State v. Johnson, 40 Conn. 136.

[24] Jamison v. People, 34 N. E. 486, 145 Ill. 357.

[25] Hornish v. People, 32 N. E. 677, 142 Ill. 620, 18 L. R. A. 237.

vinces you that such fact is proven by a fair preponderance of all the evidence in the case bearing thereon.[26]

§ 1999(5). Kansas

You are instructed that the defendant in this case has interposed the plea of insanity as a defense, and evidence has been introduced tending to support such plea, and that it devolves upon the state to prove to your satisfaction, beyond a reasonable doubt, the defendant's sanity, as above defined, at the time of the shooting. If you believe from all the evidence in the case, beyond a reasonable doubt, that the defendant at the time and place and in the manner charged in the information shot and killed ———, and if you should fail to find from all the evidence, beyond a reasonable doubt, that the defendant at the time of such shooting and killing was sane, as above defined, then you must acquit the defendant.[27]

§ 1999(6). Missouri

The jury are instructed that, to establish insanity as a defense, positive or direct testimony is not required, nor is it necessary to establish this defense beyond a reasonable doubt. It is sufficient if the jury is reasonably satisfied by the weight or preponderance of the testimony that the accused was, at the time he committed the act, incapable of distinguishing between right and wrong.[28]

The law presumes every man is sane until the contrary is established by the evidence to the satisfaction of the jury, and, when insanity in any form is set up as a defense, it is a fact which may be proven like any other fact. The burden of proving such insanity is on the defendant, and he is not entitled to the benefit of a mere doubt whether he was or was not insane.[29]

You are instructed that in this case insanity is interposed as an excuse for the charge in the information. This defense is recognized by the law, and, should insanity be proven by the evidence in this case to your reasonable satisfaction, it will be your duty to acquit. Insanity is a physical disease located in the brain, which disease so perverts and deranges one or more of the mental faculties as to render the person suffering from this affliction incapable of distinguishing right from wrong, in reference to the particular act charged against him, and incapable of understanding that the particular act in question was a violation of the law of God and of society. The law presumes every person who has reached the years of discretion to be of sound mind, and this pre-

[26] State v. Novak, 79 N. W. 465, 109 Iowa, 717.

[27] State v. Arnold, 100 P. 64, 79 Kan. 533.

[28] State v. Porter, 111 S. W. 529, 213 Mo. 43, 127 Am. St. Rep. 589.

[29] State v. Paulsgrove, 101 S. W. 27, 203 Mo. 193.

sumption continues until the contrary be shown. So, in this case, where insanity is pleaded as a defense to a criminal charge, the fact of the existence of such insanity at the time of the commission of the act complained of must, before you can acquit him upon that ground, be established by the evidence to your reasonable satisfaction, and the burden of proving this fact rests on the defendant.[30]

§ 1999(7). Ohio

The jury are instructed that, in the first place, the law presumes every person who has reached the age of discretion to be of sufficient capacity to be responsible for crime; and therefore the burden of establishing the defense of insanity of the accused affirmatively to the satisfaction of the jury rests upon the defendant. It is not required, however, that this defense be established beyond a reasonable doubt; but it is sufficient if the jury is reasonably satisfied by the weight or preponderance of the evidence that the accused was insane at the time of commission of the act.[31]

§ 1999(8). Oklahoma

Gentlemen of the jury, you are instructed that the defendant has interposed as his defense in this case the plea of insanity. When that defense is interposed, the burden of proof is upon the defendant to introduce sufficient evidence to raise in your minds a reasonable doubt of his sanity. It is not required that the defendant shall prove his insanity to the satisfaction of the minds of the jury by competent evidence beyond a reasonable doubt, or by a preponderance of the evidence. It is sufficient if he only introduces sufficient evidence to raise in your minds a reasonable doubt of his sanity; and, when this is done, you are instructed that the burden of proof is upon the state to prove the sanity of the defendant by competent evidence, beyond a reasonable doubt, before you would be justified in convicting the defendant as charged in the information, and then the burden of proving the sanity of the defendant rests upon the state, like that of proving any other material allegation of the information; and, if you believe that the state has failed to prove by competent evidence, beyond a reasonable doubt, the sanity of the defendant, and if, upon a consideration of all the evidence, together with all the legal presumptions applicable to the case, the jury have a reasonable doubt as to whether the defendant was mentally competent to distinguish between right and wrong or to understand the nature of

[30] State v. Coats, 74 S. W. 864, 174 Mo. 396.

[31] Kelch v. State, 45 N. E. 6, 55 Ohio St. 146, 39 L. R. A. 737, 60 Am. St. Rep. 680. While this instruction is not considered erroneous, it is said to go to the extreme limit with respect to the burden imposed upon the defendant.

the act he was committing, he should be acquitted, otherwise he should be convicted.[32]

You are instructed in this connection that if, after a full and careful consideration of the whole case, you entertain a reasonable doubt as to the sanity of the defendant, at the time that he fired the fatal shot, you will then give him the benefit of such doubt and return a verdict of not guilty.[33]

§ 1999(9). Oregon

The jury are instructed that where the commission of the act charged as a crime is proven, and the defense sought to be established is the insanity of the defendant, the same must be proved beyond a reasonable doubt.[34]

§ 1999(10). Wyoming

I charge you that in this case the sanity of the defendant at the time of the alleged homicide has been questioned and raised by the evidence in the case, because the defendant has interposed the plea of insanity, and evidence has been offered in support thereof, and I charge you that the burden of proof that the defendant was sane at the time of the homicide now rests upon the state, and it must satisfy you beyond a reasonable doubt that at the time of the shooting the defendant was sane; that the doing of the acts which constitute the crime charged in the information proceeded from a responsible agent, one capable of committing the offense. The burden is upon the state to prove every essential element of this crime to your satisfaction and beyond a reasonable doubt, and the elements that necessarily enter into and constitute the crime of murder in the first degree are purpose, premeditated malice, and the sanity of the accused at the time of the homicide, and the state must satisfy you beyond a reasonable doubt that all of these elements existed at the time of the homicide before you can convict the defendant of the crime charged in the information, and, if the state has failed to so satisfy you of the existence of any one of these elements, you must resolve that doubt in defendant's favor and acquit him.[35]

§ 2000. Sufficiency of evidence of capacity of minor to commit crime

You are instructed that, to establish capacity to commit crime in a person over 7 and under 14 years, it is not necessary that any witness shall state that he has such capacity, but the same may be

[32] Smith v. State, 155 P. 699, 12 Okl. Cr. 307.

[33] Alberty v. State, 140 P. 1025, 10 Okl. Cr. 616, 52 L. R. A. (N. S.) 248.

[34] State v. Branton, 56 P. 267, 33 Or. 533. This rule is statutory.

[35] Flanders v. State, 156 P. 39, 24 Wyo. 81.

shown to exist by the appearance and general conduct of the accused, and by his testimony as a witness before the jury.[36]

§ 2001. Sufficiency of evidence on issue of defense of alibi

§ 2001(1). Arkansas

The jury are instructed that one of the defenses interposed by the defendant is what is known as an alibi; that is, that the defendant was at another place at the time of the commission of the alleged offense. And the burden of proof is on the defendant to show that he was in another place when the alleged crime was committed, but that is discharged if the proof raises a reasonable doubt in your mind that he was not at the place at the time the crime was committed, but was in some other place. The defendant is not required to prove this defense beyond a reasonable doubt to entitle him to an acquittal; and if, after considering all the evidence, as well that touching the question of alibi as the criminating evidence introduced by the state, they have a reasonable doubt of the guilt of defendant, they should acquit. The defense is an affirmative one. If, however, from the evidence in the whole case there is in the minds of the jurors a reasonable doubt as to whether or not the defendant was at the place at the time the offense was committed, then there would be a reasonable doubt of his guilt, for the reason that he could not be guilty if he was not there.[37]

§ 2001(2). California

The jury are instructed that, when a defendant undertakes to establish an alibi, the evidence which he offers, taken with the other evidence in the case, must account for him during the whole period of the commission of the crime. But in this connection you are instructed that, if you entertain a reasonable doubt as to his guilt, or as to his whereabouts when his presence is material, you should give him the benefit of that doubt.[38]

§ 2001(3). Delaware

The court instructs the jury that the defense set up is that which is known in the law as an alibi, which means that at the time the alleged offense was committed the defendants were not present, but were elsewhere, and could not therefore have committed the crime. This is a good defense when proved to the satisfaction of the jury. To be effective the jury must be convinced, not only that the testimony is true, but that the alibi or absence of the defendants has been so clearly shown that it was physically impossible for them to have committed the crime charged against them.[39]

[36] State v. Williams, 21 S. E. 721, 40 W. Va. 268.

[37] Morris v. State, 224 S. W. 724.

[38] People v. Worden, 45 P. 844, 113 Cal. 569.

[39] State v. Prettyman, 100 A. 476, 6 Boyce, 452.

§ 2001(4). Florida

The court instructs the jury that one of the defenses interposed in this case is what is known as an alibi; that is, that the defendant was at another place at the time of the commission of the crime. Such a defense is as proper and legitimate, if proven, as any other, and all evidence bearing upon that point is for the consideration of the jury. If, in view of all the evidence, you have a reasonable doubt as to whether the defendant was in some other place when the crime was committed, you should give the defendant the benefit of the doubt, and find him not guilty. As regards the defense of an alibi, the defendant is not required to prove the defense beyond a reasonable doubt to entitle him to an acquittal, nor is it required that such evidence should be absolutely clear; but it is sufficient if it raises a reasonable doubt in the minds of the jury, from all the circumstances of the case, whether or not the accused was present at the time and place of the commission of the crime charged.[40]

§ 2001(5). Georgia

I charge you, gentlemen of the jury, that to overcome proof of guilt strong enough to exclude all reasonable doubt, the burden is on the accused to verify his alleged alibi to the reasonable satisfaction of the jury; but I charge you that the defendant need not establish his alibi beyond a reasonable doubt. It is sufficient if he establishes it to the reasonable satisfaction of the jury, and it is sufficient if the evidence tending to show an alibi, when considered in connection with all of the evidence of the case and the defendant's statement, raises a reasonable doubt of guilt in the minds of the jury. Whenever the proof of alibi meets this test, it is the duty of the jury to acquit the defendant.[41]

§ 2001(6). Illinois

The jury are instructed that, to render the defense of alibi available, the proof must cover the whole of the time of the commission of the crime, so as to render it impossible, or highly improbable, that the defendant could have committed the act.[42]

§ 2001(7). Iowa

You are instructed that if, in view of all the evidence, you have a reasonable doubt as to whether defendants were in some other place when the crime was committed, you should give the defendants the benefit of the doubt, and find them not guilty. The defendants are not required to prove an alibi beyond a reasonable doubt to entitle them to an acquittal. It is sufficient if the evi-

[40] Jordan v. State, 39 So. 155, 50 Fla. 94.

[41] Montford v. State, 87 S. E. 797, 144 Ga. 582.

[42] Briggs v. People, 76 N. E. 499, 219 Ill. 330.

dence raises a reasonable doubt of their presence at the time of the commission of the crime charged.[43]

§ 2001(8). Michigan

You are instructed that one of the defenses interposed by the defendant in this case is what is known in law as an "alibi"—that is, that the defendant was at another place at the time of the commission of the crime ; and I instruct you that such a defense is as proper and legitimate, if proven, as any other. And all the evidence bearing upon that point should be carefully considered by the jury. And if, in view of the evidence, the jury have any reasonable doubt as to whether the defendant was at some other place at the time the crime was committed, they should give the defendant the benefit of any doubt, and find him not guilty. The defendant is not required to prove that defense beyond a reasonable doubt to entitle him to an acquittal. It is sufficient if the evidence upon that point raises a reasonable doubt of his presence at the time and place of the commission of the crime charged.[44]

§ 2001(9). Missouri

The jury are instructed that the defendant alleges as a defense in this cause an alibi; that is, he says he was not present at the time and place of the alleged assault with intent to rob, but was elsewhere. Now, if the jury find from the evidence in the cause that the defendant was elsewhere than at the place of the alleged assault with intent to rob at the time of the alleged assault with intent to rob, then they should find the defendant not guilty; and if, upon a full consideration of all the evidence in the case, the jury have a reasonable doubt as to whether defendant was elsewhere than at the place of the alleged assault with intent to rob at the time of the assault with intent to rob, then they should find the defendant not guilty.[45]

The jury are instructed that the defendant has interposed as a defense what is known in law as an alibi; that is, that even if the offense was committed as charged he was at the time of the commission thereof at another and different place than that in which such offense was committed, and therefore was not and could not have been the person who committed the same. Now, if the evidence leaves in your minds a reasonable doubt as to his presence at the place where the offense was committed at the time of the commission thereof, you will find him not guilty.[46]

The court instructs the jury that, if there is any evidence be-

[43] State v. Hassan, 128 N. W. 960, 149 Iowa, 518.

[44] People v. Resh, 65 N. W. 99, 107 Mich. 251.

[45] State v. Bateman, 95 S. W. 413, 196 Mo. 35.

[46] State v. Speritus, 90 S. W. 459, 191 Mo. 24.

fore you that raises in your minds a reasonable doubt as to the presence of the defendant at the time and place where the crime is charged to have been committed (if you find a crime was committed), you will acquit the defendant.[47]

The jury are instructed that one defense in this case is what is known in law as an "alibi" that is, that the defendants were not present at the time and place of the commission of the offense charged in the indictment, if any such offense has been committed, but that they were at that time at another and different place. As to this defense, you are instructed that it is not necessary for defendants to prove an alibi to your satisfaction, beyond a reasonable doubt, nor by a preponderance of the testimony, but if, after a full and fair consideration of all the facts and circumstances in evidence, you entertain a reasonable doubt as to whether or not the defendants were present at the time and place of the commission of the offense charged in the indictment, if such offense has been committed by any one, it will be your duty to give the defendants the benefit of such doubt and acquit them.[48]

The jury are instructed, if they have a reasonable doubt that defendant committed the ——— alleged in the indictment, or was absent at the time said ——— is alleged to have been committed, they will find a verdict acquitting him.[49]

§ 2001(10). Montana

The jury are instructed that, while the prosecution must establish beyond a reasonable doubt the guilt of the defendant, it is not incumbent upon the defendant to prove an alibi beyond a reasonable doubt. Though the evidence offered to establish an alibi falls short of the weight of moral certainty as to the existence of the alibi, yet if it leave in the minds of the jury such a doubt or uncertainty that, taken by itself, they could not find for or against the alibi, they are bound to carry such doubt into the case of the prosecution, and to array it there as an element of the reasonable doubt beyond which the prosecution must establish guilt. The defendant is entitled as much to the benefit of such doubt as to any other doubt raised by the evidence; and if the weight of such evidence alone, or when added to that of any other, be sufficient to reduce belief in their minds as to the defendant's guilt to a reasonable doubt, they must acquit.[50]

The jury are instructed that one of the defenses made by the defendant in this case is what is known as an alibi; that is, that the defendant was in another place at the time of the commission

[47] State v. Davis, 85 S. W. 354, 186 Mo. 533.

[48] State v. Hale, 56 S. W. 881, 156 Mo. 102.

[49] State v. Edwards, 19 S. W. 91, 109 Mo. 315.

[50] State v. Spotted Hawk, 55 P. 1026, 22 Mont. 33.

of the crime. This is a proper defense, if proven; and if, in view of all of the evidence of the case, the jury have a reasonable doubt as to the presence of the defendant at the time and place when the crime was committed, they should give the defendant the benefit of the doubt, and find him not guilty.[51]

§ 2001(11). Nebraska

One of the defenses interposed by the defendant in this case is what is known as an alibi—that is, the defendant was at another place at the time of the commission of the crime; and the court instructs the jury that such defense is as proper and as legitimate, if proved, as any other, and all evidence bearing upon that point should be carefully considered by the jury; and if, in view of all the evidence, the jury have any reasonable doubt as to whether the defendant was in some other place when the crime was committed, they should give the defendant the benefit of the doubt and find him not guilty.[52]

§ 2001(12). Oklahoma

You are further instructed that one of the defenses interposed in this case by the defendant is what is known in the law as an "alibi"; that is, that the defendant was at another place at the time of the commission of the crime, if a crime was committed. The defense of alibi, to be entitled to consideration, must be such as to show that at the very time of the commission of the crime charged, if any was committed, the accused was at another place, so far away, and under such circumstances, that he could not, with ordinary exertion, have reached the place where the crime was committed, so as to have participated in the commission thereof, if a crime was in fact committed. In considering the proof upon the question of alibi, you will consider the whole of the evidence, both that given for the defendant and for the state, applying the same rules as are applied to any other evidence; the law being that when the jury have considered all of the evidence, as well that touching the question of alibi as the criminating evidence introduced by the prosecution, then, if they have any reasonable doubt of the guilt of the accused of the offense with which he stands charged, the jury should acquit.[53]

§ 2001(13). Oregon

You are instructed that one of the defenses interposed by the defendant in this case is what is known as an alibi; that is, that

[51] State v. Spotted Hawk, 55 P. 1026, 22 Mont. 33. It is held that the use of the word "proved" in this instruction does not cast any other burden upon defendant than to furnish some evidence tending to establish an alibi.

[52] McLain v. State, 24 N. W. 720, 18 Neb. 154.

[53] Tucker v. Territory, 87 P. 307, 17 Okl. 56.

the defendant was at another place at the time of the commission of the alleged crime. This court instructs you that such defense is as proper and legitimate, if proved, as any other and all evidence bearing upon that point should be carefully considered by you. If, in view of all the evidence, you have a reasonable doubt as to whether the defendant was at some other place when the crime was committed, then you should give the defendant the benefit of that doubt, and find the defendant not guilty, subject, however, to the other instructions which I will give you relative to the law of this case. Regarding the defense of an alibi, you are instructed that the defendant is not required to prove that defense beyond a reasonable doubt to entitle him to acquittal, but it is sufficient if the evidence raises a reasonable doubt of his presence at the time and place of the commission of the crime charged.[54]

§ 2001(14). Texas

The jury are instructed that among the other defenses set up by defendant is what is known in legal phraseology as an "alibi"; that is, that if the offense was committed, the defendant was at the time of the commission thereof at another and different place from that at which such offense was committed, and therefore was not and could not have been the person who committed the offense. Now, if the evidence raises in your mind a reasonable doubt as to the presence of the defendant at the place where the offense was committed, at the time of the commission thereof, you will find defendant not guilty.[55]

You are instructed that, if the evidence raises in your minds a reasonable doubt as to the presence of the defendant at the time and place when and where said property was fraudulently taken from the possession of ———, if you find that the same was taken, then you will find the defendant not guilty.[56]

§ 2001(15). Washington

The jury are instructed that one of the defenses interposed by the defendant in this case is an alibi; that is, that the defendant was at another place at the identical time that the crime was committed, if committed at all. If, in view of all the evidence, you have any reasonable doubt as to whether the defendant was at another place than that where the crime was committed at the time of its commission, then you should acquit; but if you believe from the evidence that the accused was not so far away from the place where the offense was committed but that he could, with ordinary exertion, have reached the place where the offense was

[54] State v. Branson, 161 P. 689, 82 Or. 377.

[55] Mass v. State, 128 S. W. 394, 59 Tex. Cr. R. 390.

[56] McCoy v. State, 120 S. W. 858, 56 Tex. Cr. R. 551.

committed, then you will consider that fact as a circumstance tending to prove or disprove the alibi.[57]

§ 2002. Reasonable doubt as to degree of offense

See, also, post, § 4618.
Effect of reasonable doubt as to degree of offense or character of admitted or established homicide, see post, § 3080.
Effect of reasonable doubt as to degree of offense in prosecution for larceny, see post, § 3333.

The jury are instructed that, if it should appear to you from all the evidence in this case beyond a reasonable doubt that the defendant has committed a crime which is included in the crime charged in the indictment, and there should still remain in your minds a reasonable doubt as to which degree he is guilty of, then, in that case the defendant is entitled to the reasonable doubt as to the higher crime or to the highest degree, and you can only return a verdict of guilty of the degree of the crime so included in the indictment as to which there is no reasonable doubt.[58]

E. Punishment

§ 2003. In general

You are instructed that the punishment prescribed by the law of the state of ——— for the crime charged in the information is imprisonment in the state penitentiary for a period not exceeding ——— years. If you find the defendant guilty of said offense, you will, in addition thereto, assess his punishment therefor.[59]

§ 2004. Recommendation to mercy

You are instructed that one of the accused persons admits his guilt, and through his counsel asks for recommendation of mercy by the jury. The request is a matter within your sound discretion under the circumstances.[60]

F. Cautionary Instructions

§ 2005. Duties of jury in general

§ 2005(1). California

The jury are instructed that rulings have been made by the court in your presence, and questions have been asked of witnesses by the court. From these things, or from anything that has occurred in the trial, you are not to infer what the opinion of the court may be as to the guilt or innocence of the accused. With the court's opinion you have nothing whatever to do, and if you

[57] State v. Burton, 67 P. 1097, 27 Wash. 528.

[58] State v. Megorden, 88 P. 306, 49 Or. 259, 14 Ann. Cas. 130.

[59] West v. State, 164 P. 327, 13 Okl. Cr. 312, L. R. A. 1917E, 1129.

[60] State v. Lapista (Del. Gen. Sess.) 105 A. 676, 7 Boyce, 260.

have even any suspicion of what the court may think in the matter, you have no right to consider it any more than you would have a right to consider the opinion of anybody else. The question of the guilt or innocence of the defendant is for you alone, regardless of what anybody else may think about it.[61]

§ 2005(2). Georgia

You are instructed that it is unlawful, under the laws of ———, to keep on hand at one's place of business spirituous, alcoholic, malt, and intoxicating liquors. You and I form part of the judicial system of the state, and are not concerned, in any way, with the propriety, wisdom, or policy of the legislative branch of the government in passing this law. Sufficient it is for you and me to know it is the law of ———, and that, as a part of the judicial branch of the law of ———, it is our duty to enforce the law as we find the law written; and by the enforcement of the law we mean, not only the conviction of the guilty, but the exoneration and justification of the innocent who may be charged with a violation of that law.[62]

§ 2005(3). Kansas

In conclusion, gentlemen of the jury, I urge upon you to weigh well the evidence before you, and ponder upon these instructions now given, that you may not perhaps, by careless disregard of your responsibilities, fail in conserving the rights of society, on the one hand, or, on the other, to condemn to punishment one who may have done no wrong. Courts are only respected when there is an earnest desire and true endeavor on the part of all its officers only to do right. Any departure from this justly arraigns the law tribunals for inefficiency, and excites a public disregard and contempt for their decrees. Neither passion nor sympathy should swerve or sway, but you should keep as certainly to the course pointed out by impartial justice as the needle is faithful to the pole. Thus only shall you escape an accusing conscience, and redeem the oath-bound obligations assumed by each of you at the time you were chosen to hear attentively, to consider wisely, and to determine justly.[63]

§ 2005(4). Indiana

It is proper for the court to remind you that the issue in this cause is to the defendant of so grave a nature, and to the public safety of such vital importance, that upon your part there should be no error. The accused, if he be innocent, ought not to be erroneously convicted; and, on the contrary, if he be guilty, he ought

[61] People v. Osborn, 106 P. 891, 12 Cal. App. 148.

[62] Mundy v. State, 72 S. E. 300, 9 Ga. App. 835.

[63] State v. Johnson, 50 P. 907, 6 Kan. App. 119.

not to be erroneously acquitted. You were, after careful effort, selected as intelligent and qualified jurors, sworn to impartially try and determine this cause, and a true verdict render according to the law and the evidence. If you comply with your oaths, error against either side must be precluded. Remember that the defendant's life and liberty are his most sacred and highest rights, and can only be forfeited by him for the causes, upon the conditions, and in the manner prescribed by law. In considering his rights, do not forget that by each acquittal of a guilty criminal the safeguard erected by society for its protection is weakened; for, by the nonenforcement of penalties affixed to criminal acts, contempt for the law is bred among the very class that it is intended to restrain. The evidence has been placed before you; an exhaustive discussion of the facts by counsel on either side, has been had in your hearing, and such instructions as in the judgment of the court would aid you in arriving at a correct decision have been given.[64]

§ 2005(5). Oklahoma

The jury are further instructed that it will require the concurrence of the full panel of the jury to render a verdict in this case, and that you must not arrive at your verdict by casting lot or by any manner or species of chance. You must be controlled in arriving at your verdict by the law as stated in these instructions and by the evidence you have heard from the witnesses. You must consider these instructions in their entirety. You have no right to consider any part or portion of these instructions to the exclusion of any other portion thereof.[65]

§ 2005(6). Texas

The jury are instructed that, in deliberating upon this case you are not to refer to or discuss any matter or issue not in evidence before you; neither shall you separate from each other, nor talk with any one not of your jury; and a violation of this injunction will be punished severely by the court.[66]

§ 2006. Province of court and jury

See, also, ante, § 1763(2).

§ 2006(1). United States

Now, gentlemen of the jury, you are the sole judges of the facts in this case. It is proper in proper cases for the court in the federal practice to suggest to you what the court's estimate of facts is. Whether the court in this charge has made that suggestion to you, directly or indirectly, the law is that you should not

[64] Stout v. State, 90 Ind. 1.

[65] Brantley v. State, 175 P. 51, 15 Okl. Cr. 6.

[66] Villereal v. State (Cr. App.) 61 S. W. 715.

depend upon any impression that you have as to the court's view as to the facts of the case in the making up of your own judgment. Your judgment of the facts should be your own uninfluenced judgment, uninfluenced by the court, except as you are bound to follow the law of the case as the court gives it to you, and uninfluenced by any insistence of counsel.[67]

§ 2006(2). California

It is my duty to state to you the law applicable to the case, and it is your duty, unaided by any suggestion from me, to pass upon all questions of fact. Neither the judge nor jury may trespass upon the province of the other. Our provinces are entirely distinct and separate. You should receive the law as I state it to be, notwithstanding you should firmly believe I am wrong, and the law is, or should be, otherwise. With the questions of fact, the weight of the evidence, the credit you should give to any witness sworn in the case, the court has nothing to do. These are matters entirely within your province, and which you, as jurors, must determine for yourselves.[68]

§ 2006(3). Georgia

The jury are instructed that, in deciding this question you will remember that you are the sole judges of the evidence submitted to you during the trial of this case. You will accept as correct, for your guidance in making up your verdict, the law as I shall give it to you in charge. So that, having applied the law to the evidence as you shall find it to be, you may render such verdict as the law demands at your hands. You are not at liberty, in determining your verdict, to depart from the evidence nor the law as given in charge.[69]

§ 2006(4). Illinois

You are instructed that the jury are made, under the statute, judges of the law as well as of the facts in criminal cases, and while it is the duty of the court, if requested by either party, to instruct them what the law is, it was the design of the statute that they should not be absolutely bound by such instruction; that, if they can say, upon their oaths, that they know the law better than the court does, they have the right to do so, but before assuming so solemn a responsibility they should be sure that they are not acting from caprice or prejudice, that they are not controlled by their will or their wishes, but from a deep and confident conviction that the court is wrong and that they are right. Before saying this upon

[67] Young v. Corrigan (D. C. Ohio) 208 F. 431.

[68] People v. Vereneseneckockockhoff, 58 P. 156, 129 Cal. 497.

[69] Rouse v. State, 71 S. E. 667, 136 Ga. 356.

their oaths it is their duty to reflect whether, from their habits of thought, their study and experience, they are better qualified to judge of the law than the court. If, under all these circumstances, they are prepared to say that the court is wrong in its exposition of the law, the statute has given them that right.[70]

§ 2006(5). Indiana

This is a criminal prosecution. A statute of this state requires the court in such cases to charge the jury, and in such charge to state all matters of law which are necessary for their information in giving their verdict, and these instructions are given by the court in compliance with that statute. However, the Constitution of ——— provides that, in all criminal cases whatsoever, the jury shall have the right to determine the law, conferred on you by the Constitution, gives you the right to determine and construe the law for yourselves, although your determination may differ from that stated by the court in its instructions; but in determining the law it is your sworn duty to determine it correctly, and as it in fact is, whatever may be the source of your information or the basis of your conclusion. It is your duty to consider and weigh the instructions given you by the court, and not arbitrarily, and without what you regard as a proper and sufficient reason, to reject them; and when your determination shall have been reached, it should be with the conscientious conviction that you have, so far as you were able, correctly determined the law as it in fact is.[71]

The jury are instructed that you are the judges of the law as well as of the facts. You can take the law as given and explained to you by the court, but, if you see fit, you have the legal and constitutional right to reject the same, and construe it for yourselves. Notwithstanding you have the legal right to disagree with the court as to what the law is, still you should weigh the instructions given you in the case as you weigh the evidence, and disregard neither without proper reason.[72]

The jury are instructed that by the Constitution of ——— you are the judges of the law as well as the facts. Upon the facts of the case the court has nothing whatever to say; it is your exclusive province to decide them. The province of the court is to instruct you in regard to the law, and while the court will endeavor to give you a plain, clear, and impartial statement of the law pertaining to the points that arise and grow out of this case as presented, you are also to remember that it is not intended thereby

[70] People v. Campbell, 84 N. E. 1035, 234 Ill. 391, 123 Am. St. Rep. 107, 14 Ann. Cas. 186.

[71] Hinshaw v. State, 124 N. E. 458, 188 Ind. 447.

[72] Blaker v. State, 29 N. E. 1077, 130 Ind. 203.

to thus bind your consciences, but to enlighten your judgments, if so be you should so regard it.[73]

The jury are instructed that you have a right to determine the law and the facts, but it is the duty of the court to instruct the jury what the law is.[74]

§ 2006(6). Iowa

The jury are instructed that you have taken a solemn oath to try this cause according to the law and evidence given you in open court, and you have no authority to consider or be controlled by anything else than that given you as law by the court, and unless your verdict accords with the law as given you by the court, you are guilty of willful perjury. It makes no difference what you think the law ought to be, you have no authority to consider or be controlled by anything else as law than that given you by the court.[75]

§ 2006(7). Louisiana

The jury are instructed that the Constitution of this state makes jurors the judges of the law as well as of the facts in criminal cases; but, while this is so, it is nevertheless your sworn duty to follow the law given to you by the court. The very moment you feel that the law expounded in this charge is the law of this case, your oaths compel you to apply it to the facts, and, though you have the physical power to disregard it, you cannot do so without violating your oaths. In taking the law from the court, you incur no responsibility. Misstatements of the law by the court to the prejudice of the accused may be excepted to by his counsel, and their correctness passed upon by a higher tribunal. Your oath binds you to rest your verdict on the law and the evidence.[76]

§ 2006(8) Michigan

You are instructed that you are the sole judges of the facts. It is for you to determine who is telling the truth and what inferences shall be drawn from the testimony.[77]

In this case, gentlemen, in the heat of argument you have been told, in substance, that you are not required to render a verdict in conflict with your consciences, notwithstanding the law or the facts in the case. That is not the rule, gentlemen; that is not the law. It has never been the law, and if you, gentlemen, should take that course, and it should become known, you would be liable to prosecution for perjury. Every one of you that renders a verdict upon that basis would be guilty of the crime of perjury, because

[73] Bissot v. State, 53 Ind. 408.
[74] Stocking v. State, 7 Ind. 326.
[75] State v. Miller, 4 N. W. 900, 53 Iowa, 154.
[76] State v. Ford, 37 La. Ann. 443.
[77] People v. Williams, 175 N. W. 187, 208 Mich. 586.

of the fact that you did not follow your oaths. I say that it is not the rule at all. You, gentlemen, have sworn that you would decide this case upon the evidence given you here from the witness stand and upon the laws of this state. Now you haven't any right to say that this law ought not to be enforced. We may not all agree with the rule that it should be strictly adhered to, we may not all feel that way; but the law is on the statute book, and it is not for you, nor is it for the court, to say as to whether that law should be enforced. And if a juror cannot render a verdict for the enforcement of a law of that kind he ought to say so when he is selected as a juror, so that he will not be required to violate his oath, because, as I say, you haven't any right to say I will render a verdict in accordance with my judgment, notwithstanding the evidence and the law may be opposed thereto. You have no right to do that, and if you do that you are guilty of the crime of perjury, and I am surprised, and I can only say that it is because of the heat of the argument probably that such a statement was submitted to you, gentlemen. That is not the rule, and you ought not to follow it. It is true that you are not to give any strained construction to this statute. You are not to give any strained construction to the evidence.[78]

§ 2006(9). Missouri

The jury are instructed that the instructions read to you by the court constitute the law of this case, and it is your duty to receive such instructions as the law, and, after ascertaining from the evidence what are the true facts herein, you should apply them to the law contained in said instructions, and find your verdict accordingly and not otherwise. You must not consider any of the instructions as an expression or intimation of what the court thinks of the evidence, because you are the sole judges of the facts herein, and you must ascertain them yourselves from the evidence before you, under your oaths as jurors. In a criminal prosecution such as this, before a verdict, either of conviction or acquittal can be returned, all the jurors must agree to it. When it has been agreed to, however, only the foreman should sign it.[79]

§ 2006(10). New Jersey

The jury are instructed that the credibility of witnesses and the conclusions of fact which you will draw from the evidence are questions which you must settle. The law of the case you must take from the court. If the court lays down the law incorrectly, the defendant will have his remedy by appealing to a higher court. But, if jurors disregard the law as laid down by the court, the

[78] People v. Smith, 108 N. W. 1072, 145 Mich. 530.

[79] State v. Hostetter, 222 S. W. 750.

administration of justice would soon become a mockery, and no man would be safe in his person or property.[80]

§ 2006(11). Ohio

The jury are instructed that it is the duty of the jury to receive the law as it is given them by the court, it is the exclusive province of the court to determine what the law is, and the jury have no right to hold the law to be otherwise in any particular than as given to them by the court.[81]

§ 2006(12). Texas

The jury are instructed that you are the sole and exclusive judges of the facts proved, of the credibility of the witnesses, and the weight and value to be given to their testimony, but the law you receive from the court, and you are bound to be governed thereby.[82]

§ 2007. Matters not to be considered in general

§ 2007(1). Georgia

You are instructed that in this case you are not concerned in any way with the result or effect of your verdict, just as long as you, as jurors under your oaths, know and believe that that verdict is the truth of the case based upon a consideration of the evidence adduced upon the trial of the case, under the rules of law as given you in charge by the presiding judge.[83]

§ 2007(2). Iowa

The jury are instructed that the gravity or magnitude of the punishment prescribed by law for the offense charged should not be allowed to affect your judgment or to determine your verdict.[84]

§ 2007(3). Minnesota

Now, gentlemen, considerable has been said upon the trial of this case with relation to defendant's property and where it might go in case he should be convicted, but, gentlemen, those matters have no concern with you; you are not concerned in the least where the property might go in case he should be convicted in this case, except in so far as the disposition of that property might affect the credibility of any of the witnesses testifying.[85]

§ 2007(4). Missouri

The jury are instructed that the indictment in this case is a mere formal charge, and is not in itself any evidence against the defendant. Statements of counsel are not evidence, and should not be

[80] Roesel v. State, 41 A. 408, 62 N. J. Law, 216.

[81] Robbins v. State, 8 Ohio St. 131.

[82] Jefferson v. State, 158 S. W. 520, 71 Tex. Cr. R. 120.

[83] Mundy v. State, 72 S. E. 300, 9 Ga. App. 835.

[84] State v. Baldes, 110 N. W. 440, 133 Iowa, 158.

[85] State v. Virgens, 151 N. W. 190, 128 Minn. 422.

so considered. Offers to prove certain alleged facts which may have been made in your presence are not evidence, and you should not take the same into consideration, nor allow yourselves to be in any manner influenced thereby. Neither should the jury consider any testimony stricken out by the court.[86]

§ 2007(5). New Jersey

The jury are instructed that there has been some suggestion by counsel for the defendant that this prosecution is laying the foundation for a civil suit. That is a matter you have nothing to do with. It has no place in this case at all. Your simple duty is to determine whether upon the testimony produced before you in this hearing this defendant is guilty as charged, and, if you are satisfied from such testimony that he is guilty, then it is your duty to say so; otherwise you should acquit him.[87]

§ 2007(6). Washington

You are also instructed that you must try this case upon the evidence introduced therein, and the law as given you by the court; and you are instructed to disregard all statements of counsel on either side, unless the same are supported by the testimony; nor are you to draw any conclusions or inferences from questions propounded by counsel and ruled out by the court, nor from offers of testimony which have by the court been rejected; and any evidence stricken by the court, you are not to consider.[88]

§ 2008. Duty to be governed solely by the evidence

§ 2008(1). Illinois

The jury are instructed that, in determining the question of guilt or innocence of defendant, you should do so solely upon the evidence adduced upon the trial and the instructions of the court, and none other, unaided and uninfluenced by any knowledge, if any, you may have gained from any other source.[89]

§ 2008(2). Kansas

The jury are instructed that, in deciding questions of fact you are to be guided by the law and the evidence alone, by the evidence which was given during the trial, and not from any supposed knowledge of events or occurrences derived from any source other than the testimony given before you in open court, and by the law as given to you by the court, which must be your only guide in that respect. You must bear in mind that the rights of the defendant are sacred to him, and you are bound to be especially careful that an innocent person shall not be punished and disgraced;

[86] State v. Hudspeth, 60 S. W. 136, 159 Mo. 178.

[87] State v. Clark, 64 A. 984, 74 N. J. Law, 33.

[88] State v. Burton, 67 P. 1097, 27 Wash. 528.

[89] People v. Spencer, 171 Ill. App. 237.

that no injustice be done the defendant, and that he has the benefit of every reasonable doubt and of the just presumption of innocence with which the law not only mercifully, but wisely and justly, clothes and invests him.[90]

§ 2009. Caution against sympathy or prejudice or the influence of public opinion

§ 2009(1). California

You are instructed that, although as men you may sympathize with those who suffer, yet as honest men, bound by oath to administer judgment according to law and evidence, you should not act upon your sympathies without any proof; mercy does not belong to you. No question of mercy, sentiment, or anything else resides with you, except the question of whether or not you believe from the evidence, and beyond a reasonable doubt, that the defendant is guilty.[91]

§ 2009(2). Florida

The jury are instructed that the presence of the defendant's family in court has nothing to do with the facts of this case, and in making up your verdict you should not permit their presence to have any influence whatever upon you.[92]

The jury are instructed that you would not be justified in acquitting a defendant on account of the consequences to him or his family alone. You have nothing to do with questions of that kind. It is no defense that the consequences would be great to a defendant or his family.[93]

The jury are instructed that you must be on your guard against conviction from prejudice or insufficient evidence. Unless you are satisfied from the evidence beyond a reasonable doubt of the guilt of the accused, you should render a verdict of not guilty, however strong may be your prejudice, if any you have.[94]

§ 2009(3). Georgia

The jury are instructed that you are not to allow your verdict to be the result of your sympathy or the result of sentiment; but you are to look to the evidence, and let your verdict be based upon that evidence, and upon the law applied to the evidence, after you have received it from the court. You are not responsible for the consequences of your verdict, and you will not take into consideration the fact that the party may have been in jail. That matter is not for your consideration.[95]

[90] State v. Reed, 100 P. 66, 79 Kan. 508.

[91] People v. Bojorquez, 169 P. 922, 35 Cal. App. 350.

[92] Day v. State, 44 So. 715, 54 Fla. 25.

[93] Lindsey v. State, 43 So. 87, 53 Fla. 56.

[94] Myers v. State, 31 So. 275, 43 Fla. 500.

[95] Foskey v. State, 45 S. E. 967, 119 Ga. 72.

§ 2009(4). Illinois

The court instructs the jury that in determining the guilt or innocence of the defendant of the crime charged in this cause the jury should not allow any prejudice which they feel against such crime to influence them against the defendant, nor should the jury, in deciding whether the defendant is innocent or guilty, feel a prejudice against the defendant on account of the nature of the evidence against him, nor should the jury allow themselves to entertain a prejudice or bias against the defendant by reason of the fact, alone, that the witnesses against him are females; and you are further instructed that you should not allow the fact that any witness has shed tears or manifested emotion upon the witness stand to give rise in your minds to pity and arouse in your minds prejudice against the defendant in deciding the question whether he is innocent or guilty of the crime charged against him.[96]

§ 2009(5). Indiana

The duty of counsel and the court has now been performed. The counsel engaged in this case have been untiring in their efforts to bring before you all possible evidence that may aid you in arriving at the truth. They have ably assisted you in applying the evidence to facts in contention. The court has endeavored to rightly advise you in the law, and now there confronts you the final and important duty of pronouncing upon the guilt or innocence of the defendant. I submit this case to you with the confidence that you will faithfully discharge the grave duty resting upon you without, upon the one hand, being moved by any undue demand for conviction on the part of counsel for the state, or being swayed from its right performance by any undue appeal to your sympathies. You will bear in mind that neither the life nor the liberty of the accused may be trifled away, and neither taken by careless or inconsiderate judgment. But if, after a careful consideration of the law and the evidence in the case, you are satisfied beyond a reasonable doubt that the defendant is guilty, you should return your verdict accordingly. Duty demands it and the law requires it. You must be just to the defendant and equally just to the state. As manly, upright men, charged with the responsible duty of assisting the court in the administration of justice, you will put aside all sympathy and sentiment, all consideration of public approval or disapproval, and look steadfastly and alone to the law and evidence in the case, and return into court such a verdict as is warranted thereby.[97]

[96] People v. Turner, 107 N. E. 162, 265 Ill. 594, Ann. Cas. 1916A, 1062.

[97] Hinshaw v. State, 47 N. E. 157, 147 Ind. 334.

§ 2009(6). Michigan

Considerable time was spent by counsel for the defense in addressing the jury in an appeal which, for the want of a better term, is commonly termed an appeal to sympathy, an appeal for sympathy, and you were asked repeatedly by counsel for respondent in the course of his remarks how you would like to have your son convicted under the testimony in this case. That is not the question at all. You are not called upon to consider it. It would be entirely improper for you to consider how you would like to have your son convicted under the testimony in this case. It is entirely safe to assume that there is not one of you who would like to have your son convicted under the testimony in this case. It is not likely that any of you who are fathers would like to have your son convicted. You are not here for that purpose. It would be entirely improper for you, as jurors, to analyze and consider the evidence in this case in the light of such a proposition, in the light of any such an attitude, or with any such frame of mind. You are here to consider the evidence that has been presented, whether or not under the evidence it appears beyond all reasonable doubt this man participated in the keeping of a bawdyhouse, a house of prostitution, a house of ill repute. You should dispel as far from your minds as you can as to what you would like to happen to your sons, those of you who have sons, under like circumstances. That appeal can no more properly be made by counsel for the respondent than it can be by the prosecuting attorney. The respondent would have no right to ask you what you would like to happen to your sons in connection with any feature in this case. It would be error for the prosecutor to make such an argument, and the court would have to reprove and reprimand him if he undertook to do it. So what is improper for him is improper for the defense.[98]

The jury are instructed that this is an important case—important to the people and important to the defendant. The people of this county are interested in seeing to it that no man who has been guilty of the offense such as the respondent is here charged with should be allowed at liberty. It is important to the defendant, in that no man who is innocent of the crime should be punished or convicted of that crime. Thus, you can see that you have an important and solemn duty to perform in this case—the duty of determining the guilt or innocence of the accused. You must approach the consideration of the case with the careful, honest, intelligent consideration such as jurors should give to matters of such importance. Your sympathies should not enter into the consideration of the matter. It is the duty of the court and the duty of the jury, in this case, to

[98] People v. Emaus, 174 N. W. 177, 207 Mich. 442.

weigh out and administer to this defendant justice, and your verdict should be founded along that line. It should not be guided by sympathy, or should not be guided by revenge. The fact that the deceased was foully murdered is not any reason this man should be convicted unless he is guilty. All such sentiment you are to leave behind you when you enter the jury room to consider of your verdict in this case, and as honest, intelligent citizens of this country you should, under the instructions I have given you, find your verdict from the evidence.[99]

§ 2009(7). Washington

You are instructed, gentlemen of the jury, that you are not to rush blindly to a conclusion in the case, or to allow yourselves to be swerved by passion or prejudice from the true line of duty as laid down in the law of the land. Neither are you to allow mere sentiment to influence you in the discharge of your duty. Whatever your verdict is, it must be the product of a careful and impartial consideration of all of the evidence in the case, under the rules of law as given you by the court. It is not sufficient for the state to make out by the testimony a strong probability of the defendant's guilt, or merely a better case than that of the defendant. In order to secure a conviction, the state must convince you by the evidence beyond a reasonable doubt that the defendant is guilty as charged in the indictment.[1]

§ 2010. Duty not to discriminate because of race

The jury are instructed that it is just as much the duty of a jury to convict a white man of the murder of a colored man as it would be the duty of the jury to convict a colored man for the murder of a white man, if you believe from all the evidence beyond a reasonable doubt that the white man is guilty.[2]

§ 2011. Consideration of evidence in light of knowledge and experience of men and affairs

§ 2011(1). Florida

The jury are instructed that, in considering and weighing the evidence, you have and should use the same judgment, reason, common sense, and general knowledge of men and affairs as you have in everyday life.[3]

§ 2011(2). Illinois

The court instructs the jury, as a matter of law, that in a criminal case the jury have a right to weigh and examine the evidence closely and carefully in the light of the common knowledge and

[99] People v. Nunn, 79 N. W. 800, 120 Mich. 530.

[1] State v. Barton, 142 P. 348, 70 Or. 470.

[2] Dolan v. State, 1 So. 707, 81 Ala. 11.

[3] Morrison v. State, 28 So. 97, 42 Fla. 149.

experience of mankind, and you have a right to take into consideration the common knowledge and experience of mankind and the course of the laws of nature in determining whether the evidence is reasonable or unreasonable or probable or improbable and in determining what weight it is entitled to receive.[4]

The court instructs you that, when the evidence is heard, jurors have the right to test its weight by their knowledge and experience and their judgment derived from experience, observation, and reflection. You are not bound to regard evidence precisely as given, but may consider its truth and weight by your knowledge of men, the affairs of life and the motives which influence persons. These are all proper and legitimate means of arriving at the truth in determining the issues in this case.[5]

§ 2012. Warning against allowing personal ideas of justice of legislation to have weight

The jury are instructed that you should not permit sympathy, or your ideas of what the law should be or whether the law sought to be enforced here is a good or desirable law, to interfere with or bias you in any degree. You should try the case solely upon the law as it exists and upon the evidence produced in court.[6]

§ 2013. With respect to influence of arguments of counsel

§ 2013(1). Iowa

The jury are instructed that, in your jury room, you should not refer to, discuss, or consider anything in connection with this case except the evidence received upon the trial. All extraneous matters, statements, and suggestions should be carefully discarded by you; and you should base your verdict solely upon the evidence, and be guided by these instructions alone. By your verdict the protection which the law wisely throws around the virtue of a woman and the family relation should not be lessened, nor the rights of this defendant disregarded.[7]

§ 2013(2). Missouri

You are instructed that the argument of counsel is for the purpose of aiding you to reach a proper verdict in the cause by refreshing in your mind the evidence which has been given to you in this cause and by showing the application of the law thereto; but, whatever counsel may say, you will bear in mind that it is your duty to be governed in your deliberations by the evidence as you understand it and remember it to be true, and by the law as given by the court in these instructions, and to render such verdict as in

[4] People v. Turner, 107 N. E. 162, 265 Ill. 594, Ann. Cas. 1916A, 1062.

[5] People v. Turner, 107 N. E. 162, 265 Ill. 594, Ann. Cas. 1916A, 1062.

[6] People v. Beecher, 154 Ill. App. 229; People v. Stone, 154 Ill. App. 7.

[7] State v. Butts, 78 N. W. 687, 107 Iowa, 653.

your conscience and reason and candid judgment seems to be just and proper.[8]

§ 2014. Urging agreement of jury

§ 2014(1). United States

The jury are instructed that in a large proportion of cases absolute certainty cannot be expected; that, although the verdict must be the verdict of each individual juror, and not a mere acquiescence in the conclusion of his fellows, yet they should examine the question submitted with candor, and with a proper regard and deference to the opinions of each other; that it is their duty to decide the case if they can conscientiously do so; that they should listen, with a disposition to be convinced, to each other's arguments; that, if much the larger number are for conviction, a dissenting juror should consider whether his doubt is a reasonable one which makes no impression upon the minds of so many men, equally honest, equally intelligent with himself. If, upon the other hand, the majority are for acquittal, the minority ought to ask themselves whether they might not reasonably doubt the correctness of a judgment which is not concurred in by the majority.[9]

Gentlemen, I wish to say this to you: That it would be a very peculiar judge who would want to keep a jury out with any desire on his part to punish or coerce you in any way. I certainly would not, if I could, coerce any jury into a verdict, because, when I finish telling you the law in the case and commit it to you, I commit it then to twelve men whose functions are just as important as mine, and who are charged with the province or a duty that is superlatively grave; and I commit it to twelve men, and I feel sure the officers have selected you because of your fitness and competency to discharge in a proper way that grave duty; but it might not be out of place for me to say this to you: That if every case of this district met with the same fate that up to this time this case has met with, it would amount practically to a denial of justice in the courts. Suppose every jury did just what you have done, then men who had cases in this court involving either rights of property or liberty would never move one peg year by year, and docket after docket. I want to say to you that courthouse trials are designed primarily to try, as far as is possible, to do abstract justice. That is primarily the object of courthouse trials; but you know as sensible men, and I know as a sensible man, that absolutely abstract justice does not obtain outside the courts of heaven, because,

[8] State v. Keyes, 93 S. W. 801, 196 Mo. 136, 6 L. R. A. (N. S.) 360, 7 Ann. Cas. 23.

[9] Allen v. U. S., 17 S. Ct. 154, 164 U. S. 492, 41 L. Ed. 528.

as long as men are imperfect, imperfection necessarily will creep into trials in the court room. That is why we have appellate courts, to correct errors in the trial court. But for that it would be an inexcusable waste of public money to have higher courts sitting in judgment on the courts below. So that one of the great objects of having courthouse trials is to end controversies. End them justly, if you can, of course; but end the controversies. In savage countries, where there are no courts, men go out and vindicate their view of the law by their own strong arms; but among civilized people we have got beyond that; and we select certain tribunals to which we submit cases for them to decide, and one of the greatest objects in view is to end controversies and it ought to be done. Why, if all of these litigants in this court had to come back court after court, time after time, it would be an endless proposition. There is going to be some jury somewhere that is going to decide the case and get over with it. You gentlemen may not do it; but if you fail to do it, there will come another jury that will, and the people will not be put to the expense of bringing witnesses here and summoning jurors from the various walks of life to try the case. Now, you gentlemen are divided as to what your verdict will be. I believe I can say, from looking on your faces, and I have had a very fair chance in judging men, that there is no man on the jury that would suffer his pride of opinion—because he had said a thing—to stand in his way, and because he said a thing not to yield to reason. Re-examine the ground, and see if you cannot agree. You know there is all the difference in the world between firmness and stubbornness. Now, the most stubborn thing on the face of this earth is a jackass. Now, a man can be firm, and a man may be stubborn. I have respect for a man that is firm in his belief, but not that much (snaps fingers) for a stubborn man. He has said the horse is seventeen feet high, and he is going to stick to it. Now, I can look at you gentlemen and feel that you are not that way. I never try a case in court that I do not frequently change opinion, and I would have a contempt for myself if some brother of the bar should convince me I was in error and I would not instantly correct it. One of the highest forms of integrity is intellectual integrity, and we all admire the man who will throw aside pride of opinion and do what he thinks right, no matter what the result will be. If I was in the minority, I would carefully go over the ground again, and see if by chance I have not happened to be mistaken and if the real wisdom of the situation wasn't perhaps with the majority of the jury. Now, gentlemen, I have made these remarks to you because I feel an interest in every controversy in every court over which I preside. Of course, I wish you

to understand that, if you have taken a position you cannot abandon without a violation of your oath and conscience, I do not expect you to abandon it, and I say that to you with all emphasis. But I don't want you to forget that a courthouse trial is not only to do justice, if you can, but to settle controversies. Why the United States might as well by special statute abolish the court of the ——— district of ——— if juries are never to agree. Gentlemen, I don't want to punish you, but I want you to go over the ground again, as men who are willing to do what is right, whether you have announced yourself on one position or not. The game fellow doesn't hesitate to say, "I am wrong" when he is wrong. Now, gentlemen, I am about through with this court here, and after I am I have to keep on working, and I am sure you are as willing to work as I am, and I hope you will reach a verdict one way or the other.[10]

§ 2014(2). Colorado

Gentlemen of the jury, it appearing to the court at this time that there is no misunderstanding or disagreement among you as to the law of this case or the interpretation of the instructions, that your deliberations have already been unusually prolonged without an agreement being reached, I deem it necessary to the administration of justice that this further instruction relative to your duties as jurors now be given: You should consider that this case must at some time be decided; that you have been selected in the same manner and from the same source as any future jury must be; that there is no reason to suppose that the case will ever be submitted to twelve men more intelligent, more impartial, or more competent to decide it, or that more or clearer evidence will be produced on the one side or the other; that in order to bring twelve minds to a unanimous conclusion you must examine the question submitted to you with candor and a proper regard and deference to the opinions of each other; that you ought to pay proper respect to each other's opinions, and listen, with a disposition to be convinced, to each other's argument. If a majority of your number are for conviction a dissenting juror should consider whether a doubt in his own mind is a reasonable one which makes no impression upon the minds of so many men equally honest and intelligent with himself, who under the sanction of the same oath have heard the same evidence, with the same attention and an equal desire to arrive at the truth. On the other hand, if a majority are for acquittal, the minority ought seriously to ask themselves whether they may not reasonably, and ought not to, doubt the correctness

[10] Bernal v. United States (C. C. A. Tex.) 241 F. 339, 154 C. C. A. 219.

of a judgment from which so many of their number dissent, and distrust the weight or sufficiency of that evidence which fails to carry conviction to the minds of their fellows. And whilst at last each juror must act upon his own judgment concerning the evidence in the case, and not upon the judgment of his fellows, it is your duty, guided by the foregoing, and by all of the instructions heretofore given in this case, to decide the case, if you can conscientiously do so. It is accordingly ordered by the court that you be returned to your jury room for further deliberation.[11]

§ 2014(3). Florida

The jury are admonished that there should be no mistrial in this case, if it be possible for the jury to agree upon a verdict, if they can do so without violating their conscientious convictions, based on the evidence. This case has taken up a whole week of this term, and has necessarily been costly to the state and county, and has forced the postponement of other important cases. The jury should therefore lay aside pride of opinion and judgment, examine any differences of opinion there may be among them in a spirit of fairness and candor, reason together and talk over such differences, and harmonize them, if this be possible, so that this case may be disposed of.[12]

§ 2014(4). Oregon.

Now, when you go back I want you to do the best you can to harmonize your differences, and everybody remember that it must be a very severe strain upon a defendant to go through an ordeal of this kind, and he is entitled to a verdict of whatever it shall be, and it is also important that the state shall have a verdict, as we will have to try the case over again if we do not get a verdict, and I want you to try not to lose your tempers and to try your best to harmonize your differences and everybody try to do right and to do what your consciences think should be done, but do not get stubborn and say you won't. Sometimes jurors get tired, and I know it is hard to ask jurors to do this work, but some jury will have to solve this, and so I will ask you to do the best that you can to solve it.[13]

§ 2015. Necessity that all jurors concur in verdict

The jury are instructed that you all must agree before you can render a verdict.[14]

[11] Sevilla v. People, 177 P. 135, 65 Colo. 437.

[12] Sigsbee v. State, 30 So. 816, 43 Fla. 524.

[13] State v. Butler, 186 P. 55, 96 Or. 219.

[14] Hooten v. State, 64 So. 200, 9 Ala. App. 9.

§ 2016. Duty of jurors to consult together

§ 2016(1). United States

The jury are instructed that juries are impaneled for the purpose of agreeing upon a verdict, if they can conscientiously do so. It is true that each juror must decide the matter for himself, yet he should do so only after a consideration of the case with his fellow jurors, and he should not hesitate to sacrifice his view or opinions of the case when convinced that they are erroneous, even though in so doing he defer to the views or opinions of others.[15]

§ 2016(2). California

You are instructed that if, after a full consideration of the entire evidence in this case, any juror should entertain a reasonable doubt of the guilt of the defendant, it is the duty of such juror so entertaining such doubt not to vote for a verdict of guilty, nor to be influenced in so doing for the single reason that a majority of the jury should be in favor of a verdict of guilty. In this connection you are instructed that juries are impaneled for the purpose of agreeing upon verdicts if they can conscientiously do so. They are admonished at each recess of the court not to form an opinion as to the merits of the case until it shall be finally submitted to them, and, when it is so submitted, it is the duty of jurors to deliberate and consult together with the view of reaching an agreement if they can without violence to their individual understanding of the evidence and instructions of the court. It is true that each juror must decide the matter for himself, yet he should do so only after a consideration of the case with his fellow jurors, and he should not hesitate to sacrifice his views or opinions of the case when convinced that they are erroneous, even though in so doing he defer to the views or opinions of others.[16]

The jury are instructed that it is the duty of every juror to reason with his fellow jurors, to the end that he may join in a lawful verdict.[17]

§ 2016(3). Massachusetts

Commonwealth v. Tuey, 8 Cush. 1. Quoted in State v. Egland, 121 N. W. 798, 23 S. D. 323, 139 Am. St. Rep. 1066. See § 2016(5).

§ 2016(4). New Mexico

Gentlemen of the jury, upon your report that you are unable to agree in the cause which has been submitted to you, I think it my

[15] Shepard v. United States (C. C. A. Cal.) 236 F. 73, 149 C. C. A. 283.

[16] People v. Verduzco, 110 P. 970, 13 Cal. App. 789.

[17] People v. Richards, 82 P. 691, 1 Cal. App. 566.

duty to remind you that this is the second trial of the cause; that each trial has, as a matter of course, been attended with large expense to the county and presumably to the defendant; and that you should make another effort to agree. To aid you in the further consideration of the case, I instruct you that, although the verdict to which a juror agrees must of course be his own verdict, the result of his own convictions, not a mere acquiescence in the conclusion of his fellows, yet, in order to bring twelve minds to a unanimous result, you must examine the questions submitted to you with candor and with a proper regard and deference to the opinion of each other. You should consider that the case must at some time be decided; that you are selected in the same manner and from the same source from which any future jury must be; and there is no reason to suppose that the case will ever be submitted to twelve men more intelligent, more impartial, or more competent to decide it, or that more and clearer evidence will be produced on the one side or the other. And, with this view, it is your duty to decide the case if you can conscientiously do so. In conferring together, you ought to pay a proper respect to each other's opinion, and listen, with a disposition to be convinced, to each other's arguments. On the one hand, if the larger number of your panel are for conviction or for conviction of a certain degree of murder or manslaughter a dissenting juror should consider whether a doubt in his own mind is a reasonable one, which makes no impression on the minds of so many men, equally honest, equally intelligent with himself, and who have heard the same evidence, with the same attention, and with an equal desire to arrive at the truth, and under the sanction of the same oath. And, on the other hand, if a majority are for the defendant, the minority ought seriously to ask themselves whether they may not reasonably and ought not to doubt the correctness of a judgment which is not concurred in by most of those with whom they are associated; and distrust the weight and sufficiency of that evidence which fails to carry conviction to the minds of their fellows.[18]

§ 2016(5). South Dakota

It is proper for the court to remind you that you should try to come to an agreement in this case. The only mode provided by our laws for deciding questions of fact in criminal cases is by the verdict of a jury. In a large proportion of cases, and perhaps, strictly speaking, in all cases, absolute certainty cannot be attained or expected. Although the verdict to which a juror agrees must, of course, be his own verdict, the result of his own convictions, and

[18] Territory v. Donahue, 113 P. 601, 16 N. M. 17.

not a mere acquiescence in the conclusion of his fellows, yet, in order to bring twelve minds to a unanimous result, you must examine the questions submitted to you with candor, and with a proper regard and deference to the opinions of each other. You should consider that the case must at some time be decided; that you are selected in the same manner, and from the same source, from which any future jury must be, and there is no reason to suppose that this case will ever be submitted to twelve men more intelligent, more impartial, or more competent to decide it, or that more or clearer evidence will be produced on the one side or the other. And with this view it is your duty to decide the case, if you can conscientiously do so. In order to make a decision more practicable, the law imposes the burden of proof on one party or the other in all cases. In the present case the burden of proof is upon the state to establish every part of it, beyond a reasonable doubt; and if, in any part of it, you are left in doubt, the defendant is entitled to the benefit of the doubt, and must be acquitted. But, in conferring together, you ought to pay a proper respect to each other's opinions, and listen, with a disposition to be convinced, to each other's arguments. On the one hand, if much the larger number of your panel are for conviction, a dissenting juror should consider whether a doubt in his own mind is a reasonable one which makes no impression upon the minds of so many men, equally honest, equally intelligent with himself, and who have heard the same evidence, with the same attention, with an equal desire to arrive at the truth, and under the sanction of the same oath. And, on the other hand, if a majority are for acquittal, the minority ought seriously to ask themselves, whether they may not reasonably, and ought not to, doubt the correctness of a judgment which is not concurred in by most of those with whom they are associated, and distrust the weight or sufficiency of that evidence which fails to carry conviction to the minds of their fellows.[19]

§ 2017. Duty to construe instructions as a whole

§ 2017(1). Alabama

The court further charges the jury that all the charges read by defendant's counsel do not in any way conflict with, but are in harmony with, the charge given by the court, and they should not consider them to the exclusion of the charge of the court, because the written charges are only a different way of expressing the law.[20]

[19] State v. Egland, 121 N. W. 798, 23 S. D. 323, 139 Am. St. Rep. 1066.

[20] Hammond v. State, 41 So. 761, 147 Ala. 79.

§ 2017(2). Arkansas

You are instructed that no one instruction should be considered by you alone; but all the law or instructions given you by the court are to be considered together as the law governing the case. I instructed you on the law, provided the evidence and the theory of the state be true. I have also instructed you upon the law, provided the evidence and theory of the defendants be true. It is a question of fact for you to decide which to be true.[21]

[21] Dempsey v. State, 102 S. W. 704, 83 Ark. 81.

CHAPTER XCVIII

CROPS

§ 2018. Effect of conveyance of land as passing crop.
Liability for injuries inflicted by animals upon crops or pasturage, see ante, § 786.
Measure of damages for injuries to growing crops, see post, § 2063.

§ 2018. Effect of conveyance of land as passing crop

The jury are instructed that if you find from the evidence, that one P. was the owner of a farm in this county, that he had leased said farm for the cropping season of ——— to H., the rent to be paid in a portion of the crop, to be delivered at the time of gathering, that H. had been in possession and raised a crop of corn thereon, that the tenancy, by the terms of the contract, had expired, but the tenant was still in possession by the consent of said P., and was to have until the ——— to remove his crop, and that about ———, after the crop of corn was entirely matured and ready for gathering, and a part had been gathered, and P.'s portion placed to itself in a pen on the place, and the balance was still standing in the field, all still under the possession and control of the tenant, ready to be delivered to P. as it was gathered, P. sold the farm to the defendant, and gave him possession subject to the rights of H. to get off his crop, and subsequently executed and delivered to the defendant a deed in pursuance of such sale, then the rent corn going to P. did not, by virtue of such sale and conveyance of the farm alone, pass to the defendant.[1]

[1] Moffett v. Armstrong, 40 Iowa, 484.

CHAPTER XCIX

CUSTOMS AND USAGES

§ 2019. Requisites.
2019(1). Iowa.
2019(2). Kentucky.
2019(3). Nebraska.
2020. Operation and effect.
2020(1). Connecticut.
2020(2). Kentucky.
2020(3). Nebraska.

§ 2019. Requisites

§ 2019(1). Iowa

The jury are instructed that by the term "general custom" is meant the general way of doing some particular thing—the usual way of doing such thing. To establish a general custom in reference to any particular thing, or way or manner of doing such thing, it must be made to appear from the evidence that such custom was generally and uniformly extended to all persons, under like circumstances and conditions, and that the same is notorious; that is, well understood. So if, in the case at bar, it does not appear from the evidence that all persons holding tickets or passes from points west of ——— to ——— were allowed to take their choice of line, either by ——— or ——— to ———, then the general custom in question in this case is not established.[1]

The jury are instructed that a custom or usage governing a question of legal right cannot be proved by isolated instances, but should be so certain, uniform, and notorious that it must probably have been understood by the parties as entering into the contract. The burden is upon the plaintiff to prove that such a custom existed, by a preponderance of testimony; and, if you should find that he has failed to establish such a custom by a preponderance of testimony, then, upon that branch of the case, you should not consider it further as having any bearing upon the case, in making up your verdict.[2]

§ 2019(2). Kentucky

The court instructs the jury that, before they can find for defendant on account of the custom referred to in instruction No ———, they must believe from the evidence that such custom was reasonable and of such age, such uniformity of observance at the point of delivery of the logs, such certainty and fixedness of character, and of such notoriety, that a jury would feel clear in saying

[1] Milroy v. Chicago, M. & St. P. Ry. Co., 67 N. W. 276, 98 Iowa, 188. This instruction was not excepted to.

[2] Milroy v. Chicago, M. & St. P. Ry. Co., 67 N. W. 276, 98 Iowa, 188. This instruction was not excepted to.

that such custom was known to the plaintiff at the time of the making of the contract.[3]

§ 2019(3). Nebraska

The court instructs you that a usage and custom of trade or business, in order to be binding upon the parties, must be generally known and established among those who are engaged in the business where the usage and custom are claimed to exist, and so well settled and so uniformly acted upon as to raise a fair presumption that it was known to both the contracting parties, and that they contracted in reference to it, and in conformity to it.[4]

§ 2020. Operation and effect.

§ 2020(1). Connecticut

The jury are instructed that, if you should find that such custom or usage prevailed between the wholesale and retail lumber trade at the time the parties entered into the contract for the sale and purchase of the lumber; that it prevailed and was then operative in ——— then you will find that such custom or usage was a part of the contract between the parties, and that the agreement of the parties was made in contemplation of such custom or usage.[5]

2020(2). Kentucky

You are instructed that, if the jury believe from the evidence that the defendant delivered to the plaintiff in ——— creek at the mouth of ——— and ——— creeks about ——— yellow poplar logs mentioned in the contract read to them in evidence, or shall believe from the evidence that at the time of making said contract there existed at said point of delivery a custom as referred to in instruction No. ———, to cut logs delivered into standard lengths. and that, if the logs so delivered had been cut into standard lengths, there would have been about ——— of them, or that the defendant failed to so cut said logs into standard lengths at the request of the plaintiff, and if so cut there would have been about ——— of them, they will find for the defendant, provided they further believe from the evidence that the logs delivered were all of the three lots of logs mentioned in the contract.[6]

§ 2020(3). Nebraska

You are instructed that while a usage or custom of trade and business cannot be set up to contravene an established rule of law, or to vary the terms of an express contract, yet all contracts made in the ordinary course of business, without particular stipulation to the contrary, are presumed to be made in reference to the usages and customs of such business, if any such exists.[7]

[3] Thomas v. Charles, 119 S. W. 752.

[4] Standley v. Clay, Robinson & Co., 94 N. W. 140, 68 Neb. 332.

[5] J. E. Smith & Co. v. Russell Lumber Co., 72 A. 577, 82 Conn. 116.

[6] Thomas v. Charles, 119 S. W. 752.

[7] Standley v. Clay, Robinson & Co., 94 N. W. 140, 68 Neb. 332.

CHAPTER C

DAMAGES

A. Proximate and Remote Cause

§ 2021. Breach of contract.
2022. Recovery for personal injuries.
2022(1). Delaware.
2022(2). Kentucky.
2022(3). Texas.
2023. Effect of disease contracted before or after receiving personal injuries.
2023(1). Delaware.
2023(2). Indiana.
2023(3). Kentucky.
2023(4). Michigan.
2023(5). Mississippi.
2023(6). Oregon.
2023(7). Texas.
2024. Effect of permanent injuries received in former accident.
2025. Personal injuries aggravating previous diseased condition or rendered more serious by such condition.
2025(1). United States.
2025(2). Delaware.
2025(3). Florida.
2025(4). Georgia.
2025(5). Indiana.
2025(6). Missouri.
2025(7). Nevada.
2025(8). Texas.
2025(9). Washington.
2026. Injury of one predisposed to disease.
2026(1). Arkansas.
2026(2). Indiana.

B Avoidable Consequences

2027. Duty of injured person to minimize results of wrong.
2027(1). Illinois.
2027(2). Oregon.
2028. Duty to minimize results of personal injuries and effect a cure.
2028(1). Arkansas.
2028(2). Indiana.
2028(3). Kentucky.
2028(4). Massachusetts.
2028(5). Missouri.
2028(6). Nevada.
2028(7). Tennessee.
2028(8). Texas.
2029. Same—Duty with respect to employment of competent physician.
2029(1). Illinois.
2029(2). Indiana.
2029(3). Iowa.
2029(4). Texas.
2030. Same—Duty with respect to getting best medical treatment.
2031. Duty to undergo surgical operation.
2031(1). California.
2031(2). Missouri.

§ 2032. Effect of unskillful or improper treatment of physician.
2032(1). California.
2032(2). Kansas.
2032(3). Massachusetts.
2033. Duty to follow instructions of physician.
2033(1). Michigan.
2033(2). Texas.
2034. Duty of plaintiff with respect to diet or exposure to weather.
2034(1). Indiana.
2034(2). Missouri.

C. PERSONAL INJURIES

2035. Elements of damage in general.
2035(1). United States.
2035(2). Alabama.
2035(3). Arkansas.
2035(4). California.
2035(5). Colorado.
2035(6). Delaware.
2035(7). Georgia.
2035(8). Idaho.
2035(9). Illinois.
2035(10). Indiana.
2035(11). Iowa.
2035(12). Kansas.
2035(13). Kentucky.
2035(14). Maryland.
2035(15). Michigan.
2035(16). Minnesota.
2035(17). Missouri.
2035(18). Montana.
2035(19). Nebraska.
2035(20). North Carolina.
2035(21). Oklahoma.
2035(22). Oregon.
2035(23). Texas.
2035(24). Utah.
2035(25). Virginia.
2035(26). Washington.
2035(27). West Virginia.
2035(28). Wisconsin.
2036. Recovery, in one action, of all damages, past, present, and future.
2036(1). Michigan.
2036(2). North Carolina.
2037. Permanent injuries.
2037(1). Kentucky.
2037(2). Maryland.
2037(3). Texas.
2037(4). Virginia.
2037(5). West Virginia.
2038. Injuries not permanent.
2039. Prospects of plaintiff in his particular vocation.
2039(1). Georgia.
2039(2). Washington.
2040. Physical pain, mental anguish, and nervous shock.
2040(1). Alabama,
2040(2). Arkansas.
2040(3). Colorado.
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A. PROXIMATE AND REMOTE CAUSE

§ 2021. Breach of contract

The jury are instructed that, if the jury believe from the evidence that, notwithstanding the fact the defendants have failed to keep open the ditch for the time alleged, yet if, from the filling up of the mill pond below the head of the old pond, or from other causes, the cutting or keeping open said ditch during such time would not have drained the lands of the plaintiffs, or enabled the plaintiffs to do so, then the jury ought not to find damages as resulting from said failure, there being some evidence tending to show that said pond has been filled up from causes beyond the control of said _____.[1]

§ 2022. Recovery for personal injuries

§ 2022(1). Delaware

You are instructed that in no event can damages be allowed except such as resulted directly from the negligent act of the defendant. Damages produced by other agencies than those causing the injury cannot be awarded as proper compensation.[2]

You are instructed that the father is entitled to the services of a minor child, and if such services were lost or impaired by the negligence of the defendant, the father is entitled to be reasonably compensated for such loss or impairment. But even if the defendant is liable, by reason of its negligence, for such loss of services, a recovery can be had only for such a sum as the evidence shows the father actually sustained on account of the injuries complained of caused by the defendant's negligence, and not for any loss of

[1] Michie et al. v. Cochran et al., 25 S. E. 884, 93 Va. 641.

[2] Braunstein v. People's Ry. Co., 78 A. 609, 2 Boyce, 55; Baldwin v. People's Ry. Co., 76 A. 1088, 7 Pennewill, 81.

services caused by affliction, sickness, disease, or anything else that did not result from the accident and defendant's negligence.[3]

§ 2022(2). Kentucky

You are instructed that, even though the jury believe that the plaintiff received an injury by the buggy in which she was driving being turned over and her falling therefrom while said buggy was on ——— avenue and by reason of the negligence of the defendant company, yet if they further believe from the testimony that after the buggy had been removed from ——— avenue to ——— avenue the plaintiff then got in said buggy and jumped therefrom, and received any additional injury, or her former injury was aggravated to any degree, they should not, in fixing the damages to which the plaintiff may be entitled, if any, include therein any compensation for any injury received by the plaintiff in jumping from the buggy while it was on ——— avenue or any pain or physical or mental suffering by reason thereof, or for any aggravation or increase of the injury or of the physical or mental suffering caused by her act in jumping from the buggy while it was on ——— avenue.[4]

The court instructs the jury that, if you find for plaintiff, you should not allow him anything by way of damages for any sufferings, physical or mental, or impairment of his ability to earn money, caused alone by the first or third breaking of his leg, nor should you allow him any damages for the amputation of his leg following its third breaking, unless you believe from the evidence that such amputation was the direct and proximate result of the second breaking of his leg, caused by his fall from the ladder, if he did so fall.[5]

§ 2022(3). Texas

You are instructed that, if you believe from the evidence that the injuries complained of by plaintiff in his petition are in part the result of a former accident, then, to that extent, allow him nothing therefor, as you can take into consideration herein only such injuries as you find from the evidence proximately resulted from the accident in question, if any.[6]

§ 2023. Effect of disease contracted before or after receiving personal injuries

§ 2023(1). Delaware

You are instructed that plaintiffs cannot recover for the effect of tuberculosis or any other disease contracted after the accident, un-

[3] Baldwin v. People's Ry. Co., 76 A. 1088, 7 Pennewill, 81.

[4] Kentucky Traction & Terminal Co. v. Sharp, 197 S. W. 463, 176 Ky. 794.

[5] East Tennessee Telephone Co. v. Jeffries, 154 S. W. 1112, 153 Ky. 133. Plaintiff's leg was broken three times in the same place; the suit being for the second breaking.

[6] St. Louis B. & M. Ry. Co. v. Vernon (Civ. App.) 161 S. W. 84.

less it is satisfactorily shown to the jury that such disease was the natural and probable consequence of the defendant's negligence.[7]

You are instructed that the defendant can be held liable only for such negligence as constituted the proximate cause of the injuries complained of. In order for the plaintiff in either of the cases befor you to recover at all, it must be proved to your satisfaction that defendant's negligence was the proximate cause of the injuries complained of. There can be no recovery for the effects of any disease contracted before the accident, unless the jury are clearly satisfied from the evidence that such disease was aggravated or increased by the negligent act of the defendant, and even then recovery could be had only to the extent that such effects were so aggravated or increased. We say to you, therefore, that no recovery can be had for the effects of any disease contracted or suffered by ——— which was not the natural and probable consequence of the defendant's negligence. The question always is: Was there an unbroken connection between the wrongful act and the injury—a continuous operation? Did the facts constitute a continuous succession of events, so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and the injury? Unless the evidence of the plaintiff is sufficient to show the connection between the immediate cause of the death and the injury received, the plaintiff cannot recover for the effects or consequences of the disease that caused the death. In no event can damages be allowed, except such as resulted directly from the negligent act of the defendant. Damages produced by other agencies than those causing the injury cannot be awarded as proper compensation.[8]

§ 2023(2). Indiana

The court further instructs the jury that the plaintiff must show, by a preponderance of the evidence, that any injuries, ailments, or diseases from which she is now suffering, if any such there be, are the result of her injuries sustained at the time of the accident in evidence. And the court further instructs the jury that unless they find the facts to be so established by a preponderance of the evidence, they cannot assume that such injuries, ailments, or diseases have resulted from said accident.[9]

§ 2023(3). Kentucky

The jury are instructed that, although they may believe from the evidence that plaintiff was permanently injured by the negligence of

[7] Baldwin v. People's Ry. Co., 76 A. 1088, 7 Pennewill, 81.

[8] People's Ry. Co. v. Baldwin, 72 A. 979, 7 Pennewill, 383.

[9] Louisville, N. A., etc., R. Co. v. Falvey, 3 N. E. 389, 104 Ind. 409.

the defendant and his power to earn money was diminished or destroyed thereby, yet if they further believe from the evidence that he was afflicted with tuberculosis of the throat and lungs, which diminished or destroyed his power to earn money, and this disease was not caused by or directly attributable to the injuries he received, the jury, if they find for the plaintiff, should not allow anything for the impairment or destruction of his earning capacity caused by this disease. But if they believe that the tuberculosis was wholly caused by and directly attributable to the injuries he received, the jury should not diminish the finding, if any, in his behalf on account of this disease.[10]

§ 2023(4). Michigan

You are instructed that the fact that plaintiff, at the time he claims to have received the injury in question, was suffering from other ailments or disease, will not alone prevent a recovery by plaintiff for the pains and suffering and other injuries caused solely by and resulting from the accident, although he was more susceptible to suffering because of other ailments or disease.[11]

§ 2023(5). Mississippi

The court instructs the jury for the plaintiff that if you find for the plaintiff that defendant is liable for his injury, if any, then in considering the damages, if any, if you believe from all the testimony that the plaintiff's present physical condition was proximately caused by the fall and injury to his back, then you may find for the plaintiff and assess such compensatory damage for such injury, if any; and, although you might further believe the tubercular germ was not and could not be created by the injury, yet if you believe but for this injury, if any, he would not have suffered any injury or damage from the tubercular germ and that this injury was the proximate cause of his present condition including the tubercular infection; then you may take his condition in consideration in assessing damage.[12]

The court instructs the jury for the plaintiff that, if you find for the plaintiff that defendant is liable for his injury, if any, then in assessing damages, if any, though you may not believe from the evidence in the case that the plaintiff had tuberculosis or consumption, and even though you may not believe, if you believe he had it, that the same was the result of the injury, yet if you believe that the plaintiff received a fall in the manner alleged in the declaration, and as a proximate and direct result thereof received and sustained any injury, then it is the sworn duty of the jury to find for the

[10] Taylor Coal Co. v. Miller, 182 S. W. 920, 168 Ky. 719.

[11] Hunter v. Village of Durand, 100 N. W. 191, 137 Mich. 53.

[12] Mississippi Cent. R. Co. v. Lott, 80 So. 277, 118 Miss. 816.

plaintiff and assess such damages as will, in your judgment from the testimony in the case, compensate him for all the injuries sustained on account of said fall.[13]

§ 2023(6). Oregon

I instruct you in this case, if you find that this plaintiff's present condition is due to some disease or organic trouble, whether it be hereditary, or whether he became afflicted during his lifetime, then he could not recover in this case. If you find that at the time of the accident he was suffering from some disorder or disease or illness, and that the injury which he claims occurred on ——— merely aggravated his condition, that is, made the condition worse, in such event he could not recover in this case. He alleges in his complaint that this injury is the only cause of his present condition, and he would be required to prove that by a preponderance of the evidence.[14]

§ 2023(7). Texas

The jury are instructed that, if you find for plaintiff, you will allow him such sum as you may believe from the evidence will, as a present cash payment, reasonably and fairly compensate him for mental and physical pain, if any, which he has suffered as the result of such injury, if any; also, the reasonable value of his services for the time lost, if any, by reason of his injury, if any; also, for his diminished capacity to labor and earn money in the future, if any, by reason of his injury, if any; also, for the physical and mental pain, if any, it is reasonably probable he will suffer in the future by reason of the injury, if any. In this connection you are instructed that plaintiff has testified to certain conditions of his eyes existing prior to said alleged injury. You cannot allow plaintiff anything for any physical or mental pain, for any diminished capacity to labor and earn money, or for any time lost that you may believe from the evidence resulted or will result from such former condition of his eyes. You can only take into consideration that which resulted from the injury, if any, received on the occasion in question.[15]

You are instructed that, should you find for the plaintiff, you will assess his damages at such sum as will in your judgment reasonably compensate him for any injury he has sustained, taking into consideration the nature and character of the injury, if any, sustained by his wife, whether or not it is temporary or permanent, and any pain, if any, you find she has suffered from said injury, if any. If you find that the wife was injured in her arm or shoulder,

[13] Mississippi Cent. R. Co. v. Lott, 80 So. 277, 118 Miss. 816.

[14] Hudson v. Brown Lumber Co., 154 P. 533, 80 Or. 506.

[15] Missouri, K. & T. Ry. Co. of Texas v. Bush, 120 S. W. 224, 56 Tex. Civ. App. 69.

and that this injury caused her shoulder joint to become diseased, and if you should find for the plaintiff, then you should consider the injury if any from such diseased shoulder joint and any pain, if any, such diseased shoulder joint has caused the wife in assessing the damages of plaintiff. However, if you should find for the plaintiff, and if you should find that the shoulder joint of the wife is diseased and thereby injured, and that she has suffered pain from such diseased shoulder joint, and if the evidence fails to show by a preponderance thereof that this diseased condition of said shoulder joint was caused by an injury done her by the defendant, then in assessing the damages of plaintiff you will not consider any damages, if any, from such diseased shoulder joint, nor any pain, if any, suffered by the wife from such diseased shoulder joint.[16]

You are instructed that, if you believe from the evidence that the plaintiff was affected with hysteria and neurasthenia before the accident, and that, after the accident, she was affected with hysteria and neurasthenia, then you should determine whether her condition after the accident was worse than it was before the accident, and, if it was, then it would be your duty to determine what cause or causes contributed to such worse condition if any, and if you find that the aggravation in her condition was caused by the natural progress of her affliction, if any, then you should find for the defendant, or if you find that her worse condition, if any, since the accident was and is caused by the natural progression of her former disease, if any, and also by the street car accident, then you are charged that you can allow plaintiff nothing for any aggravation, if any, in her condition since the accident, which aggravation would be under the evidence attributable to the natural progress of her disease if any before the accident.[17]

§ 2024. Effect of permanent injuries received in former accident

The jury are instructed that, if you believe from the evidence that, at the time of the accident complained of in the plaintiff's petition, the plaintiff was already suffering from permanent injuries, which he had received in other accidents, which had previously befallen him, then no damages can be assessed against defendant for or on account of such permanent injuries, if any, that the plaintiff had so formerly received.[18]

[16] Texas & P. Ry. Co. v. Boleman, 112 S. W. 804.

[17] El Paso Electric Ry. Co. v. Bolgian (Civ. App.) 109 S. W. 388.

[18] Marshall v. Kansas City, 93 Mo. App. 154.

§ 2025. Personal injuries aggravating previous diseased condition or rendered more serious by such condition

§ 2025(1). United States

You are further instructed that if you find from the evidence that the plaintiff received the injuries complained of by reason of the defendant's negligence alleged in the complaint, and that at the time of the reception of such injuries the plaintiff had been suffering from some disease, and further find that such injuries hastened the development of the disease, and that thereby, without the fault of the plaintiff, his present condition, whatever you may find that to be, has resulted from such injury, then I instruct you that the plaintiff is entitled to recover such damages as you may determine he has sustained from the injury.[19]

§ 2025(2). Delaware

You are instructed that no recovery can be had for the effects of any disease contracted or suffered by the plaintiff which was not the natural and probable consequence of the defendant's negligence.[20]

You are instructed that, if you find from the evidence that by reason of the defendant's negligence the plaintiff was subjected to an injury or shock which increased or aggravated a disease with which the plaintiff had previously been afflicted, the plaintiff may recover damages for the effects of such disease, but only to the extent that such effects were increased or aggravated by the injury or shock caused by the defendant's negligence.[21]

You are instructed that there can be no recovery for the effects of any disease contracted before the accident, unless the jury are clearly satisfied from the evidence that such disease was aggravated or increased by the negligent act of the defendant, and even then recovery could be had only to the extent that such effects were so aggravated or increased.[22]

§ 2025(3). Florida

You are instructed that, if you should find from the evidence that the plaintiff was, at the time of the injury, suffering from any physical malady, and that injuries sustained in the wreck testified to contributed to such malady or inflamed the diseased parts, the plaintiff is entitled to recover for the injuries consequent upon such injury.[23]

[19] Southern Pac. Co. v. Cavin (C. C. A. Cal.) 144 F. 348, 75 C. C. A. 350.

[20] Braunstein v. People's Ry. Co., 78 A. 609, 2 Boyce, 55.

[21] Braunstein v. People's Ry. Co., 78 A. 609, 2 Boyce, 55.

[22] Baldwin v. People's Ry. Co., 76 A. 1088, 7 Pennewill, 81.

[23] Atlantic Coast Line R. Co. v. Dees, 48 So. 28, 56 Fla. 127.

§ 2025(4). Georgia

The jury are instructed that this plaintiff contends that she was in good health at the time she claims to have been injured. Good health is a relative term, and does not mean absolute freedom from physical infirmity, but only such a condition of body and mind as that one may discharge the ordinary duties of life without serious strains upon the vital powers; and in this case, if you should believe from the evidence and the rules of law given you in charge that the plaintiff is entitled to recover, notwithstanding it may appear from the evidence that at the time of the injury the plaintiff was laboring under an infirmity of which she was ignorant, and which did not interfere with the discharge by her of the ordinary duties of life, and notwithstanding the injury, if she received such, did not entirely produce the infirmity, but aggravated the existing infirmity, if such existed, the recovery in that case would be to the extent you find the infirmity was aggravated by the injury.[24]

§ 2025(5). Indiana

You are instructed that evidence has been admitted tending to show that the decedent was suffering from chronic ailments at the time of his injury. Such evidence should be considered by you in estimating the amount of damages you will allow, if any, and only for that purpose, unless you find from a preponderance of the evidence that such chronic ailments, and not the accident, were the proximate and immediate cause of his death.[25]

§ 2025(6). Missouri

The court instructs the jury that, if defendants were guilty of negligence as defined in other instructions, then they are responsible for all the ill effects shown in the evidence, if any, which naturally and necessarily followed the injuries, if any, in the condition of health in which plaintiff was at the time, and that it is no defense that the injuries, if any, may have been aggravated and rendered more difficult to cure by reason of plaintiff's previous state of health, or that by reason of latent ailments the injuries, if any, were rendered more serious to her than they would have been to a person in robust health, and that it is no defense to say that such injuuries would not have occurred, or would not have been so great, had the passenger been in good health.[26]

The court instructs the jury that, even though you should find and believe from the evidence that plaintiff had tuberculosis in her right knee or in her right leg, or in her system generally, or

[24] City of Atlanta v. Hampton, 77 S. E. 393, 139 Ga. 389.

[25] Bailey v. Columbia Grocery Co., 124 N. E. 784.

[26] Gillogly v. Dunham, 174 S. W. 118, 187 Mo. App. 551.

had any other disease latent in her system, still, if you find and believe from the evidence that she was injured under the conditions and at the time and place set out in instruction No. ———, then the court instructs you that defendant is responsible to plaintiff for all effects which naturally and necessarily followed the injury, if any, in the condition of health in which plaintiff was or plaintiff's said right leg or right knee was at the time, and it is no defense that the injuries, if any, may have been aggravated and rendered more difficult to cure by reason of plaintiff's state of health, or that by reason of latent diseases the injuries, if any, were rendered more serious to her than they would have been to a person of robust health.[27]

§ 2025(7). Nevada

The jury are further instructed that if they believe from the evidence that, previous to the accident complained of, the plaintiff was suffering from varicose veins in the left leg, or from any other physical disability, and that such varicose veins or physical disability were aggravated by the injury complained of, and that the plaintiff used reasonable care in attending and treating said injury, then the plaintiff would be entitled to recover such an amount as would compensate him for the aggravation of the previous disability through the injury received. And, in determining whether the plaintiff used reasonable care, you are instructed that reasonable care is such care as a person of ordinary intelligence and prudence would use under the circumstances of the case.[28]

The jury are instructed that if they believe from the evidence that, previous to the accident complained of, the plaintiff was suffering from varicose veins in the left leg, or from any other physical disability, and that his previous physical disability was aggravated by want of ordinary care upon his part in attending or caring for any injury received by him while a passenger upon one of defendant's trains, the plaintiff is not entitled to recover from the defendant any damages, because of such aggravation of his previous physical disability.[29]

§ 2025(8). Texas

In this connection you are instructed that if you believe from the evidence plaintiff had received an injury or injuries prior to the injuries he received, if any, on the occasion in question, you cannot allow him anything by reason of said former injuries, by rea-

[27] Smart v. Kansas City, 105 S. W. 709, 208 Mo. 162, 14 L. R. A. (N. S.) 565, 123 Am. St. Rep. 415, 13 Ann. Cas. 932.

[28] Murphy v. Southern Pac. Co., 101 P. 322, 31 Nev. 120, 21 Ann. Cas. 502.

[29] Murphy v. Southern Pac. Co., 101 P. 322, 31 Nev. 120, 21 Ann. Cas. 502.

son of any physical or mental suffering, if any, had by him in the past, or by reason of any physical or mental suffering you may believe by the evidence will be occasioned him in the future, or by reason of any loss of time, or of any value for diminished capacity to labor and earn money in the future, which you may believe from the evidence has resulted or will result by reason of any former injury or injuries received by plaintiff; if, however, you believe from the evidence that plaintiff had received a former injury or injuries, but you further believe from the evidence that said former injury or injuries were aggravated on said occasion, then you will allow plaintiff for those items of damages above enumerated which you believe from the evidence directly resulted from such aggravation, if any.[30]

You are instructed that if the plaintiff was afflicted with trouble with his bladder before the accident, and if such affliction of his bladder was aggravated as the result of injuries, if any, received by him in the wreck, and if defendant was liable to plaintiff on account thereof, then you will consider same in estimating his damages, if any, as instructed in the ——— paragraph of this charge.[31]

§ 2025(9). Washington

You are instructed that any soreness or trouble of plaintiff's eyes prior to that time would not in itself be any defense. That would simply go to the amount of the recovery. Defendants would not have any right to injure or damage plaintiff's eyes because of the fact that they were sore or diseased, if you find that they were sore and diseased. On the other hand, the defendants would not be responsible for such soreness or disease not caused by the acts of the defendants as set forth in the complaint. For any aggravation, however, of such trouble, or any injury in addition to any prior trouble, if any, the defendants would be liable, if liable at all. You will therefore not consider this affirmative defense pleaded in the answer as a separate affirmative defense, but can only take into consideration the matters pleaded therein in determining the amount of your verdict, if you should find in favor of the plaintiff.[32]

The court instructs the jury that the ultimate questions of fact for you to determine are therefore: First, whether or not the injuries of which Mrs. ——— complains, namely, a diseased appendix and a retroverted womb, were caused by the accident in question; and, if you find that they were, then, second, what sum will

[30] Galveston, H. & S. A. Ry. Co. v. Coker (Civ. App.) 135 S. W. 179.

[31] Ft. Worth & D. C. Ry. Co. v. Morrison, 123 S. W. 621, 58 Tex. Civ. App. 158.

[32] Britz v. Houlehan, 137 P. 1035, 77 Wash. 506.

fairly compensate her for such injuries? It is charged in the complaint in this case that one of the results of the accident referred to in the complaint, so far as Mrs. ——— is concerned, is the disease of appendicitis. It is claimed by the defendant that Mrs. ——— had appendicitis before this accident. It is alleged in the complaint that before the accident plaintiff was in all respects a strong and healthy woman. It is not alleged in the complaint that plaintiff had a chronic or catarrhal appendicitis, and that the accident aggravated the disease and produced a condition of acute appendicitis, necessitating an operation. I charge you that, if you find from the evidence that plaintiff Mrs. ——— had and suffered from a diseased appendix before and down to the accident, then plaintiffs cannot recover in this action on account of their claim for appendicitis or the expense of the surgical operation therefor and you shall not allow the plaintiffs any damages on account of the claim of appendicitis, or the surgical operation for appendicitis. It is charged in the complaint that one of the results of the accident referred to in the complaint was retroversion of the womb. It is claimed by the defendant that retroversion of the womb could not be caused by this accident; that, if the plaintiff Mrs. ——— had retroversion of the womb, she had it before this accident. If you find that Mrs. ——— had a retroverted womb prior to the accident, and that she knew thereof, then plaintiffs cannot recover in this action on account of their claim for a retroverted womb, or the expense of the surgical operation therefor, nor, under the circumstances, could plaintiffs recover if the accident aggravated the condition, since, if Mrs. ——— knew that she had a retroverted womb at and prior to the time of the accident, then it was her duty to so allege, and not allege that she was a perfectly sound and healthy woman. If, however, you find that Mrs. ——— had a retroverted womb at and prior to the time of the accident, and she was ignorant thereof, then, before plaintiffs would be entitled to damages on that account, they must show that the condition of retroversion was aggravated by the accident. If you find that she had a retroverted womb, and that it was not aggravated by the accident, then plaintiffs will not be entitled to any damages on account of the retroverted womb or any expense attending and resulting from the operation of restoring it to its proper position. On the other hand, if she had a retroverted womb at and prior to the time of the accident, and she was ignorant thereof, and the accident aggravated the condition, causing her pain and distress, then plaintiffs would be entitled to damages for such aggravation. You must, so far as you can, separate the results of the infirmities of Mrs. ———, if any, which existed be-

fore the accident from the results of the accident. It is only the accident and the natural results of the accident that you are to consider, if you arrive at the question of damages in this case. If you find the fact to be that Mrs. ——— had retroversion of the womb before the accident, and the same was aggravated by the accident, in considering the question of damages, you are only to consider the aggravation, and not the natural and probable consequences of the retroversion of the womb, which existed before the accident.[33]

§ 2026. Injury of one predisposed to disease

§ 2026(1). Arkansas

The jury are instructed that, if you find that the defendant company in this case is liable under the instructions given by the court, and that the plaintiff received injuries complained of in the manner alleged, and that at the time of such injury he was predisposed to hernia, but otherwise in good health, and that said injury was solely excited or caused by the sudden jerk of the handle of the lug hook in plaintiff's hand, and without his fault, and that his injury, whatever you find that to be, has directly resulted therefrom, then you are instructed that the plaintiff is entitled to recover to the fullest extent of whatever you find his injuries so received to warrant, notwithstanding such predisposition or weakness in regard to hernia.[34]

§ 2026(2). Indiana

The jury are instructed that a common carrier of passengers is bound to carry and transport for hire persons who are sick, weak, debilitated, or predisposed to disease, as well as those who are healthy and robust; and if you find from the evidence that the plaintiff received the injuries complained of, or any of them, in the manner alleged in the complaint, and that at the time of the reception of said injuries, or any of them, the plaintiff was predisposed to malarial, scrofulous, or rheumatic tendencies, but otherwise in good health; and you further find that said injuries, or any of them, solely excited or developed said predisposition to malarial, scrofulous or rheumatic tendencies, so that thereby, without the fault of the plaintiff, her present condition, whatever you may find that to be, has directly resulted—then I instruct you that the plaintiff is entitled to recover to the full extent of whatever you may find her present condition to be.[35]

[33] Frick v. Washington Water Power Co., 130 P. 98, 72 Wash. 214.

[34] St. Louis Southwestern Ry. Co. v. Smith, 145 S. W. 218, 102 Ark. 562.

[35] Louisville, N. A., etc., R. Co. v. Falvey, 3 N. E. 389, 104 Ind. 409.

B. Avoidable Consequences

§ 2027. Duty of injured person to minimize results of wrong

Duty to minimize consequences of pollution of water course, see post, § 5224.
Duty to minimize damages from delay in delivery of telegram, see post, § 5051.

§ 2027(1). Illinois

The jury are instructed that it was the duty of the plaintiff to make all reasonable exertions to render the damages suffered by him, if you find he suffered any, as light as possible. In no case can a person recover for damages to his business or property which he knowingly permits to go on without making every reasonable effort and taking active steps to prevent it or have it stopped. If you believe from the evidence in this case that the plaintiff could have lessened the loss or damage, if any, suffered by him by taking proper and reasonable precautions so to do, then the defendant cannot be charged with liability for any damage caused by plaintiff's neglect as before stated.[36]

§ 2027(2). Oregon

It is also the duty of a person seeing himself damaged or about to be damaged to use reasonable efforts to prevent or minimize those damages; and therefore you may consider all of the circumstances detailed to you in evidence in this case in determining whether, under the peculiar circumstances of this case, it was the duty of this plaintiff to take any action in the premises to minimize or reduce his damages; and you may consider this in determining the damages to which you may think the plaintiff is entitled in this case, if any.[37]

§ 2028. Duty to minimize results of personal injuries

§ 2028(1). Arkansas

You are instructed that the plaintiff makes no allegations in his complaint that the defendant owed him any duty or was under any obligation to furnish him medical attention for the cut on his hand alleged to have been inflicted by ———. Now, if you find from the evidence that the condition of plaintiff's hand as alleged in his complaint is due to his negligence in not having the cut thereon promptly given proper medical treatment, or is the result of an infection due to his negligence in failing to have the alleged cut given proper medical treatment, and yet you believe from a preponderance of the evidence that plaintiff is entitled to recover under the instructions in this case, then your verdict should be for only such damages as are the result of the original injury, if any; in other words, the plaintiff can only recover, if at all, dam-

[36] Nelson v. Buick Motor Co., 183 Ill. App. 323.

[37] Boyd v. Grove, 173 P. 310, 89 Or. 80.

ages occasioned by the negligence of ———, which was the proximate cause of the present injury.[38]

§ 2028(2). Indiana

You are instructed that a person suffering injuries by the fault of another has no right to aggravate the same by carelessness or inattention to such injury, but, if he does so, he has no right to recover from the party causing the original injury damages resulting from such aggravation, and which resulted from his own carelessness.[39]

§ 2028(3). Kentucky

The court instructs the jury that, if they believe from the evidence that the plaintiff was injured at the time and place mentioned in the petition, it was his duty to use such reasonable means as he could in the exercise of ordinary care, to mitigate said injury and effect a cure, and, if he negligently failed to do so, he cannot recover for any aggravation of his injury as a direct result of his failure to reasonably care for said injury, if any.[40]

§ 2028(4). Massachusetts

The jury are instructed that if, under the instructions of the court, the jury finds that there was such physical injury in this case as to permit the recovery of damages for mental suffering or disease also, then in determining the damages to be awarded for mental suffering or disease the jury must eliminate from consideration such of the plaintiff's symptoms or demonstrations, if any, as could have been prevented by the exercise of such self-control as the plaintiff was capable of at the time of such symptoms or demonstrations.[41]

The jury are instructed that, if the jury believes that the plaintiff has had fits, spasms, or spells, since the accident, and if the jury also believes that the coming on of such fits, spasms, or spells was always or sometimes under the plaintiff's control in the sense that she could by the exercise of the will power or self-control of which she was capable have always or sometimes prevented them from happening, had she wished to do so, then so far as that was the case she cannot recover for fits, spasms, or spells so preventable, or for their consequences.[42]

§ 2028(5). Missouri

You are instructed that if you believe from the evidence that plaintiff's injuries have been aggravated, and his pain and suffer-

[38] Johnson v. Plunkett-Jarrell Grocer Co., 191 S. W. 929, 127 Ark. 243.

[39] Citizens' St. R. Co. v. Hobbs, 43 N. E. 479, 15 Ind. App. 610.

[40] Louisville & N. R. Co. v. Baker, 164 S. W. 799, 158 Ky. 224.

[41] Dooley v. Boston Elevated Ry. Co., 87 N. E. 586, 201 Mass. 429.

[42] Dooley v. Boston Elevated Ry. Co., 87 N. E. 586, 201 Mass. 429.

ing enhanced, by his own imprudence, or want of ordinary care, then for such increase of pain, or for such aggravation of injury, he cannot recover.[43]

§ 2028(6). Nevada

The jury are instructed that, where a person becomes injured through the fault of another, it is the duty of the person receiving the injury to use reasonable means and care to protect himself against any aggravation of the injury, and to do all things reasonably necessary to cure such injury; and if the jury believe from the evidence in this case that any injury received by the plaintiff while a passenger upon one of the defendant's trains was not serious, or of great extent at the time of receiving the injury, but that the wound received by plaintiff while such a passenger became infected as a result of the lack of reasonable precautions and care on the part of plaintiff, and such infection has caused said injury or wound to become greater and plaintiff's leg to have become more incapacitated than it would otherwise have been, then, and in such event, defendant cannot be held liable in damages to plaintiff for any injury or suffering or physical disability on the part of plaintiff, which plaintiff could have prevented by the use of reasonable precautions and attention in caring for such wound and injury, but the liability of defendant must be confined to such sum in damages as would justly compensate plaintiff for the injury received while upon the train, and the consequences that would naturally or probably result if such injury had received reasonable attention, and plaintiff had used ordinary care to effect a cure thereof.[44]

§ 2028(7). Tennessee

You are instructed that it was the duty of the plaintiff, upon being injured, to do all reasonably within his power to have his knee cured and restored to its original condition.[45]

The jury are instructed that, if plaintiff selected and used all reasonably accessible means for that purpose, and for a time, upon his own judgment and without medical advice, adopted and pursued such treatment as a physician of ordinary care, prudence, and skill would have used in treating such an injury, the law would accept that action on his part as a full discharge of his duty in that behalf, even though it might appear from the evidence at large that a more skillful treatment might have produced a more favorable result.[46]

[43] Fullerton v. Fordyce, 44 S. W. 1053, 144 Mo. 519.

[44] Murphy v. Southern Pac. Co., 101 P. 322, 31 Nev. 120, 21 Ann. Cas. 502.

[45] Arkansas River Packet Co. v. Hobbs, 58 S. W. 278, 105 Tenn. 29.

[46] Arkansas River Packet Co. v. Hobbs, 58 S. W. 278, 105 Tenn. 29.

§ 2028(8). Texas

The jury are instructed that for all the suffering, if any, either mentally or physically, which plaintiff could have prevented by the exercise of prudence and reasonable care, treatment, and attention to his fingers that were hurt, if any, by the negligence of defendant's servants, he cannot recover anything; and if you believe from the evidence that plaintiff's bone felon was not bruised and injured at the time of the accident, then you will not consider the bone felon, or the condition of the hand on which the bone felon was, either then, thereafter, or now, or the suffering he may have endured therefrom, in arriving at your verdict, whatever may be your findings as to the accident on the other hand of plaintiff.[47]

The jury are instructed that it was the duty of plaintiff to exercise such care as a person of ordinary prudence would have exercised under similar circumstances to facilitate the cure of his injuries, and he cannot recover for any injury which, by the use of such care, he could have avoided.[48]

§ 2029. Same—Duty with respect to employment of competent physician

§ 2029(1). Illinois

The jury are instructed that a person who is suffering from an injury is only required to use reasonable diligence to employ a physician of ordinary skill and experience to treat him, and if, in this case, you believe from the evidence that plaintiff used such reasonable diligence, then the law regards the injury, if any, resulting from the mistakes of the physician employed by plaintiff, if there were any such mistakes, or from the failure of the means employed to effect a cure, as a part of the immediate and direct damage flowing from the original injury.[49]

§ 2029(2). Indiana

You are instructed that if, therefore, you should find from the evidence that the plaintiff received some injuries about the head and ear such as required medical treatment, then it was his duty to use reasonable diligence to procure proper and reasonably competent medical attention, and to continue to obtain for himself such treatment so long as his injuries appeared reasonably to require it. And if the evidence shows any failure on the part of the plaintiff to discharge the duty of obtaining reasonably proper medical attention, then he cannot recover damages for any aggravation of his injury or result therefrom occasioned by such failure.[50]

[47] St. Louis S. W. Ry. Co. of Texas v. Ball, 66 S. W. 878, 28 Tex. Civ. App. 287.

[48] Gulf, C. & S. F. Ry. Co. v. Denson (Civ. App.) 72 S. W. 70.

[49] Rohmer v. Anderson, 189 Ill. App. 274.

[50] Citizens' St. R. Co. v. Hobbs, 43 N. E. 479, 15 Ind. App. 610.

The jury are instructed that it was the duty of the plaintiff to use ordinary care, judgment, and diligence in securing medical or surgical aid after she received the injuries complained of, if any she received; and if you find from the evidence that after she received such injuries, if any she did receive, she failed to use such ordinary care, judgment, and diligence in procuring timely medical or surgical aid, and if you further find from the evidence that, by reason of such failure, her condition is now different and worse than it would have been if she had used such ordinary care, judgment, and diligence in the premises, then, if you find for the plaintiff, you should take this into account in making up your verdict, and should not allow her any damages for ailments and diseases, if any, that may have resulted from such failure.[51]

§ 2029(3). Iowa

You are instructed that, if the plaintiff was injured as alleged, it was incumbent on him to make use of reasonable means to effect as speedy and complete a recovery as could reasonably be accomplished; that if, in the selection of a physician or surgeon, he immediately employed a person of good reputation and skill, and used reasonable judgment in the selection of a skillful surgeon and physician, his damages should not be affected if he did not secure the most skillful; and that plaintiff was bound only to employ a person of such reputed skill and reputation as persons of reasonable care and prudence were accustomed to employ in such cases.[52]

§ 2029(4). Texas

You are further charged that if you find from the evidence that plaintiff was injured as claimed by him, and you further find that such injury was caused by the negligence of the defendant under the foregoing instructions, then it was the duty of the plaintiff to exercise that degree of care that an ordinarily prudent person would have exercised under the same or similar circumstances to employ a physician or physicians or to secure proper treatment for his injuries, if any, and if you find that plaintiff failed to employ a physician or physicians or to have his injuries properly treated, and if you further believe from the evidence that the injuries, if any, received by plaintiff are greater by reason of such failure, then for such increased injury or sufferings, if any, he cannot recover.[53]

[51] Louisville, N. A., etc., R. Co. v. Falvey, 3 N. E. 389, 104 Ind. 409.

[52] Rice v. City of Des Moines, 40 Iowa, 638.

[53] St. Louis Southwestern Ry. Co. of Texas v. Johnson (Civ. App.) 94 S. W. 162.

§ 2030. Same—Duty with respect to getting best medical treatment

You are instructed that, in arriving at the amount of his damages, you are to say, not only what they are, but whether the means used by the plaintiff to reduce the damages were such as an ordinarily prudent man would use. You cannot say that he should or should not have obtained any particular kind of treatment. As to that, he must alone be the judge. But when he has determined what treatment to take, it will be for you to say if in making that determination he used the means that a reasonably prudent man would take to cure himself of his injury, or to reduce the extent thereof under the same circumstances. If you find that he did not, and you can say that some other treatment would have brought about a cure or reduced the amount of his damages, and that that treatment was one that a reasonably prudent man would have adopted, then you must say that he has not used the care which a reasonably prudent man would use to reduce the damages, and you must take that into consideration in arriving at your verdict, and you fix the standard as to what a reasonably prudent man would do under such circumstances.[54]

§ 2031. Duty to undergo surgical operation

§ 2031(1). California

You are instructed that you must determine from the evidence introduced in this case the nature and extent of the injuries suffered by the plaintiff, and, in determining whether or not such injuries are permanent in character, the court instructs you the law does not require one injured by the negligence of another to undergo a serious or critical operation which might be attended by some risks of failure, if such person exercised reasonable diligence in caring for her injuries and reasonable means to prevent aggravation of them, and to effect her speedy and complete recovery; and a refusal to undergo such an operation cannot be considered in mitigation of damages, even though under the evidence it might lessen the effects of the injury.[55]

§ 2031(2). Missouri

The court instructs the jury that it was the duty of the plaintiff, when injured, to take such steps as an ordinarily careful and prudent man would have taken, in the exercise of ordinary care, under the same circumstances, to reduce his damages to the minimum. And if you find from the evidence that the plaintiff could, after his

[54] Rowe v. Whatcom County Ry. & Light Co., 87 P. 921, 44 Wash. 658.

[55] Boa v. San Francisco-Oakland Terminal Rys., 187 P. 2, 182 Cal. 93. The objection was made to this instruction that the medical testimony proved that an operation would have effected a permanent cure. There was, however, conflicting testimony on the point.

injuries, have had an operation performed on his head which would have improved his condition, and if you further find from the evidence that he was advised by a competent surgeon that such operation was necessary to be performed in order to improve his condition, and if you further find from the evidence that such operation, had it been performed, would have greatly lessened his physical pain and mental anguish, and greatly improved his health, and if you further find from the evidence that plaintiff, in failing to have such operation performed, failed to exercise ordinary care to improve his condition, then, if you find for the plaintiff, you should only allow him as damages such amount or sum as his damages would have aggregated if he had, at said proper time, had such operation performed.[56]

§ 2032. Effect of unskillful or improper treatment of physician

§ 2032(1). California

You are instructed that, if you find from the evidence that the plaintiff was injured through the negligence of the defendant, and that she used ordinary care in the selection of a physician and surgeon for the purpose of treating her said injuries, it will be no defense to show that the physician or surgeon thus selected by her was unskillful or failed to give her the best or proper treatment, providing she complied with the directions and submitted to the treatment prescribed by such physician and surgeon.[57]

§ 2032(2). Kansas

The jury are instructed that a person injured by the negligent acts of another does not insure that the surgeons, doctors or nurses employed by him will be guilty of no negligence, want of care or skill, or error in judgment. The liability to mistake in judgment, or the efforts or means used in the endeavor to effect a cure or to remedy a condition, is an incident to the original injury, and the injured party having used ordinary care in the selection of attendants, the injury resulting from such mistake is in law regarded as one of the immediate and direct damages resulting from the injury.[58]

§ 2032(3). Massachusetts

The jury are instructed that if the plaintiff, in an honest effort to lessen the injurious effects of the accident, used due care in applying for treatment of the wound on his knee to a reputable physician, the defendant is responsible in damages for the injuries that resulted to the plaintiff from the defendant's negligence, even

[56] Ward v. Ely-Walker Dry Goods Bldg. Co., 154 S. W. 478, 248 Mo. 348, 45 L. R. A. (N. S.) 550.

[57] Boa v. San Francisco-Oakland Terminal Rys., 187 P. 2, 182 Cal. 93.

[58] McIntosh v. Atchison, T. & S. F. Ry. Co., 198 P. 1084, 109 Kan. 246.

though such injuries were aggravated by an accidental and mistaken, but honest, treatment on the part of said physician.[59]

§ 2033. Duty to follow instructions of physician

§ 2033(1). Michigan

Right here counsel on both sides agree that an aggravation of the damages, occasioned by reason of negligence, if any such neglect existed, in caring for the arm after the injury, should not be allowed. I so instruct you. But if there was employed to care for his arm a reputable physician, who treated him so long as such physician deemed necessary, and until he discharged himself, and from that the boy and his parents followed the directions of such physician as to the use and treatment of his arm, he cannot be charged with negligence affecting his right in this case because the result is not as expected. But if he has negligently failed to follow directions as to use and treatment of his arm, and thereby his damages have been aggravated, that aggravation should be considered, and should reduce his claim.[60]

§ 2033(2). Texas

The jury are instructed that, if you believe from the evidence that after the defendant received his injury (if you believe he received any) he did not properly care for same, but negligently violated the instructions of his physician, and negligently used and walked upon his injured leg, and thereby prevented and delayed the recovery of said injury or wound, you cannot find for any additional damages caused by such neglect.[61]

§ 2034. Duty of plaintiff with respect to diet or exposure to weather

§ 2034(1). Indiana

The jury are instructed that it was the duty of the plaintiff to use ordinary care to cure and restore herself; and if you find from the evidence that the plaintiff failed to use such ordinary care in the premises, but that she unnecessarily exposed herself in inclement weather, or otherwise, after receiving her injuries, if any she received, in said accident, and thereby increased and aggravated such injuries and enhanced their evil effects, you will take these facts into account in arriving at your verdict, if you find for plaintiff, and should not allow any damages to plaintiff for any ailments, injuries, diseases, or their aggravation, from which plaintiff has been or may be suffering by reason of such exposure, and from which she would not otherwise be suffering.[62]

[59] Gray v. Boston Elevated Ry. Co., 102 N. E. 71, 215 Mass. 143.

[60] Strudgeon v. Village of Sand Beach, 65 N. W. 616, 107 Mich. 496.

[61] Gulf, C. & S. F. Ry. Co. v. Denson (Civ. App.) 72 S. W. 70.

[62] Louisville, N. A., etc., R. Co. v. Falvey, 3 N. E. 389, 104 Ind. 409.

§ 2034(2). Missouri

You are instructed that, if the plaintiff conducted himself imprudently by imprudently drinking, thereby increasing his trouble and difficulty of being cured, he must take the consequences of such action, and cannot charge the defendant therewith.[63]

C. Personal Injuries

§ 2035. Elements of damage in general

§ 2035(1). United States

The jury are instructed that, if you find that it was negligence on the part of the railroad company for coming with unnecessary speed or unnecessary violence on the passenger coach, and that this caused the accident, with no imprudence or carelessness of the plaintiff contributing to it, your next inquiry is, what damages you will give him. There is no place here for punitive or exemplary damages. All that you can do is to compensate him for his loss of time, and for the pain he suffered, and for such diminution of his capacity to work coming directly from this accident, and for such private consequences, if any, he may suffer; estimating in money what you think he ought to have.[64]

The jury are instructed that the damages, if any, in this case cannot be exemplary, that is, given by way of example or punishment, but must be limited to actual or compensatory damages; and in estimating their amount you should take into consideration the monetary loss, if any, sustained by plaintiff through inability to work during the periods of his incapacity and probable incapacity alleged in the complaint, also the condition of his health, and physical ability to labor, before the accident complained of, as compared with the present condition thereof, and how far the injury is probably permanent in its character and results, as well as the physical and mental suffering he has suffered, if any, by reason of the injury; and you will allow such damages as in your opinion will fairly and justly compensate plaintiff for all the injury and loss and suffering, physical and mental, sustained by him, as the direct and proximate results of the accident, not to exceed the amount demanded in the complaint.[65]

The jury are instructed that, in estimating the damages for a personal injury resulting from the negligence of the defendant, the jury may allow, not only for the direct expenses incurred by the plaintiff, but also for the privation and inconvenience he has been subjected to, for the pain and suffering, bodily and mental, which

[63] Boggess v. Metropolitan St. Ry. Co., 23 S. W. 159, 118 Mo. 328.

[64] Columbia, N. & L. R. Co. v. Means (C. C. A. S. C.) 136 F. 83, 68 C. C. A. 651.

[65] Swensen v. Bender (C. C. A. Cal.) 114 F. 1, 51 C. C. A. 627.

he has already endured, or is likely to experience, as well as the pecuniary loss he has already sustained, and is likely to sustain during the remainder of his life, from his disabled condition, and his actual permanent loss of earning power.[66]

The jury are instructed that, if the plaintiff is entitled to recover, the measure of his recovery is what is denominated "compensatory damages"; that is, such sum as will compensate him for the injury he has sustained. The elements entering into damage are the following: First, such sum as will compensate him for the expenses he has paid or incurred in effecting his cure, and caring for and nursing him during the period that he was disabled by the injury; second, the value of his time during the period that he was disabled by the injury; third, if the injury has impaired the plaintiff's power to earn money in the future, such sum as will compensate him for such loss of power; fourth, such reasonable sum as the jury shall award him on account of pain and anguish he has suffered by reason of his injury.[67]

§ 2035(2). Alabama

Gentlemen of the jury, if you believe from the evidence in this case that the plaintiff is entitled to recover, in estimating the amount of damages he is entitled to, if any, you may take into consideration the disabling effect of the injury or injuries, past and prospective, loss of time, loss of profits, doctors and medicine bills reasonably incurred, the incapacity to do as profitable labor as before the injury, and the mental and physical suffering caused by such injury.[68]

The court charges the jury that if they find their verdict for the plaintiff, they should give him such damages as will compensate him for all pain and anguish, both of mind and body, he may have suffered as a proximate result of his injuries in the wreck of the engine, as well as for all loss or impairment of his ability to earn a livelihood the balance of his life.[69]

§ 2035(3). Arkansas

The court instructs the jury that, if you find for the plaintiff, in assessing his damages you may take into consideration the physical injuries inflicted, the loss of time, if any, the doctor's bill, if any, and the pain and suffering, if any, which resulted from the injuries sustained, as well as any depreciation of the earning capacity of plaintiff and his power to labor in the future, if any will result from the injury; and the court instructs you that the law furnishes you no measure of damages for pain and suffering either of body or

[66] Owens v. Pennsylvania R. Co. (C. C. Pennsylvania) 41 F. 187.

[67] Owens v. Pennsylvania R. Co. (C. C. Pennsylvania) 41 F. 187.

[68] Mobile Light & R. Co. v. Thomas, 80 So. 693. 16 Ala. App. 629.

[69] Adams v. Crim, 58 So. 442, 177 Ala. 279.

mind, and the amount to be assessed by you on account of pain and suffering, if any, must be left to your sound discretion and judgment, based upon the evidence in the case.[70]

You are also instructed that, if you find for the plaintiff, you will award her such damages as will fairly compensate her for all pain and anguish, if any, both of body and mind, suffered by plaintiff on acount of the injuries received and for the diminution, if any, of her physical health and vigor, and also such sums of money as the evidence shows, if any, she was compelled to expend for medicine and medical attention.[71]

The jury are instructed that, if you find for the plaintiff, you will assess his damages at such a sum that will compensate him for the bodily injury sustained, if any; the physical pain and mental anguish suffered and endured by him in the past, if any, and that which will be endured in the future, if any, by reason of the said injury; the effect of the injury on his health, according to the degree and probable duration of the same, if any; his loss of time, if any; and his pecuniary loss from his diminished capacity for earning money through life, according to what you find his probable expectancy to be, if he had not received the injury complained of, if any; and the amount of money, expended for medicines and medical attention, if any; and from these, as proven from evidence, assess such damages as will compensate him for the injuries received.[72]

You are instructed that if you find for the plaintiff you will assess his damages at such a sum of money as will be a fair and reasonable compensation to him for the injuries he has received as a result of the alleged accident; and in arriving at the amount of said sum of money you will take into consideration, as you find from the evidence, the nature and extent of his injuries, whether temporary or permanent in character, results reasonably certain to follow, any disfigurement of his person as a result of his injuries, the bodily pain and mental suffering he has endured, and that he is reasonably certain from the evidence to hereafter endure, as a result of his physical injuries, the loss of earnings from his labor since he received his injuries, and the loss of earnings in the future of his life by virtue of his decreased capacity to earn money because of his injured condition, his age and reasonable expectancy of years of life, his vocation and earning capacity prior to his injury, with his probable chance of being promoted to a position of increased remuneration of his services had he not been injured, his condition of

[70] Arkansas Land & Lumber Co. v. Wilson, 201 S. W. 818, 132 Ark. 617.

[71] Mills v. Franklin, 196 S. W. 928, 130 Ark. 80.

[72] Prairie Creek Coal Mining Co. v. Kittrell, 153 S. W. 89, 106 Ark. 138.

physical strength and health prior to his injuries, and the expenses to which he is subjected as a result of his injured condition.[73]

You are instructed that, if you find for the plaintiff, in assessing her damages you will take into consideration her age and condition in life, the injuries sustained by her, and the physical and mental pain and anguish endured by her on account of the injury, if any, together with such as she will necessarily endure in the future, resulting from her injury, if any, together with all other facts and circumstances in the case, and assess her damages at such sum as you believe from the evidence will fully compensate her for the injuries.[74]

§ 2035(4). California

You are instructed that, if you believe from the evidence that the plaintiff is entitled to a verdict against the defendant, you may assess the amount of damages in a sum not to exceed the amount prayed for in the complaint, and in so doing you have a right to consider the character of the injuries, if any, sustained by the plaintiff; the pain and suffering, if any, endured and which will be endured as a result of said injuries sustained by her, if any; the effect of such injuries, if any, upon the plaintiff; the permanent character of said injuries, if any; what before the injuries complained of was the health and physical condition of plaintiff, her physical ability to maintain herself as compared with her condition afterwards.[75]

The court instructs the jury that, if you find that the plaintiff is entitled to recover, you may award him such damages, within the amount claimed, as in your opinion will compensate him for the pecuniary damages proved to have been sustained by him and proximately caused him by the wrong complained of. And, in estimating the amount of such damages, you may consider the physical and mental pain suffered, if any, the nature, extent, and severity of his injury or injuries, if any, the extent, degree, and character of suffering, mental, or physical, if any, its duration and its severity, and medical expenses incurred or paid, the cost of nursing and attendance, if any, and the loss of time and value thereof, and the loss of earning capacity, if any. You may also consider whether the injury, if any, was temporary in its nature, or is permanent in its character. And from all these elements you will resolve what sum will fairly compensate the plaintiff for the injury sustained.[76]

[73] St. Louis, I. M. & S. R. Co. v. Brogan, 151 S. W. 699, 105 Ark. 533.

[74] St. Louis, I. M. & S. Ry. Co. v. Wright, 150 S. W. 706, 105 Ark. 269; Arkansas Southwestern R. Co. v. Wingfield, 126 S. W. 76, 94 Ark. 75.

[75] Learned v. Peninsula Rapid Transit Co., 193 P. 591.

[76] Ryan v. Oakland Gas, Light & Heat Co., 130 P. 693, 21 Cal. App. 14.

The court instructs the jury that, if you find that the plaintiff is entitled to recover, the measure of his recovery is what is denominated compensatory damages; that is, such sum as will compensate him for the injury he has sustained. The elements entering into this damage are the following: (1) Such sum as will compensate him for the expenses he has incurred in caring for and nursing him during the period that he was disabled by the injury, not exceeding the amount alleged in the complaint. (2) The value of his time during the period that he was disabled by the injury. (3) If the injury has impaired the plaintiff's power to earn money in the future, such sum as will compensate him for such loss of power. (4) Such reasonable sum as the jury may award for pain suffered or to be necessarily suffered from the injury. The first two of these elements are the subject of direct proof, and are to be determined by the jury on the evidence they have before them. The third and fourth elements are from necessity left to the sound discretion of the jury, but the damages in all cannot exceed the amount alleged in the complaint.[77]

§ 2035(5). Colorado.

The court instructs you that, in determining the amount of damages to which the plaintiff is entitled, if any, you will take into consideration all the facts and circumstances in evidence before you,—the nature and extent of the plaintiff's physical injuries, if any; whether such injuries are permanent or temporary; and also such prospective sufferings and loss of health, if any, as you may believe, from all the evidence before you, to be reasonably certain from the injuries she may have received; her capacity for labor prior to such injuries, and the amount usually earned by her, if anything, and her diminished capacity for labor, if any, by reason of the injuries claimed to have been received; and, if you find for the plaintiff, you will allow her such sum as shall be fair and just between the parties hereto, not exceeding the amount claimed.[78]

§ 2035(6). Delaware

You are instructed that, if you shall find in favor of the plaintiff, your verdict should be for such sum of money as would be a reasonable compensation for plaintiff's pain and suffering down to the present time and for such pain and suffering as he is likely to have in the future, so far as such pain and suffering may be reasonably ascribed to his injuries resulting from defendant's negligence; also for all expenditures of money made by him for medical

[77] Ryan v. Oakland Gas, Light & Heat Co., 130 P. 693, 21 Cal. App. 14. This instruction allows damages reasonably certain to occur in the future including mental suffering.

[78] Denver Tramway Co. v. Owens, 36 P. 848, 20 Colo. 107.

treatment for such injuries, and for the increase or aggravation of any disease resulting therefrom, and also for all losses heretofore suffered, or likely to be hereafter suffered, by him because of any incapacity to labor resulting from his said injuries.[79]

§ 2035(7). Georgia

The jury are instructed that if, under the rule of law given you in charge, you should find that the plaintiff is entitled to recover in this case, in estimating the damages you may consider the pain and suffering he may have endured at the time of and since the accident and injury, for the mental suffering he may experience throughout life by reason of the injury to his leg and to the impairment of his physical strength and vigor. After all, in estimating these damages, there is no other standard or measure than your enlightened consciences and your impartiality under your oath as jurors.[80]

Upon the question of damages, I charge you that there are several elements of damages which may be considered, as you may find the evidence in the case. If you find there are permanent injuries, you have the right to give damages for that as a distinct item. If you find there was physical pain and suffering, you have the right to give damages for that as a distinct item. If you find there was mental suffering, you have the right to give damages for that as a distinct item. You have the right to give damages for that mental suffering which a man may have from the consciousness that his earning capacity is injured for life. That is one element of damages. The fact that a man is not able to work, or may be damaged for life, is a matter that the jury may take into consideration. You can give damages for diminution of earning capacity, if the evidence justifies you to find that his earning capacity has been diminished, and that defendant is liable therefor.[81]

§ 2035(8). Idaho

I instruct you that, if you find for the plaintiff, the rule as to damages to be allowed is this: Where an injury has been received by the servant on account of the negligence of the master, damages should be computed and ascertained and awarded on the basis, as nearly as possible, of compensating the servant for the pain, suffering, and loss he has sustained and will sustain in the future on account of the injury; and he should be placed, as nearly as it is possible to estimate, in as good a position as he was before the injury was inflicted.[82]

[79] Bruanstein v. People's Ry. Co., 78 A. 609, 2 Boyce, 55.

[80] J. S. Betts Co. v. Hancock, 77 S. E. 77, 139 Ga. 198.

[81] Brush Electric Light & Power Co. v. Simonsohn, 32 S. E. 902, 107 Ga. 70.

[82] Ramon v. Interstate Utilities Co., 170 P. 88, 31 Idaho, 117.

You are instructed that, if you should find for the plaintiff, then in estimating his damages you may take into consideration the extent and character of his injuries as shown by the evidence; the pain and suffering which plaintiff has endured by reason thereof; the loss of earnings caused thereby. And if you further believe from the evidence that plaintiff will continue to suffer from these injuries, then you may consider such future pain and suffering and any future loss of earning capacity, if any, as you find will naturally and probably result from such injuries, and award the plaintiff such compensatory damages as under all the circumstances of the case you may deem just. In estimating the loss of earning capacity, if you should determine from the evidence that plaintiff would be permanently injured, you may consider the expectancy of plaintiff's life, based upon the evidence and upon your own experience and knowledge as to such matters.[83]

You are instructed that you have experienced and observed the affairs of life, and it is your duty, if you shall determine the plaintiff is entitled to damages, under the instructions of the court in estimating the same, to use your own experience and knowledge as to such matters.[84]

§ 2035(9). Illinois

The court instructs the jury that, if you find for the plaintiff, you will be required to determine the amount of his damages. In determining the amount of damages the plaintiff is entitled to recover in this case, if any, the jury have a right to, and they should, take into consideration all the facts and circumstances as proved by the evidence before them; the nature and extent of plaintiff's physical injuries, if any, so far as the same are shown by the evidence; his sufferings in body, if any, resulting from such physical injuries as the jury may believe, from the evidence before them in this case, he has sustained by reason of such injuries; his loss of time and inability to work, if any, on account of such injuries; all moneys he necessarily expended or became liable for, for doctor's bills, if any, while being treated for such injuries—and may find for him such sums as in the judgment of the jury, under the evidence and instructions of the court in this case, will be a fair compensation for the injuries he has sustained or will sustain, if any, so far as such damages or injuries, if any, are claimed and alleged in the declaration.[85]

The court instructs the jury that if you find for the plaintiff

[83] Cnkovch v. Success Mining Co., 166 P. 567, 30 Idaho, 623.

[84] Cnkovch v. Success Mining Co., 166 P. 567, 30 Idaho, 623.

[85] Donk Bros. Coal & Coke Co. v. Thil, 81 N. E. 857, 228 Ill. 233.

you will be required to determine the amount of her damages. In determining the amount of damages the plaintiff is entitled to recover in this case, if any, the jury have a right to and they should take into consideration all the facts and circumstances as proved by the evidence before them; the nature and extent of plaintiff's physical injuries and resulting from the street car collision in question, if any, so far as the same are shown by the evidence; her suffering in body and mind, if any, resulting from such physical injuries, and such future suffering and loss of health, if any, as the jury may believe, from the evidence before them in this case, she has sustained or will sustain by reason of such injuries; her loss of time and inability to work, if any, on account of such injuries; and may find for her such sum as, in the judgment of the jury, under the evidence and instructions of the court in this case, will be a fair compensation for the injuries she has sustained or will sustain, if any, so far as such damages and injuries, if any, are claimed and alleged in the declaration.[86]

The jury are instructed that, if you find the issues for the plaintiff, then the plaintiff is entitled to recover such actual damages as the evidence may show he has sustained as the direct and proximate result of such injury, taking into consideration his loss of time, his pain and suffering, his necessary and reasonable expenses in medical and surgical aid and nursing, so far as the same may appear from the evidence in this case; and if the jury find from the evidence that the said injury is permanent and incurable, they should also take this into consideration in assessing the plaintiff's damages, and the jury are instructed that the fact that said plaintiff is married and that his wife is living cannot be considered by them in determining the amount of damages to which plaintiff is entitled in this case.[87]

The jury are instructed that, if you find the defendant guilty, then the plaintiff is entitled to recover her actual damages, which she has sustained as the direct or proximate result of such injury, such as her loss of time, her pain and suffering, her necessary and reasonable expenses in medical and surgical aid and nursing, as the same may appear from the evidence in this cause; and if you find from the evidence that the said injury is permanent and incurable, you should also take this into consideration in assessing the plaintiff's damages.[88]

The jury are instructed that, in estimating the plaintiff's damages, it is proper for the jury to estimate the effect of the injury

[86] Chicago & M. Electric Ry. Co. v. Ullrich, 72 N. E. 815, 213 Ill. 170. This instruction has been held good against various specific objections.

[87] Chicago, etc., R. Co. v. Holland, 13 N. E. 145, 122 Ill. 461.

[88] City of Chicago v. Stearns, 105 Ill. 554.

in future upon the plaintiff's health, if any, the use of his hand, and his ability to attend to his affairs generally in pursuing his course of life, and the bodily pain and suffering, the necessary expenses of medical care and loss of time, and all damages, present and prospective, which can be treated as a necessary result of the injury inflicted by the collision upon the plaintiff in this action.[89]

The jury are instructed that, in assessing damages in this action, you may take into consideration, not only the loss, expense, and injury arising from the injuries received at the time of the accident, as well as the bodily pain and mental suffering of the plaintiff, but also the prospective loss and damage, if any, arising from any disability resulting to plaintiff, which rendered him less capable of attending to his business than he would have been if the injury had not been received.[90]

The court instructs the jury that, if you find for the plaintiff, you will be required to determine the amount of his damages. In determining the amount of damages the plaintiff is entitled to recover in this case, if any, the jury have the right to, and they should, take into consideration all the facts and circumstances as proved by the evidence before them, the nature and extent of plaintiff's physical injuries, if any, so far as the same are shown by the evidence to be the direct result of the injury, his suffering in mind and body, if any, resulting from such physical injuries, and such future suffering and loss of health, if any, as the jury may believe from the evidence before them in this case he has sustained or will sustain by reason of such injuries, and may find for him such sum as in the judgment of the jury, under the evidence and instructions of the court in this case, will be fair compensation for the injuries he has sustained, or will sustain, if any, so far as such damages and injuries, if any, are claimed and alleged in his declaration and proved, and it is not necessary for any witness to express an opinion as to the amount of such damages.[91]

The jury are instructed that if, under the evidence and instructions of the court the jury find the defendant guilty, then in estimating the plaintiff's damages, if any, it will be proper for the jury to consider the effect, if any, of the injury in the past and in the future upon the plaintiff, the use of his arm and his ability to attend to his affairs generally, in pursuing any ordinary calling, in so far, if at all, as the evidence shows that these have been affected in the past and will be affected in the future, and also the bodily pain and suffering, if any, he sustained or will sustain as a direct

[89] Illinois Cent. R. Co. v. Read, 37 Ill. 484, 87 Am. Dec. 260.

[90] Illinois Central R. Co. v. Read, 37 Ill. 484, 87 Am. Dec. 260.

[91] Chandler v. Illinois Cent. R. Co., 171 Ill. App. 240.

result of said injury, and any and all damages in so far, if at all, as they are alleged in the declaration and shown by the proof to be the necessary and direct result of the injury complained of.[92]

§ 2035(10). Indiana

You are instructed that if you find for the plaintiff herein, and that he is entitled to recover, it will be your duty to assess his damages in such an amount as will fairly compensate him for the injuries sustained as charged in the complaint, if any, and in arriving at this amount you may take into account the amount of pain and suffering, both physical and mental, which he has already endured, if any, by reason of his said injuries; also you may consider his crippled and maimed condition, if you find it to exist, and probable duration of his life, and the loss of time from work, if any, caused by his said injury, and diminution in his earning capacity occasioned by such injury, if any, and, from all the evidence in the case relating to his said injury and bearing upon his damages, assess such an amount as in the judgment of the jury will fairly compensate the plaintiff for the injuries so sustained, not exceeding, however, the sum of $———, prayed for in the complaint.[93]

The court instructs the jury that if you find, under the evidence and the rules of law I have given you, that the plaintiff is entitled to recover, it will be your duty to assess the amount of damages which, in your judgment, he should recover. In assessing this amount every particular and phase of the injury may enter into the consideration of the jury in estimating his damages, loss of time with reference to his condition and ability to earn money in his business or calling, his loss from permanent impairment of his physical powers, his pain and suffering, both physical and mental, already endured, and that may be endured from his injuries in the future, and his personal disfigurement, and the jury should give the plaintiff such a sum as will compensate him for the injuries received, taking into consideration all the facts proved in the case.[94]

The court instructs you that, if you find for the plaintiff upon the complaint, it will be your duty to assess his damages at such sum as will reasonably compensate him for the injury that the evidence shows him to have sustained, not exceeding the sum of $———, and in estimating such damage it will be proper for you to take into consideration the injury, if any shown, to his body, as to whether same is permanent or otherwise, the effect, if any, same

[92] Sullivan v. Chicago City Ry. Co., 167 Ill. App. 152.

[93] Reitz v. Hodgkins, 112 N. E. 386, 185 Ind. 163.

[94] Evansville Hoop & Stave Co., v. Bailey, 84 N. E. 549, 43 Ind. App. 153.

has upon his health, the physical pain and mental anguish, if any, that he has suffered as a consequence of such injury, the time he has lost, if any, by reason of such injury, and such damages, if any, as you believe from the evidence he will sustain in the future as the direct effect of the injury he received, if any shown, together with all the facts and circumstances in evidence in the case relevant thereto, and assess his damages at such sum as from the evidence you may deem proper, not exceeding the amount sued for.[95]

You are instructed that, if you find for the plaintiff, you will assess her damages in any amount you deem proper on a consideration of all the evidence, not exceeding $———, and in estimating such damages you may consider the physical and mental pain she has suffered and may continue to suffer. You may also consider the extent of plaintiff's injury, and if you find that the use of one of her legs is impaired, you may also consider the fact that she is deprived of the pleasure and satisfaction in life that those only can enjoy who are possessed of the free use of all the members of the body. You may further consider the impairment of her ability, either past or future, to perform her household duties, and the expense she has incurred for physician's services, and allow such damages as will reasonably and justly compensate the plaintiff for her injuries.[96]

The jury are instructed that if they find that the plaintiff has proven by a preponderance of the evidence the injuries he has sustained as charged in the complaint, then every particular and phase of the injury may enter into the consideration of the jury in estimating his damages, loss of time, with reference to his condition and ability to earn money in his business or calling, his loss from permanent impairment of his physical powers, his pain and suffering already endured, and that may be endured, from his injuries in the future, his personal disfigurement; and the jury should give the plaintiff such a sum as will compensate him for the injuries received, taking into consideration all the facts proven in the case.[97]

The jury are instructed that, if the jury find that the plaintiff was injured by the wrongful, negligent act of the defendant, the railroad's, agents and servants, and while plaintiff himself was acting with reasonable prudence, then, in assessing his damages,

[95] Monongahela River Consol. Coal & Coke Co. v. Hardsaw (App.) 79 N. E. 1062.

[96] Town of Sellersburg v. Ford, 79 N. E. 220, 39 Ind. App. 94.

[97] Pittsburg, C., C. & St. L. Ry. Co. v. Montgomery, 49 N. E. 582, 152 Ind. 1, 69 L. R. A. 875, 71 Am. St. Rep. 301.

the jury should take into account the peril, if any there was, to plaintiff's life; the suffering of body and mind, if any there was: the fact, if it is a fact, as shown by the evidence that the injury he suffered was and is permanent; the extent of it; how far, if at all, the injury renders him less capable and fit to pursue his calling and business; any loss of time shown; its value, if shown; any expense incurred. And, so considering said elements, the jury should assess such damages within the demand of the complaint as will reasonably and justly compensate plaintiff for his injuries.[98]

The jury are instructed that, if you find under the evidence that the plaintiff is entitled to recover, it will be your duty to assess the amount of damages which, in your judgment, she should recover. In estimating this amount you may take into consideration expenses actually incurred, loss of time occasioned by the immediate effect of her injuries, and physical and mental suffering caused by, and arising out of, her injuries. In addition, you may consider the professional occupation, if any, of the plaintiff, and her ability to earn money, and she will be entitled to recover for any permanent reduction of her power to earn money by reason of her injuries; and the amount assessed should be such a sum as, in your judgment, will fully compensate her for the injuries, or any of them, thus sustained.[99]

If you find for the plaintiff, you will be required to determine the amount of her damages. On this subject I instruct you that, in estimating the damages, you will consider her bodily pain and suffering occasioned by the injury, or any sickness resulting from the injury; and in case you find that the plaintiff has not yet recovered from her alleged injuries, or that by such injury she has to any extent been permanently disabled, then you should take such facts also into consideration in estimating her damages, to which you may add such an amount as you, in the exercise of a sound discretion, may think will be a just compensation for her anxiety and distress of mind, as are fairly and reasonably the plain consequences of the injury complained of.[1]

§ 2035(11). Iowa

The court instructs the jury that, if you find the plaintiff entitled to recover, he should be allowed fair and reasonable compensation for his injuries, if any. In estimating his damage, no precise rule can be given for the amount to be allowed, as they are not in their nature susceptible of exact money valuation. You are to use your own sense and judgment, and be guided by the

[98] Terre Haute & I. R. Co. v. Brunker, 26 N. E. 178, 128 Ind. 542.

[99] Louisville, N. A., etc., R. Co. v. Falvey, 3 N. E. 389, 104 Ind. 409.

[1] Pittsburgh, C. & St. L. Ry. Co. v. Sponier, 85 Ind. 165.

evidence in allowing him such sum as will reasonably compensate him. In making up this amount, if you find for the plaintiff, you should consider the ability of the plaintiff to earn wages and perform labor prior to the alleged injury, as shown by the evidence, and also his ability to earn wages and perform labor since receiving the alleged injury, and award the reasonable value of the time lost because of the injury, and a fair compensation for the bodily pain and suffering caused by the said injury, if any.[2]

The court instructs the jury that, if you find plaintiff was injured by reason of the defendant's negligence, and without negligence on his part which contributed to his injury, you may then proceed to a consideration of the plaintiff's damages. In fixing such amount you should allow him such sum as will fairly and reasonably compensate him for the injury received. In so doing you may take into consideration the pain and suffering of body and mind incident to such injury; the injury to the knee, and internal injuries, if they are shown; his expenses incurred for medical care and attendance and medicine; and, if you find such injury continuing and permanent, that prior to such injury he was capable of earning wages by manual labor, and that such injury has in whole or in part incapacitated him from performing manual labor, then such diminished earning capacity may be taken into consideration in estimating plaintiff's damages. And in this connection plaintiff's expectancy of life, as shown by mortality tables, may be considered. But in this connection regard should be had to the probable time during such expectancy of life that plaintiff might be expected to be capable of performing manual labor on account of age and natural infirmities incident thereto. And if the jury find that the plaintiff is suffering from diseases or infirmities not caused by the accident complained of, such fact should not be considered to the enlargement of the damages allowed.[3]

The jury are instructed that, if you find plaintiff entitled to recover, he should be allowed a fair and reasonable compensation for his injuries. In estimating his damage, no precise rule can be given for the amount to be allowed, as they are not in their nature susceptible of exact money valuation. You are to use your own sense and judgment, and be guided by the evidence, in allowing him such sum as will reasonably compensate him. In making up this amount, you should award, as may appear from the evidence, the reasonable value of the time lost because of the in-

[2] Petterman v. City of Burlington, 153 N. W. 154, 170 Iowa, 555.

[3] Greenway v. Taylor County, 122 N. W. 943, 144 Iowa, 332. It is not error, in absence of request to omit reference to the possibility of engaging in other occupations, or to omit to specifically instruct as to the present worth of loss of future earnings.

jury, the amount he has paid for medical attendance and nursing, and fair compensation for the bodily pain and suffering caused by the said injury; and if you further find that plaintiff's injuries are permanent, and will, to some extent, disable him in the future, and cause him pain and suffering hereafter, you should also allow him such further sum as, paid now in advance, will reasonably compensate him for such future disability, pain, and suffering as the evidence shows it is reasonably probable will result to him in the future from such injuries.[4]

§ 2035(12). Kansas

The court instructs the jury that, if you find for the plaintiff, then you should allow her such a sum of money as in your judgment will fairly and fully compensate her for the injuries which the testimony in the case shows her to have sustained, and in determining the amount of such award you should consider the character of any injury to her person which the testimony shows her to have sustained, any mental or physical pain which the evidence shows she may have suffered, or which the testimony reasonably shows she will suffer in the future; whether or not her ability to earn money has been impaired by such injuries as the testimony shows her to have sustained; the time which she has necessarily lost by reason of such injuries; the state and condition of her health before and subsequent to the injuries complained of in so far as such subsequent health has been occasioned by the alleged injuries, if any—and you should allow her such a sum of money as will in your best judgment fairly and fully compensate her for the injuries which the evidence shows to be the direct and natural consequences of such injuries which the evidence shows her to have sustained.[5]

The jury are instructed that, if the jury find from the evidence that said plaintiff is entitled to recover herein for the injuries complained of in her said petition, she will be entitled to a verdict for an amount which shall be full compensatory damages for the loss of time from the performance of her usual and ordinary labors and duties, the expenses necessarily incurred for medicines and medical attendance, and for the physical pain which has resulted from the injury up to the time of the commencement of the action; and, if you find from the evidence that said plaintiff is still disabled from such injury, such further damages as appear from the evidence to be the natural and probable result of such injuries, taking into consideration the permanency or probable

[4] Cotant v. Boone Suburban Ry Co., 99 N. W. 115, 125 Iowa, 46, 69 L. R. A. 982.

[5] Arkansas City v. Payne, 102 P. 781, 80 Kan. 353, 18 Ann. Cas. 82.

duration of the same, not exceeding in all the sum of ——— dollars.[6]

§ 2035(13). Kentucky

The court instructs the jury that, if you find for the plaintiff, you will award him such a sum in damages as will fairly compensate him for any mental and physical suffering which he has endured, or it is reasonably certain he will hereafter endure, and for any doctor's bills incurred in treating his injuries, not to exceed $———, and for any permanent impairment of his power to earn money which you may believe from the evidence are the proximate results of his injuries, not exceeding in all, however, the sum of $———, the amount claimed in the petition.[7]

You are instructed that, if you find for plaintiff, you should award him such a sum in damages as you may believe from the evidence will fairly and reasonably compensate him for the physical and mental sufferings, if any of either, the time, if any, not exceeding ——— months, lost from his usual work or business, the cost to him of medicine and surgical bills, if any of either, incurred in effecting a cure, not to exceed $———, and for the permanent impairment, if any, of his power to earn money that may have resulted to and been directly caused plaintiff by the negligence, if any, of defendant's agents and servants complained of. But the damages, if any are allowed, should not altogether exceed $———, the amount claimed in the petition.[8]

You are instructed that, if the jury shall find a verdict for the plaintiff, the measure of his damage will be such fair equivalent in money as will reasonably compensate him for the necessary and reasonable expense incurred for the medical and surgical attention, if any, not to exceed the sum of $———, for his loss of time, if any, not to exceed the sum of $———, for his pain and suffering of body and mind, which he has endured, and such as the jury shall believe from the evidence it is reasonably certain he will suffer in the future, if any, as the direct and proximate result of his injuries in the evidence described, not to exceed in all, however, the sum of $———, the amount claimed in the petition.[9]

You are instructed that, if you find for the plaintiff, you should find in such a sum as will reasonably and fairly compensate him for any pain and suffering, mental and physical, caused him by his injuries, and for any pain and suffering which it is reasonably cer-

[6] City of Kansas City v. Bradbury, 25 P. 889, 45 Kan. 381, 23 Am. St. Rep. 731.

[7] Chesapeake & O. Ry. Co. v. Bland, 188 S. W. 498, 171 Ky. 430.

[8] Louisville & N. R. Co. v. Moore, 150 S. W. 849, 150 Ky. 692.

[9] Louisville & N. R. Co. v. Cook, 128 S. W. 81.

tain from the evidence he will endure in the future as a result of his injuries, and for any permanent reduction in his power to earn money directly resulting from his injuries; and, if you shall believe from the evidence that his injuries were caused by the gross negligence of the defendant, then you may in your discretion find in such a further or additional sum as you may think right and proper under the evidence, and on these instructions, not exceeding in all the sum of $———, the amount claimed in the petition. If you find for the defendant, you will say so, and no more.[10]

You are instructed that, if you find for the plaintiff, you will find for her such sum in damages as you may believe from the evidence will fairly compensate her for any injuries to her person, and for permanent injuries, if any, and for physical pain and mental suffering, if any, and for medical bills paid or agreed to be paid by her, not exceeding $———, and not exceeding in all the amount claimed in her petition, to wit, $———.[11]

The court instructs the jury that, if the jury shall find for plaintiff, they should award her such sum in damages as they shall believe from the evidence will fairly and reasonably compensate her in pain and suffering, mental or physical, directly resulting to her from her injury, for any loss of time or impairment of her power to earn money after she reached the age of twenty-one years caused thereby, and for any medical service, not exceeding the sum of $——— made necessary by her injury.[12]

You are instructed that, if you find for the plaintiff, you should allow him such a sum in damages as you may believe from the evidence will reasonably and fairly compensate him for his physical and mental suffering, if any of either, for his loss of time, if any, the reasonable expense, if any, in the matter of physicians' bills, incurred by him, and such permanent impairment, if any, of his power to earn money as may have resulted to and been directly caused him by the negligence of the defendants complained of, if there was such negligence; but the damages altogether, if any are allowed the plaintiff, should not exceed the amount claimed in the petition, viz. $———.[13]

You are instructed that, if the jury believe from the evidence that the agents of defendant in charge of the train upon which plaintiff was a passenger so negligently operated said train as that plaintiff was by a sudden or violent jerk, not necessary or usual in the operation of said train, thrown upon the floor, and

[10] Louisville & N. R. Co. v. Smith, 122 S. W. 806, 135 Ky. 462.

[11] Wynn v. Paducah City Ry., 102 S. W. 824.

[12] Louisville St. Ry. Co. v. Brownfield, 96 S. W. 912.

[13] South Covington & C. St. Ry. Co. v. Nelson, 89 S. W. 200. See Forgy v. Rutledge, 180 S. W. 90, 167 Ky. 182.

——— was thrown upon plaintiff, striking him with his elbow or knee in the side or bowels, thereby causing plaintiff to have rupture or hernia, they will find for plaintiff such reasonable sum in damages as they may believe, from the evidence, will compensate him for the physical and mental pain, if any, suffered by him by reason of said injury, and for any permanent diminution of power, if any, to earn money by reason of such injury, not exceeding ——— dollars.[14]

§ 2035(14). Maryland

You are instructed that, if the jury shall find a verdict for the plaintiff, then in estimating the damages you are to consider his health and condition before the injury complained of as compared with his present condition in consequence of said injury, and also the physical and mental suffering, if any, to which he was subjected by reason of said injury, and to allow him such damages as in the opinion of the jury would be a fair and just compensation for the injury which he has sustained.[15]

The court instructs the jury that if they find a verdict for the plaintiff, and in so finding they believe from the evidence that the accident was due entirely to the negligence of the defendant, and that the plaintiff in no manner contributed to the accident by any negligence of his own, then in estimating the damages the jury are to consider the health and condition of the plaintiff before the injuries complained of as compared with his present condition in consequence of such injuries, and whether the same are in their nature permanent, and how far they are calculated to disable the plaintiff from engaging in those business pursuits for which in the absence of such injuries he would have been qualified, and also the physical and mental suffering to which he has been subjected by reason of said injuries; and the jury are to determine what, in their opinion, will be a fair and just compensation for the injuries suffered, and, after deducting therefrom the amount paid to the plaintiff by way of relief, allow the remainder of the sum so determined as damages to the plaintiff.[16]

You are instructed that if the jury find for the plaintiff in this case, then, in estimating the damages, they are entitled to take into consideration the plaintiff's state of health and physical condition prior to the accident, his capacity for doing work and earning wages prior thereto, as compared with his condition and capacity since the accident in consequence thereof; and they may also consider the question as to whether the injuries will be permanent in

[14] Chesapeake & O. Ry. Co. v. Jordan, 76 S. W. 145.

[15] Epstein v. Ruppert, 99 A. 685, 129 Md. 432.

[16] Baltimore & O. R. Co. v. Branson, 98 A. 225, 128 Md. 678.

their effect, and they may also consider the physical and mental anguish which the plaintiff has suffered in the past, or is likely to continue to suffer in the future, and award him such sum as in their judgment will be an adequate compensation for the injuries which he has sustained.[17]

You are instructed that, if you find for the plaintiff, in estimating the damages you are at liberty to consider the health and condition of the plaintiff before the injuries complained of, as compared with his present condition in consequence of the said injuries, and whether the said injuries in their nature are permanent and calculated to disable the plaintiff from engaging in those business pursuits, for which in the absence of said injuries he would have been qualified, and also the physical and mental suffering to which he has been subjected by reason of said injuries, and to allow such damages as in the opinion of the jury will be a fair and just compensation for the injuries which the plaintiff has suffered.[18]

The jury are instructed that, if the jury shall find a verdict for the plaintiff, then, in estimating the damages, they are to consider his health and condition before the injury complained of, as compared with his present condition in consequence of said injury, and whether the same is in its nature permanent, and how far, if at all, it is calculated to disable him from engaging in employments for which, in the absence of such injury, he would have been qualified, and also the physical and mental sufferings, if any, to which he was subjected by reason of such injury, and to allow him such damages as in the opinion of the jury will be a fair and just compensation for the injury he has sustained.[19]

§ 2035(15). Michigan

The court instructs the jury that, in approaching the question of damages in this case, if you come to it, you should bear in mind that it is the purpose of the law, in awarding damages, to award full, fair, adequate compensation for any and all injuries growing out of the accident complained of. The purpose of awarding damages is not to punish the defendant. No such theory as that at all should occupy any juror's mind when he considers the question of awarding just and proper damages. But the rule of damages is to award, as nearly and fully as money can, compensation for each and every injury for which the jury find the defendant to have been responsible. Approaching this phase of the case, if you come to it, in that spirit, what are the elements that you may rightly consider,

[17] Pennsylvania Steel Co. of Philadelphia v. Nace, 77 A. 1121, 113 Md. 460, 45 L. R. A. (N. S.) 281.

[18] Chesapeake & Potomac Telephone Co. of Baltimore City v. Lysher, 68 A. 619, 107 Md. 237, 126 Am. St. Rep. 389.

[19] Philadelphia, Wilmington & B. R. Co. v. Anderson, 72 Md. 519, 20 A. 2, 8 L. R. A. 673, 20 Am. St. Rep. 488.

if you determine that the plaintiff is entitled to damages? First, let me say to you, gentlemen of the jury, that no damages can be assessed against this defendant because of any injuries which the plaintiff may have sustained in any accident other than the one in question in this case. Excluding, then, any damages of the nature just suggested, you should ascertain the extent of any injury growing directly and necessarily out of this accident.[20]

You are instructed that in this action, which is for a single wrongful act, the plaintiff, if she has shown herself entitled to recover, is entitled to recover all damages which she has suffered up to the time of trial, and for all damages which it is reasonably probable that she will sustain in the future, not exceeding, in all, the amount claimed in the declaration, and that has been stated to be ———. In estimating the compensatory damages in cases of this character, all the consequences of the injury, future as well as past, are to be taken into consideration, including the bodily pain, which is shown by the proofs to be reasonably certain to have naturally resulted from the injury. The injured party, when entitled to recover, should be awarded compensation for all the injuries, past and prospective. These are intended to include and embrace indemnity for actual nursing and medical expenses; also for loss of power, or loss of capability to perform ordinary labor, or capacity to earn money, and reasonable satisfaction of physical powers. The elements of damages which the jury are entitled to take into account consist of all effects of the injury complained of, consisting of personal inconvenience, the sickness which the plaintiff endured, the loss of time, all bodily and mental suffering, impairment of capacity to earn money, the pecuniary expenses, the disfigurement or permanent annoyance which is liable to be caused by the deformity resulting from the injury; and, in considering what would be a just sum in compensation for the sufferings or injury, the jury are not only at liberty to consider the bodily pain, but the mental suffering, anxiety, suspense, and fright may be treated as elements of the injury for which damages, by way of compensation, should be allowed. And as these last-mentioned elements of damage are, in their very nature, not susceptible of any precise or exact computation, the determination of the amount is committed to the judgment and good sense of the jury. And if you find for the plaintiff, such sum should be awarded as will fairly and fully compensate her for all damages which she has sustained consisting of the elements referred to, not exceeding in amount the sum claimed in the declaration.[21]

[20] Garaszewski v. Wurm, 169 N. W. 871, 204 Mich. 227.

[21] Sherwood v. Chicago & W. M. Ry. Co., 46 N. W. 773, 82 Mich. 374.

§ 2035(16). Minnesota

You are instructed, in the event you find for the plaintiff, that, she is entitled to damages which will fairly compensate her for the pain and suffering which she has sustained up to this time, and for any pain and suffering which under the evidence you believe she will sustain in the future as the result of the accident that we have under consideration. You should allow her such damages as will fairly compensate her for any permanent injuries which she has sustained.[22]

The jury are instructed that, if you conclude that plaintiff is entitled to recover, you should award him by your verdict such amount as will, in your judgment, compensate him for his injuries and sufferings. You may take into account the permanence of his disabilities, his loss of time, and his pain of body and mind.[23]

§ 2035(17). Missouri

The jury are instructed that, if the jury find the issues for plaintiff in this case, you will, in determining his damages, take into consideration the mental and physical pain and suffering endured by him since said injuries and in consequence thereof, if any, the character and extent of his said injuries, if any, and whether they are temporary or permanent, the impairment of his earning capacity, if any, and find for him in such sum as in your judgment under all the facts and circumstances in evidence will be a fair and reasonable compensation to him for whatever injuries he has sustained, if any, as a direct result of the negligence of the defendant.[24]

The court instructs the jury that if they find for the plaintiff they will assess his damages at such sum as they believe from the evidence will be a reasonable compensation to the plaintiff: First. For any pain of body and anguish of mind suffered by him as the direct result of the injuries sustained by him, if any, as shown by the evidence and caused by the negligence of the defendant, and also for such pain of body and anguish of mind, if any, which will in all reasonable probability result to plaintiff from such injuries in the future. Second. For such reasonable expense as he has incurred for medical services and medicines directly caused by the injuries, not exceeding for this the sum of $———. Third. For any loss of earnings suffered by plaintiff as the direct result of said injuries, not exceeding for this item the sum of $———. Fourth. For any loss of earnings, if any, which plaintiff will in all reasonable probability suffer in the future as the direct result of such injuries. The total amount of said recovery not to exceed the sum of $———.[25]

[22] Carson v. Turrish, 168 N. W. 349, 140 Minn. 445, L. R. A. 1918F, 154.

[23] Wilson v. Northern Pac. R. Co., 26 Minn. 278, 3 N. W. 333, 37 Am. Rep. 410.

[24] Wagner v. Gilsonite Const. Co., 220 S. W. 890.

[25] Bamber v. United Rys. Co. of St. Louis, 192 S. W. 953.

The court instructs the jury that if you find a verdict for the plaintiff you are, in estimating her damages, to consider any change in her physical condition which you may believe from the evidence resulted from the injury to her; the physical or mental anguish, if any, suffered by her on account of her injuries at the time of and since such injuries, as shown by the evidence, and such damages, if any, as you may from the evidence find it is reasonably certain she will suffer in the future therefrom; and you will find a verdict for such sum as in your judgment will under all the evidence reasonably compensate her for such injuries, including compensation for such sums of money, if any, as the evidence shows she herself has heretofore paid out for medicines, nursing and medical treatment, but not including any amount not already actually paid by her.[26]

The court instructs the jury that if you find for the plaintiff, and if you believe from the evidence that she sustained injuries as the direct result of said collision, then you may allow her such damages for such injuries, if any, as you may believe from the evidence she has sustained, as a direct result of said collision. In estimating such damages you may take into consideration the physical pain and suffering, which you may believe from the evidence she has endured, if any, or is reasonably certain to endure in the future, if any, as a direct result of said injuries, if any. You may also take into consideration the effect, if any, of said injuries, if any, upon plaintiff's health. You may also take into consideration any reasonable sums of money, if any, which you may believe from the evidence plaintiff has become liable for for necessary medical treatment received by her on account of said injuries, if any, not to exceed the sum of $———, but the whole amount of your verdict should not exceed $———.[27]

You are instructed that, if you find for the plaintiff, in estimating and determining the measure of his damages you should take into consideration, in connection with all the facts and circumstances in evidence, the bodily pain and mental anguish, if any, endured by him, and directly resulting from the injuries received, if any, and whether they are permanent in their nature; the extent, if any, to which he has been prevented and disabled by reason of such injuries from working and earning a livelihood; his reasonable and necessary expenses in endeavoring to be cured, if any; and you will find for him in such a sum as in your judgment, under all the evidence in the case, will compensate him for such injuries and damages before mentioned as you find from the evidence plaintiff sustained, not exceeding, however, the sum of $———.[28]

[26] Haywood v. Kuhn, 151 S. W. 204, 168 Mo. App. 56.

[27] Stauffer v. Metropolitan St. Ry. Co., 147 S. W. 1032, 243 Mo. 305.

[28] O'Donnell v. United Rys. Co. of St. Louis, 133 S. W. 1165, 152 Mo. App. 606. It was objected that recovery for expenses should have been limited to itemized expenditures.

The court instructs the jury that, if under the evidence and the law as declared in the other instructions of the court you decide to find a verdict in favor of plaintiffs, you should assess the damages in your verdict at such a sum as you believe from the evidence to be a reasonable compensation for any one or more of the following items of damage, if any, which you find and believe from the evidence Mrs. ——— had already sustained (or is reasonably certain to sustain in the future) as a direct result of the acts of defendant complained of in this action, namely: (1) For any pain of body or mind; (2) for any injury to her nervous system; (3) for any permanent lameness or crippled physical condition, if you find from the evidence that any such injury directly resulted to her. But the total award of damages in your verdict is limited to the amount claimed in the petition namely, to $———.[29]

The jury are instructed that the plaintiff claims in her petition that on ———, she was a passenger on a cable train of defendant, and that while she was a passenger on such train it came in collision with another cable train of defendant. Now, if you find for the plaintiff, and if you believe from the evidence that she sustained injuries as a direct result of said collision, then you may allow her damages for such injuries, if any, as you may believe from the evidence she has sustained as a direct result of said collision. In estimating such damages you may take into consideration the pain and suffering which you may believe from the evidence she has endured, if any, or is reasonably certain to endure in the future, if any, as a direct result of such injuries, if any. You may take also into consideration the loss of earnings, if any, which you may believe from the evidence she has sustained as a direct result of such injuries, if any. You may also take into consideration any sum of money which you may believe from the evidence plaintiff has reasonably become liable for, if any, for necessary medical treatment received by her on account of and as a direct result of said injuries, if any, not to exceed $———, for the whole amount of your verdict should not exceed the sum of $———.[30]

You are instructed that, if you find for plaintiff, then in assessing her damages you may take into consideration all physical pain, if any, and mental anguish, if any, she suffered on account of the injuries, if any, she received by falling over the coal hole in front of No. ——— street, on ———, if you find and believe from the evidence that she did fall at said time and place. And if you further find and believe from the evidence that plaintiff, on account of said injuries, if any, was compelled to lose her means of livelihood,

[29] Westervelt v. St. Louis Transit Co., 121 S. W. 114, 222 Mo. 325.

[30] Price v. Metropolitan St. Ry. Co., 119 S. W. 932, 220 Mo. 435, 132 Am. St. Rep. 588.

you may take this into consideration, and allow her such amount therefor, not to exceed ——— dollars per week, as you may find and believe from the evidence she is entitled to. And if you also find and believe from the evidence that on account of said injuries it became necessary to amputate plaintiff's right leg, and that the same was amputated on account thereof, then you may take that fact into consideration in assessing her damages, and allow her such sum as you may find and believe from the evidence she is entitled to, not to exceed in all the sum of $———.[31]

You are instructed that if, under the evidence and the instructions, the jury find in favor of the plaintiff, you will assess his damages at such sum as you believe from the evidence will fairly compensate plaintiff for such injuries, if any, as you find from the evidence he sustained at the time of the accident mentioned in the evidence, and in assessing the damages of the plaintiff, if the jury find in his favor, you will take into consideration the nature and character of the injuries, if any, sustained by the plaintiff at the said time, the pain and suffering and mental anguish plaintiff has endured, if any, as a direct result of his injuries sustained at the time of the accident; the pain of body and mental anguish you believe from the evidence plaintiff will suffer in the future as a direct result of the injuries, if any, sustained at the time of the accident; the reasonable valuation of the loss of time, if any, which the jury believe from the evidence plaintiff has been compelled to lose from his occupation as a direct result of the injuries sustained at the said time; the reasonable valuation of the loss of time, if any, the jury believe from the evidence plaintiff will be compelled to lose in the future as a direct result of his injuries sustained at the time of the accident; and the reasonable valuation of the medical service, if any, necessarily rendered the plaintiff as a direct result of the injuries sustained at the time of the accident, which you believe that the plaintiff is legally bound to pay.[32]

You are instructed that, if the jury find for the plaintiff, they should assess his damage at such sum as they believe from the evidence will be a fair compensation to him, subject to the limitations of the other instructions given herein: First. For any pain of body or mind which the plaintiff has suffered or will suffer by reason of his injuries, and directly caused thereby. Second. For any loss of earnings from his business, directly caused by his disability to attend to his business, which the plaintiff has or will hereafter have

[31] Smart v. Kansas City, 105 S. W. 709. 208 Mo. 162, 14 L. R. A. (N. S.) 565, 123 Am. St. Rep. 415, 13 Ann. Cas. 932.

[32] Gilroy v. St. Louis Transit Co., 92 S. W. 1152, 117 Mo. App. 663.

sustained, directly caused by his injuries. Third. For any expenses for medicine, nursing, medical or surgical attention which the plaintiff has necessarily incurred, or will hereafter necessarily incur, directly caused by the said injuries, in seeking relief therefrom.[33]

The court instructs the jury that, if they find for the plaintiff, they must assess his damages in such a sum, not exceeding $———, as they believe from the evidence will fairly compensate him for the injuries sustained; and in determining such amount they may take into consideration not only the pecuniary loss, if any, heretofore sustained by the plaintiff by reason of such injury, but also such loss, if any, as the jury believes from the evidence he may hereafter sustain by reason of his lessened earning capacity for the remainder of his lifetime; and the jury may further take into consideration the physical pain, suffering, and mental anguish resulting from such injury, and the deformity in his appearance.[34]

You are instructed that, if the jury find for the plaintiff, in estimating and determining the measure of his damages they should take into consideration, in connection with all the facts and circumstances in evidence, the bodily pain and suffering and mental anguish, if any, endured by him, and resulting from the injuries received; the character and extent of his injuries, and whether they are permanent in their nature; the extent, if any, to which he has been prevented and disabled by reason of such injuries from working and earning a livelihood for himself; his necessary expenses for medical attention in endeavoring to be cured; and may find for him such sum as, in the judgment of the jury, under all the evidence in the case, will compensate him for the injuries received, not, however, exceeding the sum of ——— dollars.[35]

The jury are instructed that, if the jury find for the plaintiff, then, in assessing his damages, they will allow the reasonable expense, if any, which they may believe from the evidence that he has incurred for medical treatment growing out of the injuries sustained by him in the derailment of defendant's train. They will also allow him a reasonable compensation for the loss of time and earnings, if any, that they may believe from the evidence that he has sustained up to the present time in consequence of such injuries; and the jury may take into consideration the impairment, if any, in plaintiff's capacity to earn a livelihood, which they may believe from the evidence that he has sustained in consequence of such injuries, and allow him a reasonable compensation therefor; and the jury may also take into consideration the physical pain

[33] Robinson v. St. Louis & S. Ry. Co., 77 S. W. 493, 103 Mo. App. 110.

[34] Duerst v. St. Louis Stamping Co., 63 S. W. 827, 163 Mo. 607.

[35] Mirrieless v. Wabash R. Co., 63 S. W. 718, 163 Mo. 470.

and mental anguish, if any, that they may believe from the evidence he has suffered in consequence of such injuries, and allow him a reasonable compensation therefor; and also they may take into consideration the physical pain and mental anguish, if any, that they may believe from the evidence he will suffer in the future in consequence of such injuries, and allow him a reasonable compensation therefor, not to exceed in all the sum of ——— dollars.[36]

The jury are instructed that if, under the law and evidence, you find the issues in this cause for the plaintiff, the damages which you may award him should be compensatory only, and should not exceed the amount sued for in the petition. And in estimating such damages you will take into consideration, and allow him for, expenses incurred in treating his injuries; also compensation for the time he lost during his illness occasioned by his injury. And while the evidence may not prove any specific sum, in dollars and cents, that plaintiff may have been damaged in by reason of his physical pain and mental anguish, yet you may allow him what you may believe to be just and fair to compensate him for such sufferings. You will also take into consideration, in estimating his damages, his diminished capacity for earning money, if you so believe from the evidence, and on account thereof make him such allowance as you may believe to be fair and just for any loss that you may believe from the evidence he has sustained in the past by reason thereof, and for any loss you may believe from the evidence he may sustain in his future earnings, by reason of such diminished earning capacity as may be occasioned by his injury.[37]

You are instructed that, if the jury find the issue submitted in the instructions for plaintiff, they will assess his damages at such sum, not exceeding $———, as they believe from the evidence will be a fair compensation to him for the pain and suffering of mind and body that he has already endured on account of the alleged injury, and such as he is reasonably likely to suffer therefrom in the future, and for any permanent physical disability of the right foot, ankle, or leg, if any, which the jury may believe from the evidence the plaintiff has sustained by reason of such injuries; but inasmuch as no amount of medical bill has been shown by the evidence to have been incurred by plaintiff, and no specific value for his alleged loss of time, if the jury allow plaintiff for these items, they can only give him a nominal amount for each of them.[38]

You are instructed that if the jury find for plaintiff, you will

[36] Smiley v. St. Louis & H. Ry. Co., 61 S. W. 667, 160 Mo. 629.

[37] Rodney v. St. Louis S. W. Ry. Co., 28 S. W. 887, 127 Mo. 676.

[38] Boggess v. Metropolitan St. Ry. Co., 23 S. W. 159, 118 Mo. 328.

assess his damages at such sum as, in your judgment, he may be entitled to, under the facts proved and instructions given, not exceeding, however, ——— dollars; and, in fixing the amount of such damages, you will take into consideration his age and condition in life, the nature and extent of the physical injuries inflicted, whether the same are permanent or only temporary, and the bodily pain and mental anguish, and any and all such damage which it appears from the injury will reasonably result to him from such injuries in the future.[39]

§ 2035(18). Montana

You are instructed that if you believe, under these instructions and the evidence in the case, that the plaintiff is entitled to recover damages from the defendant for any injuries which he has proven by a preponderance of the evidence that he has sustained by reason of the facts set forth in his complaint, then you have the right to find for him for such an amount of damages, not to exceed $———, as you believe from the evidence will compensate him for the personal injuries so received, if any, and in doing so you have the right to consider the personal injuries received by him, if any have been proved, and any pain or suffering he may have endured in consequence thereof, if any pain or suffering has been proved, and you have the right to consider his loss of time, if any, caused by such injuries, if any have been shown.[40]

You are instructed that, if you are satisfied by the preponderance of the evidence that the plaintiff received any of the injuries through the causes specified in the complaint, you will find for the plaintiff for damages in such sum as will compensate him for the injuries, if any, he has sustained, not exceeding, however, the sum of $———. The elements entering into damages are the following: (1) Such as will compensate him for the expense, if any, he has paid or incurred for care and medical attendance in consequence of such injuries, not exceeding the sum of $———. (2) If you are satisfied by a preponderance of the evidence that such injuries have impaired the plaintiff's power to earn money in the future, such sum as will compensate him for such loss of power. (3) Such reasonable sum as will compensate him on account of the pain and anguish he has suffered by reason of such injuries. (4) Such sum as will compensate him for time lost, if any, through any of said injuries. The first of these elements is the subject of direct proof, and is to be determined by the jury on the evidence they have before them. The second, third, and fourth elements are, from necessity, left to the sound discretion of the jury under the evidence.[41]

[39] Ridenhour v. Kansas City Cable Ry. Co., 13 S. W. 889, 102 Mo. 270.

[40] Lehane v. Butte Electric Ry. Co., 97 P. 1038, 37 Mont. 564.

[41] Rogan v. Montana Cent. Ry. Co.,

§ 2035(19). Nebraska

The jury are instructed that, if you find for the plaintiff, you will allow him as damages such sum as will compensate him for the injuries he has sustained, not exceeding $———, which is the amount sued for. The elements entering into damages are as follows: (1) The value of his time during the period that he was disabled by the injuries; (2) if the injuries have impaired plaintiff's power to earn money in the future, such sum as will compensate him for such loss of power; (3) such reasonable sum as the jury shall award him on account of any pain and anguish he has suffered by reason of his injuries; (4) such prospective suffering and loss of health, if any, as the jury may believe from all the evidence before them in this case he will sustain by reason of such injuries; (5) such sum as the jury may deem proper for the inconvenience of his going through life with only one eye.[42]

You are instructed that, if from the evidence and instructions in the case you find for the plaintiff, you will then allow the plaintiff damages in such sum as you believe, from all the evidence in the case, will actually compensate her for the injuries sustained by her, if any. You will take into consideration the nature, location, and extent of the injury. You will allow plaintiff the fair and reasonable amount of necessary medical services for which plaintiff may have become obligated, if any, and for her loss of time from her occupation, if any. You will also allow plaintiff damages for her mental and physical suffering, if any such has been proved. Mental suffering and physical pain are incapable of measurement by any fixed and arbitrary rule, but must from its nature depend largely upon the judgment of the jury, governed by the circumstances of the particular case. You cannot allow damages by way of punishment. That is for the criminal law, and not for the jury in a civil case. The damages, if any allowed, must be compensatory only.[43]

The jury are instructed that in ascertaining what damage, if any, the plaintiff had sustained by reason of her injuries, they are to consider the character and extent of such injuries as shown by the evidence whether such injuries, or any thereof, were permanent or temporary only; her physical pain and mental suffering, if any, which the evidence showed she had endured, or which it was reasonably certain from the evidence she would endure in the future, as the natural and direct result of such injuries, taking into consideration the age of the plaintiff at the time the accident happened, and her reasonable expectancy of life.[44]

52 P. 206, 20 Mont. 503. In this case there was no way of exactly measuring the value of time lost by plaintiff.

[42] Bower v. Chicago & N. W. R. Co., 148 N. W. 145, 96 Neb. 419.

[43] Kast v. Link, 132 N. W. 717, 90 Neb. 25.

[44] Carlon v. City Savings Bank of Omaha, 124 N. W. 91, 85 Neb. 659.

The court instructs the jury that, if you find from the evidence and these instructions that the plaintiff is entitled to recover, it will be your duty to fix and ascertain from the evidence the amount to which he is entitled. You should carefully examine all the evidence as to the nature, character, and extent of the injury, and the result; whether the disability, if any, resulted from the injury, was permanent or temporary; its extent, whether total or partial. If any permanent disability resulted, you should consider plaintiff's age; his reasonable expectancy of life; how much money he could earn as he was before the injury; how much, if any, he could earn with his reduced capacity, if any there was, on account of the injury—remembering that no reduction of capacity on any other account is to be considered—and allow him a reasonable compensation for any loss of time and capacity resulting from the injury. You should also allow him for his suffering. The law lays down no rule for estimating his damages on this account, but leaves it to your sound judgment, and you should allow him such amount as in your best judgment would be just under the circumstances, not exceeding in all the sum claimed, $———.[45]

§ 2035(20). North Carolina

The jury are instructed that, where the plaintiff has been injured by the negligent conduct of the defendant he is entitled to recover damages for past and prospective loss resulting from defendant's wrongful and negligent acts, and these may embrace indemnity for actual expenses incurred in nursing and medical attention, loss of time, loss from inability to perform mental or physical labor, or of capacity to earn money, and for actual suffering of body or mind which are the immediate and necessary consequences of the injuries, but, in this case, as the plaintiff has not introduced evidence to show what he paid for nursing and medical attention or what his services for loss of time were worth, you will only consider such damages, if any, as he is entitled to recover for actual suffering of body and mind which are the immediate and necessary consequences of injuries sustained if you find by the greater weight of the evidence he was injured by the negligent conduct of the defendant.[46]

§ 2035(21). Oklahoma

The court instructs the jury that, if you find for the plaintiff in this case, in assessing the damages which he is entitled to recover, the jury should take into consideration his age, experience, habits, health, bodily qualifications, his life expectancy, his occupation prior to his injury, the extent of his injury, his ability at that time

[45] City of Lincoln v. Holmes, 28 N. W. 851, 20 Neb. 39.

[46] Ruffin v. Atlantic & N. C. R. Co., 55 S. E. 86, 142 N. C. 120.

to perform labor, the pain and suffering he endured, his mental anguish, whether his injuries are permanent or otherwise, and the character of the same, and award him such sum or sums as you believe will reasonably and fairly compensate him for the damages sustained.[48]

The court instructs the jury that, in the event you find for the plaintiff, you will fix the amount of his recovery at such sum as you find, from all the evidence in the case, will in your judgment reasonably compensate for the injury resulting to him as shown by the proofs in the case; that you will take into consideration, in fixing the sum, the pain and suffering, if you believe the plaintiff has suffered pain from said injury, the loss of time, if any has been proved, the impairment or loss of plaintiff's eyesight, if you find from the evidence that his eyesight has been impaired or lost because of the injuries complained of, and the permanency of his injuries, if you find they are permanent, and whatever reasonable sum, if any, you find from the evidence the plaintiff has been obliged to expend in procuring necessary treatment for his injuries, in all however, not to exceed the amount sued for.[49]

You are instructed that, if you find from a preponderance of the evidence that the plaintiff is entitled to recover from the defendant, then it is your duty to award him such sum by way of damages as you believe from the evidence will fairly compensate the plaintiff for the loss he has sustained by reason of his injuries; and in arriving at such amount you may consider his age at the time of the accident, his health and physical condition before and after the injury, his habits, his earning capacity, the character of his injuries, as to whether they are permanent or otherwise, the physical pain and mental suffering, if any, which he has suffered, or will reasonably be expected to suffer by reason of his injuries, his loss of time, if any, and, together with all other facts and circumstances in evidence in the case showing or tending to show the amount of damage the plaintiff has sustained, determine the amount which you believe the plaintiff is entitled to recover, but your verdict should not in any event exceed the sum of $———, the amount claimed in the plaintiff's petition.[50]

You are instructed that, in the event you should find for the plaintiff in this case, you may assess his damages at such sum as will reasonably and fairly compensate him for the injuries sustained, not exceeding $———, and in arriving at the amount you can take into consideration the extent of the plaintiff's injuries,

[48] Midland Valley R. Co. v. Goble, 186 P. 723, 77 Okl. 206.

[49] Bartlesville Zinc Co. v. James, 166 P. 1054.

[50] Chicago, R. I. & P. Ry. Co. v. Penix, 159 P. 1141, 61 Okl. 4.

if any, and his mental and physical suffering by reason thereof, if any, and the loss of his power to earn money, if you find from the evidence there was such loss.[51]

The court instructs the jury that, if you find that the defendant is liable, then you should give the plaintiff such damages as he has proved in this case, not exceeding the amount named in the petition, and in estimating such damages you must take into consideration the permanent injury to the plaintiff, the shock to his system, his pain and anguish, and a fair recompense for the loss of what he might otherwise have earned, and has been deprived of the capacity for earning by the wrongful act of the defendant.[52]

The court instructs the jury that if, under the evidence and the instructions of the court, you find in favor of the plaintiff, you should assess his damages in such an amount as you believe from the evidence will be a fair compensation to him for the pain of body and mind, if any, which he has suffered, occasioned by such injuries; and, in determining what amount of damages you will award him, you may take into consideration the question as to whether or not the injuries received by plaintiff are permanent, but you cannot award him anything for the impairment of any earning capacity the plaintiff may have had.[53]

You are instructed that, if you find the issues for the plaintiff, then he is entitled to recover reasonable damages; for the law only permits the recovery of reasonable damages. The measure of plaintiff's damages, if you find he is entitled to recover, is reasonable compensation for the physical pain which you may find he has suffered, also any loss which you may find he has sustained by being unable to work and earn money, together with any loss you may find he has sustained by reason of lessened capacity to labor since he left the hospital, also any loss which you may find he has sustained by reason of any permanent injuries, if you find he has sustained any injuries of that character, and also any expenses which you may find he has incurred in the way of doctor's bills, hospital and nurse expenses; provided such damages do not exceed in the aggregate the sum of $———, the sum named in the complaint.[54]

The court instructs you that if you find that the plaintiff is entitled to recover in this action, the amount of the recovery is for you to determine from all the facts in the case. Of course, you

[51] Midland Valley R. Co. v. Kersey, 157 P. 139, 59 Okl. 9.

[52] Henryetta Coal & Mining Co. v. O'Hara, 150 P. 1114, 50 Okl. 159.

[53] Muskogee Electric Traction Co. v. Rye, 148 P. 100, 47 Okl. 142. Proper where no evidence of loss of earnings, or as to any impairment of earning capacity.

[54] Seay v. Plunkett, 145 P. 496, 44 Okl. 794.

cannot measure in dollars and cents the exact amount she is entitled to, but it is for you to say, in the exercise of a sound discretion, from all the facts in the case, after considering and weighing all the facts in the case, without fear and without favor, and without passion and without prejudice, what amount of money will reasonably compensate her for the damage and injury she has suffered. If you find for the plaintiff in this case under the instructions given by the court, and that the plaintiff has sustained injuries as set forth in her petition, then to enable the jury to estimate the amount of damages, it is not necessary that any witness should have expressed an opinion as to the amount of such damage, but the jury may themselves make such estimate from the facts and circumstances in proof, and by considering them in connection with their knowledge, observation, and experience in business affairs of life. If you find for the plaintiff, then, in assessing plaintiff's damages, if any damages alleged in her petition are proved, you have a right to take into consideration the nature, extent, and character of the injury sustained by her so far as the same is shown by the evidence, if any such are shown, pain and suffering undergone by her in consequence of such injury, if any such is shown by the evidence, and assess her damages at such sum as in your judgment will compensate the plaintiff for such injury, pain, and suffering.[55]

You are further instructed that, if you find for the plaintiff, it is your privilege to find any sum which, in your judgment, will compensate the plaintiff for injuries sustained, not exceeding the amount claimed; and in arriving at your verdict, if you find for the plaintiff, it is your duty to take into consideration the extent of the injury, and the amount you think will fairly compensate the plaintiff for such injury, considering her station in life, the condition she was in at the time she was injured, and her condition since that time, and her condition at the present time, as you see her on the stand.[56]

§ 2035(22). Oregon

The court instructs the jury that, if you find that the plaintiff is entitled to a verdict, it will be then your duty to assess the damages plaintiff has sustained by reason of the injury, and you have the right when assessing the damages to take into consideration the bodily pain and suffering that plaintiff has already undergone and will hereafter suffer on account of the injuries received, also the loss of power to perform labor and duties which he would be called upon to perform in his condition in life and the impairment of his capacity to earn money, and if, after considering all these

[55] Muskogee Electric Traction Co. v. Mueller, 134 P. 51, 39 Okl. 63.

[56] Atchison, T. & S. F. R. Co. v. Chamberlain, 46 P. 499, 4 Okl. 542.

elements of damages, you conclude that the plaintiff is entitled to recover, it is your duty to determine the sum that, in your judgment, will compensate plaintiff for injuries he received, not exceeding the amount asked for in the complaint.[57]

The jury are instructed that, if your verdict be for the plaintiff, in estimating the damages you shall take into consideration the nature and extent of the plaintiff's injury, its probable permanency, the pain and suffering which the plaintiff has endured and will endure hereafter, if any, the effect that the injury may have upon the earning power of the plaintiff, the loss of wages which the plaintiff has sustained by reason of the injury complained of, and any results or effects which are shown by the evidence to follow as the direct and proximate result of the injury which the plaintiff has sustained.[58]

§ 2035(23). Texas

You are instructed that, in arriving at the amount of damages, if any you give to the plaintiff, you may take into consideration the physical pain, if any, sustained by the plaintiff by reason of said wreck; and such as you may find, if any, he will suffer in the future. You may also take into consideration the earning capacity and ability of the plaintiff before and since said accident, if from a preponderance of the evidence in the case you find a difference therein, and if from a preponderance of the evidence in the case you find that the plaintiff has sustained injuries, if any, from which he has not yet recovered, if you so find, or from which he will not in the future recover, if you so find, then you may take such fact or facts into consideration, if any you find, in arriving at the amount of damages, if any, that you may assess against the defendant and for the plaintiff.[59]

You are instructed that, in estimating the damages, if any, you should consider the time lost, if any, as proximate result of the injury, decreased capacity to earn money in the future, if any, and the mental and physical suffering endured in the past, if any, and the mental and physical suffering that will be endured in the future, if any, but in this connection you are instructed not to consider anything as an element of damages, in making your verdict, which you do not believe from the evidence was the direct and proximate result of the injury received on account of the negligence of the defendant, if any. If you should find for the plaintiff, you will find for him in such sum of money as, if paid now, will fairly compensate him for the injuries he has sustained as the direct and proxi-

[57] Mackay v. Commission of the Port of Toledo, 152 P. 250, 77 Or. 611.

[58] Lang v. Camden Iron Works, 146 P. 964, 77 Or. 137.

[59] Gulf, C. & S. F. Ry. Co. v. McKinnell (Civ. App.) 173 S. W. 937; Gulf, C. & S. F. Ry. Co. v. McKinnell (Civ. App.) 171 S. W. 1091.

mate result of said injuries, if any, taking into consideration the time lost, if any, his decreased ability to earn money in the future, if any, the mental and physical suffering he has endured, or may hereafter endure, if any, by reason of said injuries.[60]

You are instructed that, if your verdict is in favor of the plaintiff, then you will, in view of and subject to the foregoing instructions, assess his damages at such sum as you believe from the evidence to be fair and just compensation for the injuries alleged and proved to have been suffered by plaintiff on the occasion in question, if any, taking into consideration as elements of damage, so far as shown by the evidence to be a natural and probable result of such injuries, if at all, mental and physical pain to him therefrom, if any, including such as he will in reasonable probability suffer therefrom in the future, if any, and also the reasonable value of time lost to him from such injuries down to the trial, if any, and also, such sum, if paid now, as will be fair and just compensation to him for his diminished capacity, from such injuries, to labor and earn money in the future, if any.[61]

The court instructs the jury that, if the plaintiff sustained damages by reason of the negligence of the defendant the ——— Company, as alleged, and you find for plaintiff, then the measure of his damage to his person is such sum in money as you may believe from the evidence will compensate him for the injury sustained, if any, and in estimating his damages you should take into consideration the mental and physical pain, if any, which plaintiff has suffered, and which he may hereafter suffer, as a result of his injuries, if any; and if you believe from the evidence that the injuries to plaintiff, if any, are of a permanent nature, and will impair his capacity to perform labor in the future, then in addition to the above you should find such sum as will compensate plaintiff for such diminished capacity, if any, to perform labor in the future.[62]

The jury are instructed that, if you find for plaintiff, you will allow him such sum as you find and believe from the evidence will, as a present cash payment, fairly compensate him for his diminished capacity, if any, you find he has sustained on account of his injuries to labor and earn money; also, for the mental and physical pain, if any, he has suffered on account of his injuries, if any, and for the physical and mental pain, if any, you find and believe from the evidence it is reasonably probable he will suffer in the future on account of his injuries, if any, and all reasonable and necessary physicians' bills, if any.[63]

[60] Wells Fargo & Co. v. Benjamin (Civ. App.) 165 S. W. 120.

[61] St. Louis, B. & M. Ry. Co. v. Vernon (Civ. App.) 161 S. W. 84.

[62] Missouri, K. & T. Ry. Co. of Texas v. Aycock (Tex.) 135 S. W. 198.

[63] Missouri, K. & T. Ry. Co. of Texas v. Dalton. 120 S. W. 240, 56 Tex. Civ. App. 82.

You are instructed that, if you find for the plaintiff and allow him damages, you will allow him such sum, if paid now, as you believe from the evidence will be a fair compensation for the injuries sustained by him; and in estimating his damages you will take into consideration the mental and physical pain suffered by him in consequence of his injury; and if you believe from the evidence that, in consequence of his injury, he will suffer pain in the future, you will take that into consideration in estimating his damages; and if you believe that in consequence of his injury he has heretofore been prevented from laboring and earning money, and has lost time, you will take that into consideration in estimating his damages, and allow him the reasonable value of the time so heretofore lost by him, if any, in consequence of his injury; and if you believe from the evidence that in consequence of his injury his ability to labor and earn money in the future has been lessened, you will take that also into consideration in estimating his damages, and allow him such sum, if paid now, as you believe from the evidence will be a fair compensation for his diminished capacity, if any, to labor and earn money in the future.[64]

You are instructed that, in the event of your verdict being for the plaintiff, in assessing his damages, you may take into your consideration the reasonable value of time lost, if any, consequent upon his injuries, the necessary sums of money, if any, expended by him for medical attendance and medicine rendered necessary by his injuries, the bodily and mental pain, if any, suffered by, or that may be suffered by, reason of his injuries; and if you believe, from the evidence, plaintiff's injury is permanent, and will impair his capacity to labor and earn money in future, you may, in addition to the foregoing, find such sum as will be a fair and reasonable compensation for his future diminished capacity to labor and earn money.[65]

You are instructed that, if you find for plaintiff, you will award her such sum of money as damages as you believe from the evidence will reasonably and fairly compensate plaintiff for the bodily and mental pain, if any, reasonably necessary medical expenses, if any, loss of time from her business, if any, and diminished capacity to pursue her occupation in the future, if any, which you believe from the evidence the plaintiff has sustained or incurred by reason of said injuries, if any.[66]

You are instructed that, if you should find for plaintiff, you will allow him, by your verdict, such a sum of money as you may

[64] El Paso & S. W. R. Co. v. O'Keefe, 110 S. W. 1002, 50 Tex. Civ. App. 579.

[65] Galveston City Ry. v. Chapman, 80 S. W. 856, 35 Tex. Civ. App. 551.

[66] Missouri, K. & T. Ry. Co. of Texas v. White, 55 S. W. 593, 22 Tex. Civ. App. 424.

believe from the evidence will fairly compensate him for the reasonable value of any of his time that you may believe from the evidence he has lost by reason of his said injury; for any reasonable expenses that you may believe from the evidence he has incurred by reason of such injury in the way of medicines and medical treatment in treating such injury; for any decrease in his capacity to labor and earn money in the future, that you may believe from the evidence has been caused by such injury; and for any physical suffering and mental anguish that you may believe from the evidence he has endured by reason of such injury. In this connection, however, you are instructed that you can allow him damages for those things caused by said injury from the falling of said block and striking him only, and for none other. So, if you should believe from the evidence that some of the consequences which plaintiff claims were caused by said block's striking him on the head are due to some other cause, you cannot allow him any damages for such troubles so due to some other cause. In other words, you can allow him damages for only those injuries that you may believe from the evidence were caused by said block's striking him, if you allow him any.[67]

The court instructs the jury that, in case they should find for plaintiff, he will be entitled to recover such damages, if any, as he may have sustained as the direct and proximate results of defendant's negligence, if any. And, in determining the amount of your verdict for damages, you will take into consideration the nature and extent of the injuries to plaintiff so received, and the physical and mental pain resulting therefrom, if any, and you will also consider any loss of time or diminished capacity to earn money at his chosen profession, if any, which he may have sustained as the direct and proximate result of said injuries; and you will assess such damages for plaintiff as will, based upon the evidence, be a just, fair, and reasonable compensation for said injuries and pecuniary loss and damages he has sustained, if any, and you will also include in your verdict such further sum or sums of money, if any, as you may find he has necessarily incurred in the proper care and treatment of his injuries so caused by defendant, if any —your verdict in no event to exceed the amount claimed in plaintiff's petition.[68]

You are instructed that if, under the law given in this charge, and the evidence submitted to you, you find in favor of plaintiff, you will say so by your verdict, and further say by your verdict at what you assess his damages, if you find any; and in estimating

[67] Sherman Oil & Cotton Co. v. Stewart, 42 S. W. 241, 17 Tex. Civ. App. 59.

[68] Gulf, C. & S. F. Ry. Co. v. Brown, 40 S. W. 608, 16 Tex. Civ. App. 93.

such damages you are confined entirely to the testimony in the case, under the rules of law given you in this charge. You are authorized to take into consideration, in estimating such damages, if any you find, any medical bill you may believe the plaintiff incurred on account of said alleged injuries, the value of the time lost by the plaintiff during the period necessary for his cure, and while disabled from his injuries to work and labor, taking into consideration the nature of his business, and the value of the services in conducting the same, and fair compensation for the mental and physical sufferings caused by the injury, as well as the probable effect of the injury in future upon his health and use of his limbs, and his ability to labor and attend to his affairs, and generally any reduction of his power and capacity to earn money and pursue the course of life which he might otherwise have done.[69]

§ 2035(24). Utah

If, under the evidence and the instructions given you by the court, your verdict is in favor of the plaintiff, you will assess his damages, and in doing so you have the right and should take into consideration his age and his earning capacity, before and after the injury, the nature and extent of his injury, and whether permanent or not, the physical pain and mental anguish suffered and endured and that he will probably hereafter endure by reason and on account of said injury, the time lost and that he will probably hereafter lose, as may appear from the evidence, by reason of and as a direct result of such injury, such expense, if any, as he will hereafter incur in the treatment of the injury, together with all the facts and circumstances in evidence in the case, and after doing so you will assess the damages at such sum as from the evidence you may deem proper, not exceeding the amount claimed by plaintiff in his complaint.[70]

You are instructed that, in determining the amount of damages, if any, that the plaintiff is entitled to in this case, the jury should take into consideration all of the facts and circumstances before them in evidence, the nature and extent of plaintiff's physical injuries, if any is shown by the evidence to have resulted from the negligent act, or acts, of the defendants, or either of them, his suffering in body and mind, if any, resulting from such injuries, and also such suffering and loss of health, if any, as the jury may believe from all the evidence before them the plaintiff has sustained, or will sustain, by reason of such injuries, his loss of time and service and inability to work and earn money for himself, resulting

[69] Missouri, K. & T. Ry. Co. of Texas v. Kirkland, 32 S. W. 588, 11 Tex. Civ. App. 528.

[70] Picino v. Utah-Apex Mining Co., 173 P. 900, 52 Utah, 338.

from such injuries, and should find for him such sum as in the judgment of the jury under all the evidence will be just.[71]

You are instructed that, if you find for the plaintiff, then it will become your duty to assess the damages; and in finding damages you should assess such amount as will fully compensate him for such injuries as he has proved.[72]

§ 2035(25). Virginia

The court instructs the jury that, if under all the evidence and instructions of the court they should find for the plaintiff, they should allow him such sum as they believe from the evidence will compensate him reasonably for the injuries received, if any; and in estimating his damages, if any, they may take into consideration the mental and physical pain and suffering, if any, consequent upon the injuries received, the reasonable value of time already lost, if any, consequent upon his injuries; and, if they believe from the evidence that the said injuries are permanent and will wholly or partially disable him to labor and earn money in the future, then they may, in addition to the above, find such sum as will, if paid now, be a fair compensation for his diminished capacity, if any, to labor and earn wages in the future, and in this connection they may take into consideration the probable duration of the plaintiff's life under all the proof in the case.[73]

The court instructs the jury that, if they find for the plaintiff, in estimating his damages they may take into consideration any bodily injuries which he may have sustained by reason of the accident complained of, and any physical pain he may have suffered thereby, and assess his damages at such a sum as they may think just and proper under the evidence in this case, not exceeding the sum of $——— claimed in the declaration.[74]

The court instructs the jury that in estimating such damages they should take into consideration the injuries he has sustained and the bodily and mental suffering caused by the injury, together with all such sums as he may have expended, if any, to be cured of his injury and sickness occasioned by such injury, and also such damages as will compensate him for the loss of time and earning capacity, so far as they, the jury, may believe from the evidence his injury has caused him any such loss.[75]

The court instructs the jury that, if they shall find for the plaintiff, then in fixing the damages they should take into consideration all of the facts and circumstances of the case as shown by

[71] Dimmick v. Utah Fuel Co., 164 P. 872, 49 Utah, 430.

[72] Harrington v. Eureka Hill Min. Co., 53 P. 737, 17 Utah, 300.

[73] Chesapeake & O. Ry. Co. v. Arrington, 101 S. E. 415, 126 Va. 194.

[74] City of Charlottesville v. Jones, 97 S. E. 316, 123 Va. 682.

[75] Roanoke Ry. & Electric Co. v. Young, 62 S. E. 961, 108 Va. 783, 15 Ann. Cas. 946.

the evidence, and fix the damages at such sum as they deem just and proper in the light of the whole evidence, not to exceed the sum of $——— in either case.[76]

The court instructs the jury that, if they should find for the plaintiff, they may, in estimating damages, take into consideration the following: The physical and mental suffering of plaintiff received from his injury, his loss of wages for the time during which he was prevented by said injuries from working, proper compensation for his being unable because of said injuries to follow such a calling or business as he could otherwise have followed, and for moneys expended by plaintiff or for which he is obligated or indebted for medical and surgical attention, medicines, nursing, etc.[77]

§ 2035(26). Washington

You are instructed that, in ascertaining the damages all the consequences of the injury, future as well as past, reasonably certain to be incurred, are to be taken into consideration, including loss of time or capacity to work, if any, damage to car, if any, and bodily pain and suffering, reasonable doctor's bills, if any has been proved, bodily inconvenience, or mental disturbances, if shown, and such sum awarded, if any, as will reasonably compensate the plaintiff for his injury. You will readily understand there is no exact legal standard by which to measure damages for pain and suffering or mental distraction, and upon these questions the jury must exercise its own good judgment and sound common sense based upon the evidence in the case.[78]

The jury are instructed that, if you find a verdict for the plaintiff, you will allow him such sum as will fairly compensate him for the injury he has sustained, and to determine its amount you may consider plaintiff's age, his previous condition of health, his earning capacity, his expectancy of life, the permanency of the injury, the pain and suffering he has endured, and which he will probably suffer from the injury in the future, and the expense he has incurred for physicians and hospital services on account of such injury.[79]

§ 2035(27). West Virginia

The court instructs the jury that if they find for the plaintiff, they are, in estimating the damages, at liberty to consider the health, condition, and earning capacity of the plaintiff before the injury, as compared with the present condition; also whether said injury was permanent in its nature, and how far it is calculated to disable the plaintiff from engaging in those pursuits and occupa-

[76] Norfolk & W. Ry. Co. v. Denny's Adm'r, 56 S. E. 321, 106 Va. 383.

[77] Virginia & S. W. Ry. Co. v. Bailey, 49 S. E. 33, 103 Va. 205.

[78] Kane v. Nakamoto, 194 P. 381.

[79] Richardson v. City of Spokane, 122 P. 330, 67 Wash. 621.

tions for which, in the absence of said injury, he would have been qualified; also the physical suffering to which he was subjected by reason of said injury; also any "losses" that may occur in the future to the plaintiff, provided they are such as the jury believe from the evidence will actually result to the plaintiff as the proximate damages of the wrongful act complained of; also all necessary and legitimate expenses incurred by the plaintiff because of said injury; and the jury are to allow such damages as, in the opinion of the jury, will be a fair and just pecuniary compensation for the injury which the plaintiff has sustained.[80]

§ 2035(28). Wisconsin

You are instructed that you will name such sum as you find from a preponderance of all the credible evidence in the case, to a reasonable certainty, will be required to fairly and reasonably compensate the plaintiff in money for such loss of earnings and such pain and suffering, both mental and physical, as you are satisfied is chargeable to the injury, and also for such loss of earnings, if any, and the impairment, if any, of capacity to earn a livelihood in the future, as it is reasonably certain will result from the injury, and such pain and suffering, both mental and physical, if any, as it is reasonably certain he will suffer in the future.[81]

The jury are instructed that, if the plaintiff is entitled to recover at all in this action, he is entitled to such sum as will fully compensate him for such loss of earnings as you are satisfied by the evidence he has reasonably sustained as a result of the injury; for all bodily pain and suffering and mental suffering, which he has endured by reason of the injury complained of; and for such permanent injuries as you are satisfied from a fair preponderance of the evidence it is reasonably certain the plaintiff will suffer in the future by reason of the injury complained of. You will answer this question regardless of your answers to the other questions and assess such damages as you are satisfied by the evidence considered under the instructions given to you, will fully compensate the plaintiff for all the elements of damage I have suggested to you.[82]

The jury are instructed that you should consider the nature and extent of plaintiff's injuries and physical pain and suffering, and the mental injury and anxiety which she has endured, and the extent of impairment, if any, of her physical or mental pow-

[80] Perkins v. Monongahela Valley Traction Co., 95 S. E. 797, 81 W. Va. 781.

[81] Bassett v. Milwaukee Northern Ry. Co., 170 N. W. 944, 169 Wis. 152.

[82] Sorensen v. J. I. Case Threshing Mach. Co., 109 N. W. 84, 129 Wis. 366.

ers, or both, which you believe from the whole evidence to have been brought upon her by reason of such injuries.[83]

The jury are instructed that plaintiff is entitled to such amount of damages as, in your judgment, will compensate her for all the physical injuries directly resulting from the negligence complained of, as well as the mental suffering resulting therefrom. This does not include punitory damages, but does include such pain and suffering of body and mind as you find, from the evidence, she has suffered from the negligence of the defendant, and without her fault, and which is directly the result of such negligence. If you find the plaintiff is entitled to recover, say, from all the evidence, how much will compensate her for all the injuries sustained,—the pain and suffering caused by the negligence complained of, if you so find, if you find it was the direct result thereof. By compensatory damages we mean such damages as, in your judgment, will be a reasonable compensation to the plaintiff for all the pains and suffering, in the past, resulting from the accident, and, also, any future suffering therefrom, which, from the evidence, you may find is reasonably certain to result from said injury.[84]

§ 2036. Recovery, in one action, of all damages past, present, and future

§ 2036(1). Michigan

The jury are instructed that a person who receives an injury can have but one right of action. When he comes before a jury once, that is the end of his case; and therefore, if he is entitled to recover at all, he is entitled to recover for the injuries he has received in the past, that which he endures at present, and that which he is likely to endure in the future, so far as they are covered in the declaration.[85]

§ 2036(2). North Carolina

The jury are instructed that in this class of cases the plaintiff is entitled to recover as damages one compensation for all injuries, past and prospective, in consequence of the defendant's wrongful or negligent acts. These are understood to embrace indemnity for actual nursing and medical expenses and loss of time or loss from inability to perform ordinary labor, or incapacity to earn money. Plaintiff is to have a reasonable satisfaction for loss of both bodily and mental powers, or for actual suffering, both of body and mind, which are the immediate and necessary consequences of the injury.[86]

[83] Pumorlo v. City of Merrill, 103 N. W. 464, 125 Wis. 102.

[84] Stutz v. Chicago & N. W. Ry. Co., 40 N. W. 653, 73 Wis. 147, 9 Am. St. Rep. 769.

[85] Wilton v. City of Flint, 87 N. W. 86, 128 Mich. 156.

[86] Clark v. Durham Traction Co., 59 S. E. 518, 138 N. C. 77, 107 Am. St. Rep. 526.

§ 2037. Permanent injuries

§ 2037(1). Kentucky

You are instructed that, if you find for plaintiff under instruction No. ———, and further find from the evidence that the injury is permanent, you will award him such sum in damages as will fairly and reasonably compensate him for any pain and suffering, mental or physical, which he has endured, and which it appears from the evidence he will thereafter endure, as the direct and proximate result of such injury, and for the permanent impairment of his power to earn money, together with any reasonable expenses incurred by him for medical services, not exceeding $———, and medical supplies, not exceeding $———, and the total amount of your award shall not in any event exceed $———, the amount claimed in the petition.[87]

§ 2037(2). Maryland

You are instructed that, in estimating damages, the jury are to consider the health and condition of the plaintiff before the injuries complained of, as compared with her present condition in consequence of such injuries, and whether the same are in their nature permanent, and how far they are calculated to disable the plaintiff from engaging in those business pursuits for which, in the absence of such injuries, she would have been qualified; and also the physical and mental suffering to which she had been subjected by reason of said injuries, and the jury are to allow such damages as, in their opinion, will be a fair and just compensation for the injuries suffered.[88]

§ 2037(3). Texas

You are instructed that, if you find for the plaintiff under the foregoing instructions, you will assess such damages as will, in your judgment, reasonably and fairly compensate him in money for the physical and mental pain, if any, consequent upon his injuries received, also, if from a preponderance of the evidence you believe that plaintiff's injuries, if any, are permanent, and will diminish his ability to labor and earn money in the future, then in addition you will allow him such sum as in your judgment will reasonably and fairly compensate him for the diminution, if any, in his capacity to labor and earn money in the future.[89]

§ 2037(4). Virginia

The court further instructs the jury that, if they believe from the evidence that the plaintiff in this cause has been permanently

[87] Louisville & N. R. Co. v. Lynch, 126 S. W. 362, 137 Ky. 696.

[88] United Rys. & Electric Co. of Baltimore v. Kolken, 78 A. 383, 114 Md. 160.

[89] Kirby Lumber Co. v. Bratcher (Civ. App.) 191 S. W. 700.

injured by reason of the accident complained of, he has the right to recover prospective as well as past damages, not exceeding $———, the amount claimed in the declaration.[90]

§ 2037(5). West Virginia

The court further instructs the jury that, if they believe from all the evidence that plaintiff's injury is permanent, and further find from such evidence for the plaintiff, then in assessing plaintiff's damages they may consider plaintiff's probable duration of life, the physical and mental suffering, if any, of plaintiff, his loss of wages, if any, proper compensation for not being able to perform or follow his calling or business, if any, and money, if any, shown to be spent by him for medical and surgical treatment.[91]

§ 2038. Injuries not permanent

You are instructed that if you find for plaintiff under instruction No. ———, and further find from the evidence that his injury is not permanent, then you will award him such sum in damages as will fairly and reasonably compensate him for any pain and suffering, mental or physical, which he has endured, or which it is reasonably certain from the evidence he will yet endure, as the direct and proximate result of the injury, and for any time which he has lost, or which it is reasonably certain he will hereafter lose, as the direct and proximate result of such injury, together with such reasonable expenses for medical services, not exceeding $———, and medical supplies, not exceeding $———, as have been expended by him, and in no event may you award him more than $———, the amount claimed in the petition.[92]

§ 2039. Prospects of plaintiff in his particular vocation

§ 2039(1). Georgia

The jury are instructed that you should also take into consideration and give the proper effect to any evidence before you, if there be such, tending to show that there were reasonable prospects of increased earnings on the part of the plaintiff in case he had not been injured.[93]

§ 2039(2). Washington

You are instructed that, if you should find from the evidence that the plaintiff was a trainman of experience and in line for promotion, you have a right to consider these facts in determining the amount of damages to be awarded to him if you find in his favor.[94]

[90] City of Charlottesville v. Jones, 97 S. E. 316, 123 Va. 682.

[91] Howes v. Baltimore & O. R. Co., 87 S. E. 456, 77 W. Va. 362.

[92] Louisville & N R. Co. v. Lynch, 126 S. W. 362, 137 Ky. 696.

[93] J. S. Betts Co. v. Hancock, 77 S. E. 77, 139 Ga. 198.

[94] Myhra v. Chicago, M. & P. S. Ry. Co., 112 P. 939, 62 Wash. 1.

§ 2040. Physical pain, mental anguish, and nervous shock

§ 2040(1). Alabama

The court charges the jury that, if they are reasonably satisfied from the evidence in this case that the plaintiff is entitled to recover, then, in arriving at a verdict, it is the duty of the jury to consider whether or not the plaintiff suffered mental and physical pain on account of injury to his leg, and whether or not he was rendered a cripple for life; and if the jury are reasonably satisfied from the evidence that, as the proximate result of his injury to his leg, he did suffer mental and physical pain, and was rendered a cripple for life, it is the duty of the jury to render such a verdict as the jury find to be sufficient to compensate the plaintiff for pain and suffering and his crippled condition, but, of course, your verdict could in no event be greater than the amount claimed in the complaint.[95]

The court charges the jury that physical and mental pain, when proved, are actual damages, and may be looked to by the jury in the estimation of such damages, if from the whole evidence you find that plaintiff should have a verdict.[96]

§ 2040(2). Arkansas

The jury are instructed that, if you find for the plaintiff, you shall find for him in such sum to which you find from a preponderance of the evidence the plaintiff is entitled. And in determining this amount you will compensate the plaintiff for all the pain and suffering endured by him which has resulted from said injury, or which shall thereafter result therefrom, if you find from a preponderance of the evidence that there will be pain and suffering therefrom in the future. You will also consider, in arriving at the amount of your verdict, the effect of said injury on his nervous system, if you find the nervous system of said plaintiff has been impaired by reason of said injury and the shock and fright incident and connected with the injury. You shall further consider the probable duration of the injury to the nervous system of the plaintiff, together with the probable effect in the future on the mental and physical condition of the plaintiff resulting from the impaired nervous system, which may have been proved by a preponderance of the evidence, if any have been so proved.[97]

§ 2040(3). Colorado

You are instructed that you may take into consideration the nature and character of the injuries, the mental and physical pain, if any, plaintiff has suffered, or will suffer as the proximate re-

[95] Mobile Light & R. Co. v. Hughes, 67 So. 278, 190 Ala. 216.

[96] Alabama & S. R. Co. v. Davis, 24 So. 862, 119 Ala. 672.

[97] St. Louis, I. M. & S. Ry. Co. v. Bird, 153 S. W. 104, 106 Ark 177.

sult of such injuries, providing such injuries and suffering have been pleaded by the plaintiff in her complaint, and proved by a fair preponderance of all the evidence introduced on the trial.[98]

§ 2040(4). Georgia

The court instructs the jury that the plaintiff sues and contends for damages for pain and suffering. The court instructs you further that pain and suffering is an element of damages which the law recognizes. If you believe, from the evidence in this case, that the plaintiff is entitled to recover of the defendant any sum on account of pain and suffering resulting from the injury alleged and as stated in the declaration, then the amount of such recovery would be and is left by the law to the enlightened consciences of impartial jurors. The court instructs you further that if you find that the plaintiff is entitled to recover, under the evidence and under the rules of law given you in charge, you would be authorized to find such amount in damages as would compensate her for the physical and mental pain which she has suffered as a direct and proximate result of the defendant's negligence, if you find that the defendant was negligent. This would be such compensation, however, as would be compensation without injustice to the defendant. If you find that she has suffered pain, mental and physical, up to the present time, if you find that her injury is such as will probably cause her future pain and suffering, mental and physical, you would be authorized to allow her compensation for such mental or physical pain and suffering. If you allow her an amount for any future mental and physical pain and suffering, you must reduce that amount to its present cash value, figured at the rate of ——— per cent. per annum.[99]

The jury are instructed that the loss of ability to labor is pain and suffering.[1]

The jury are instructed that the plaintiff also sued for pain and suffering, which she claims to have sustained, and alleges that she will still continue to endure this pain, and that her general health has been impaired. Now, that comes under the general head of pain and suffering. There is no mathematical measure given by law for this. The jury ascertains from the evidence, if defendant is liable, how much pain and suffering has been undergone by plaintiff, and how much she will undergo, if the evidence discloses it. Then they will find for her what their enlightened consciences, as impartial jurors, would find from the evidence to be fairly compensatory to her, and at the same time, fair to the defendant.[2]

[98] Colorado Springs & I. Ry. Co. v. Marr, 141 P. 142, 26 Colo. App. 48.

[99] Pidcock v. West, 102 S. E. 360, 24 Ga. App. 785.

[1] City of Rome v. Ford, 79 S. E. 243, 13 Ga. App. 386.

[2] Mayor, etc., of Savannah v. Du Four, 78 S. E. 779, 13 Ga. App. 61.

§ 2040(5). Illinois

The court instructs the jury that if, under the evidence and instructions of the court, you find the defendant guilty, then, in assessing the plaintiff's damages, if any such damages as are alleged in her declaration are proved, you have a right to take into consideration the nature, extent, and character of the injury sustained by her, so far as the same is shown by the evidence, if any such are so shown, the pain and suffering undergone by her in consequence of such injury, if any such is shown by the evidence, and assess damages in such sum as, in your judgment, will compensate the plaintiff for such injury and pain and suffering.[3]

§ 2040(6). Indiana

The jury are instructed that, in estimating the plaintiff's damages, it is proper that you should take into consideration the plaintiff's physical and mental suffering.[4]

§ 2040(7). Mississippi

The court instructs the jury, for the plaintiff, that if they find for the plaintiff they should find a verdict for such an amount as in their judgment the evidence in the case warrants; and in fixing the amount the jury should take into consideration the physical pain and mental anguish which plaintiff suffered as a result of his injury, if they believe from the evidence he suffered such pain and anguish.[5]

§ 2040(8). Missouri

The court instructs the jury that if under all the evidence in this case, and the other instructions, if any, given you, you find your verdict in favor of the plaintiff and against the defendant, you will assess her damages in such sum, if any, as you may believe and find from the evidence in this case will fairly compensate her for: First, any physical pain of body and anguish of mind, if any, which you may find from the evidence she has suffered as a direct result of her injuries; and, second, from any nervous shock, if any, which you may find from the evidence she has suffered, if any, as a direct result of her injuries.[6]

The court further instructs the jury that if under the evidence and the law as declared in the other instructions of the court you decide to find a verdict in favor of plaintiffs, and if you further find from the evidence that Mrs. ——— sustained an injury to her

[3] Springfield Consol. Ry. Co. v. Hoeffner, 51 N. E. 884, 175 Ill. 634.

[4] Pittsburg, C., C. & St. L. Ry. Co. v. Montgomery, 49 N. E. 582, 152 Ind. 1, 69 L. R. A. 875, 71 Am. St. Rep. 301.

[5] Lindsey Wagon Co. v. Nix, 67 So. 459, 108 Miss. 814.

[6] Milton v. Holtzman (App.) 216 S. W. 828. An objection to this instruction on the ground that it directed a verdict against the defendant, regardless of his negligence, was overruled.

nervous system as a direct consequence of the facts recited in the first instruction of the court (if you find from the evidence the facts to be as therein recited), and that there has been thereby directly caused to Mrs. ——— a hysterical condition which produces sensations and impressions of pain and suffering to her, then she is entitled to recover as part of the damages for her pain of mind reasonable compensation for the kind of pain and suffering last above described (if any) which you may find she has already endured as a direct result of said injury, as well as for such pain and suffering of that nature, if any, as you may find from the evidence she is reasonably certain to endure hereafter.[7]

The court instructs you, gentlemen of the jury, that if you find for plaintiff you should, in estimating his damages, consider his physical condition before and since receiving the injuries for which he sues, as shown by the evidence, the physical pain and mental anguish, if any, suffered by him on account of his injuries at the time of and since such injuries, as shown by the evidence; and for such mental anguish and physical pain and injury, if any, as you may, from the evidence, find it is reasonably certain he will suffer in the future therefrom, and you will find a verdict for such sum as, in your judgment, will, under the evidence, reasonably compensate him for such injuries.[8]

§ 2040(9). Oklahoma

The court instructs the jury that if you find for the plaintiff, then you should allow him such a sum as in your judgment, based upon the testimony in this case, would be a reasonable present payment in cash for the damages sustained, if any, by the plaintiff, and you may take into consideration his health and physical condition prior to the injury. If you believe from the evidence that his health and physical condition since then is impaired as a result of such injury, if any, then you may also consider whether or not he has been permanently injured, if any, and to what extent, if any, he may have endured physical suffering as a natural and inevitable result of such injury, and you may consider what, if any, the effect of such injury may have been upon him in the future in respect to pain and suffering, both physically and mentally, if any, and you may consider what physical pain and mental suffering, if any, the plaintiff suffered as a direct cause of the injury, and allow him such sum as, in the exercise of sound discretion, you may believe, from all the facts and circumstances in evidence, would be fair and just, not to exceed $———.[9]

[7] Westervelt v. St. Louis Transit Co., 121 S. W. 114, 222 Mo. 325.

[8] Maguire v. St. Louis Transit Co., 78 S. W. 838, 103 Mo. App. 459.

[9] City of Ada v. Smith, 175 P. 924. An objection to this instruction on the ground that it allowed a recovery for mental anguish, disconnected

§ 2040(10). Virginia

The court instructs the jury that, if they believe from the evidence that the defendant was guilty of negligence upon the occasion mentioned in the plaintiff's declaration, and that as a result of that negligence the said plaintiff was injured, they can take into consideration not only the bodily pain and suffering of the plaintiff, and the expenses she has been put to, but, in addition, may allow such damages as may reasonably seem to them fit for the mental suffering and nervous shock which has resulted or may result from the said negligent act of said defendant.[10]

§ 2041. Recovery for disfigurement

§ 2041(1). California

The jury are instructed that the amount of the damages which you will assess is left to your judgment and discretion, considering the proper elements of damages, which are as follows: Adequate compensation for all of the physical and mental pain and suffering which the plaintiff suffered at the time of the accident, which he has suffered since that time, and which he is reasonably certain to suffer in the future by reason of his injuries; also, for the mortification and anguish of mind which he has suffered, and will in the future suffer, by reason of the mutilation of his body, and the fact that he may become an object of curiosity or ridicule among his fellows.[11]

§ 2041(2). Wisconsin

Heddles v. Chicago & N. W. Ry. Co., 46 N. W. 115, 77 Wis. 228, 20 Am. St. Rep. 106. Quoted in Merrill v. Los Angeles Gas & Electric Co., 111 P. 534, 158 Cal. 499, 31 L. R. A. (N. S.) 559, 139 Am. St. Rep. 134. See § 2041 (1).

§ 2042. Same—Injuries to convict

You are instructed that if you find for the plaintiff, when you come to fix the amount of damages he should recover in this case, you will give him such sums of money as you may believe from the evidence will compensate him for such pain as he has suffered on account of the injury; such further sum as you believe will compensate him for his personal disfigurement, occasioned by the injury; and give him such other sums of money as may reasonably be necessary to pay for the medicine and medical treatment he has been required to have on account of the injuries received.[12]

from physical suffering, was not sustained.

[10] Southern R. Co. v. Smith, 28 S. E. 173, 95 Va. 187.

[11] Merrill v. Los Angeles Gas & Electric Co., 111 P. 534, 158 Cal. 499, 31 L. R. A. (N. S.) 559, 139 Am. St. Rep. 134.

[12] St. Louis, I. M. & S. Ry. Co. v. Hydrick, 160 S. W. 196, 109 Ark. 231.

§ 2043. Recovery for injuries from fright

§ 2043(1). Kentucky

The jury are instructed that, if you believe from the evidence that the injuries complained of by the plaintiff were the result of fright, unaccompanied by physical injury incurred by her or inflicted on her at the time of the accident, you will find for the defendant.[13]

§ 2043(2). Missouri

The jury are instructed that, if you believe from the evidence that plaintiff suffered no physical injury or injuries, then you cannot allow her any damages for fright or mental anguish, if any, you may believe she suffered, but any bodily suffering from cold or from being wet, if any, would be a physical injury within the meaning of this instruction.[14]

§ 2044. Loss of earnings and impairment of earning capacity

§ 2044(1). Alabama

The court charges the jury that, if they find for the plaintiff, they should give him such damages as will compensate him for all the earnings which the evidence shows he has lost by his injuries, as well as all the earnings which the evidence reasonably shows he will lose on account of his injuries in the future, if the jury are reasonably satisfied that he will lose earnings in the future on account of his injuries.[15]

§ 2044(2). Illinois

The court instructs the jury that if, under the evidence and the instructions of the court, the jury find the defendant guilty, then, in assessing the plaintiff's damages, the jury may take into consideration, not only the loss and immediate damage arising from the injury received at the time of the accident, but also the permanent loss and damage, if any is proved by the evidence, arising from any disability resulting to the plaintiff from the injury in question, which renders her less capable of attending to her business than she would have been if the injury had not been received.[16]

§ 2044(3). Kentucky

You are instructed that, if the jury find for the plaintiff, they will award him such sum in damages as they may believe from the evidence will fairly and reasonably compensate him for any physical pain or mental anguish which he has endured, if any, or which it is reasonably certain he will hereafter endure, if any, and for any

[13] Kentucky Traction and Terminal Co. v. Bain, 170 S. W. 499, 161 Ky. 44.

[14] Dye v. Chicago, etc., R. Co., 115 S. W. 497, 135 Mo. App. 254.

[15] Louisville & N. R. Co. v. Elliott, 52 So. 28, 166 Ala. 419.

[16] North Chicago St. R. Co. v. Brown, 52 N. E. 864, 178 Ill. 187.

permanent impairment, if any, of his power to earn money, which they may believe from the evidence are the direct and proximate result of his injuries, if any, not exceeding in all, however, the sum of $———, the amount claimed in the petition.[17]

§ 2044(4). Michigan

The jury are instructed that you are to consider, as a third element of injury for which the plaintiff would be entitled to recover, if you find for him upon the propositions of fact under the instructions given you, the loss of time and the disability occasioned by the alleged injury. The loss of time would consist in the actual loss from the time of the accident or injury until he was restored to health, or until the wound was healed. You should also consider the disability entailed by the accident, actual loss of his services, his inability to work, to attend to his ordinary business or trade, and you should consider the extent of his injury. To what extent does this injury deprive him from pursuing his avocation, and earning the usual compensation or wages therefor? It is difficult, if not impossible, to give you any definite or well-defined standard from which to measure the loss or injury he may have sustained. The question as to what amount the plaintiff should be awarded, rests largely in your sound discretion. You should consider, however, on this branch of loss and injury, the occupation of the plaintiff, his ability to earn wages before the accident or injury, and the extent to which such ability to earn wages has been diminished or lost to the plaintiff. You may consider the age of the plaintiff and his reasonable expectation of life, which is shown by the evidence to be ——— years. Also his habits of industry and temperance. You should also consider the contingencies of a much shorter life. The plaintiff may not live to the full period of expectancy. Also you should consider the contingencies of sickness and inability to secure employment at all times, as well as the fluctuations in value and demand of his services, and you should make a reasonable deduction for these contingencies. Whatever you may determine to be his actual injury or loss of services, or inability to earn wages, you can in no event award him a greater sum for this element of injury or loss than the present worth of such loss. The actual loss of time while he was sick and unable to work should be awarded to him, but when you come to consider beyond that the disability that he has sustained, which may extend into the future, you are to determine as best you can the ex-

[17] Louisville & N. R. Co. v. Briggs, 215 S. W. 529, 185 Ky. 676. This instruction states the rule under the state law, while the action was brought under the federal Employer's Liability Act; but the court says that the rule of damages under such act is not so different from the former rule as to make the above instruction reversible error.

tent of that disability, and the injury that he has sustained—may sustain in the future—and, when you have determined that as near as you can in your judgments, that amount is not to be, and should not be, the measure of your verdict, but the present worth of it. I suppose you all understand what the present worth of a given sum means. It is arrived at by dividing a given sum by one dollar, plus the legal rate of interest, or usual rate of interest, for the given time.[18]

§ 2044(5). Oklahoma

You are instructed, further, that if you find in favor of the plaintiff under the foregoing instructions—that is, that he received the injuries complained of while in the employment of the defendant company, as a proximate result of the negligence of the defendant company and not on account of any negligence of his own, which caused or contributed to said injury—then you are instructed that under said circumstances the plaintiff would be entitled to recover against the defendant, and it would be your duty to return a verdict in his favor and award him such a sum, as damages, as you may find would fairly and reasonably compensate him for the injuries he has sustained by reason thereof, and in arriving at the amount of his compensation you may take into consideration the loss of time, if any, he has sustained by reason of such injuries, the physical and mental pain, if any, he has suffered on account of same, and the diminished earning capacity, if any, that he has or may continue to suffer as a result of such injury.[19]

§ 2044(6). Texas

The jury are instructed that, if you find in plaintiff's favor, you may take into consideration the loss of time, if any, which plaintiff has already suffered, as well as the loss of time, if any, which you may find he will suffer in the future, and if you find that plaintiff is insane, and that such insanity was proximately caused by his injuries, then in estimating his damages the jury should take into consideration the fact of the insanity, so far as it affects his earning power.[21]

§ 2044(7). Washington

You are instructed that if, through any negligence of the carrier or its employés a passenger is injured without any fault or negligence on his part, then such carrier becomes liable for all damages that such passenger may suffer on account of any injuries so received or that are directly and proximately traceable to such injuries which would be reasonable compensation for the pain and

[18] Kinney v. Folkerts, 48 N. W. 283, 84 Mich. 616.

[19] Wichita Falls & N. W. Ry. Co. v. Puckett, 157 P. 112, 53 Okl. 463.

[21] Knox v. Robbins (Civ. App.) 151 S. W. 1134. This instruction does not authorize the recovery of double damages.

suffering arising to him from such injuries as well as for all permanent injuries to him or to any portion of his body or the permanent impairment of any of his organs and for any injury to his mental faculties caused by such injuries, and in this connection if you find for the plaintiff in this action you may consider the evidence, if any relating to the plaintiff's mental faculties, and if you find that the plaintiff's mind or his mental faculties were injured or permanently impaired by reason of said injuries, then you may consider damages therefor, and in estimating such damages you should consider the degree of probable permanent injury to plaintiff's mind and to what extent such impairment of plaintiff's mental faculties, if any, lessens plaintiff's capacity for performing equally as remunerative employment as before such injuries; and if you find that his capacity for obtaining employment or earning a livelihood has been lessened by reason of such injuries to his mind or to his mental faculties, then you may estimate how much less the plaintiff will probably earn for the balance of his life by reason of such injuries and allow the plaintiff therefor.[22]

§ 2045. Future pain, loss of time, and earnings, and expenditures

§ 2045(1). Alabama

The court charges the jury that, if they find for the plaintiff they should award him such damages as will compensate him for the pain and suffering which he has undergone, and will in future undergo, on account of his injuries, if the jury are reasonably satisfied from the evidence that he has been caused suffering, and will in future be caused to suffer pain, on account of his injuries.[23]

§ 2045(2). California

You are instructed that in this action the plaintiff, if he has shown himself entitled to recover, is entitled to recover for all damages which he has suffered up to the time of the trial, and for all damages that it is reasonably probable that he will sustain in the future, not exceeding the sum claimed in the complaint. In estimating the compensatory damages in cases of this character, all the consequences of the injury, future as well as past, are to be taken into consideration, including the bodily and physical pain and suffering which is shown by the proof to be reasonably certain to have naturally resulted from the injury. The plaintiff, if you find him entitled to recover, should be awarded compensation for all expenses actually paid or incurred for doctor's bills, not exceeding the amount claimed therefor in the complaint. If you find that plaintiff is entitled to recover, and believe from the evidence that the injuries sustained are permanent in their character, this must

[22] Cole v. Seattle, R. & S. Ry. Co., 85 P. 3, 42 Wash. 462.

[23] Louisville & N. R. Co. v. Elliott, 52 So. 28, 166 Ala. 419.

also be taken into consideration in your estimate of damages, and, if you find for the plaintiff in this action, such sum should be awarded as in you best judgment will fairly and fully compensate him for any injuries received by reason of the alleged negligence and carelessness of the defendant, not exceeding in amount the sum claimed in the complaint.[24]

The jury are instructed that if, under the evidence and instructions of the court, the jury find for plaintiff, then, in assessing the plaintiff's damages, the jury may take into consideration not only the loss and immediate damage arising from the injuries received at the time of the accident, but also the permanent loss and damage, if any is proved, arising from any disability resulting to the plaintiff from the injury in question, which renders him less capable of attending to his business than he would have been if the injury had not been received.[25]

§ 2045(3). Illinois

The jury are instructed that, in assessing the damages in this action, if they find for the plaintiff, they may take into consideration, not only the bodily disability occasioned by the accident, but also any impairment of his intellectual faculties and general health, if any, which they are satisfied, from the evidence, will affect or impair his future ability to attend to his business the same as if the injury, complained of, had not been received.[26]

The jury are instructed that, in estimating the plaintiff's damages, it will be proper for the jury to consider the effect, if any, of said injury upon the plaintiff's ability or disability in the future to work or to attend to his affairs generally, if the evidence shows these will be so affected in the future.[27]

§ 2045(4). Iowa

You are instructed that, if the plaintiff has been prevented by said accident from performing labor on her sewing machine, you should inquire and determine from evidence to what extent she has been disabled, if any, and whether or not, under the evidence, such disability is reasonably certain to continue, and allow her for such disability such sum as the evidence shows she may be entitled to. But the entire sum should not exceed the amount claimed in the petition.[28]

[24] Hersperger v. Pacific Lumber Co., 88 P. 587, 4 Cal. App. 460.

[25] Treadwell v. Whittier, 22 P. 266, 80 Cal. 574, 5 L. R. A. 498, 13 Am. St. Rep. 175.

[26] Illinois Cent. R. Co. v. Read, 37 Ill. 484, 87 Am. Dec. 260.

[27] Heidenreich v. Bremner, 176 Ill. App. 230. The action was by the father as next friend.

[28] Bailey v. City of Centerville, 78 N. W. 831, 108 Iowa, 20.

§ 2045(5). Missouri

You are instructed that if the jury find for the plaintiff, they should assess his damages at such a sum as they may believe from the evidence will be a fair compensation to him: First, for any pain of body or mind which the jury may believe from the evidence he has suffered or will suffer by reason of his injuries, and directly caused thereby; second, for any loss of the earnings of his labor and avocation which the jury believe from the evidence he has sustained or will hereafter sustain by reason of his injuries, and directly caused thereby.[29]

You are instructed that, in estimating plaintiff's damages, if the jury find for her, they will take into consideration, not only the physical injury inflicted, the bodily pain and mental anguish endured and suffered, but may also allow for such damages as appears, from the evidence, will reasonably result to her from said injuries in the future, not to exceed in all the sum of $———.[30]

§ 2045(6). Pennsylvania

The jury are instructed that plaintiff is entitled to be compensated to-day, you are compensating him to-day, for loss which he will sustain in the future. He is not entitled to recover the full amount of that loss which he may sustain some time in the future; but he is entitled to recover a sum which to-day will compensate him for that loss, taking into consideration the fact that he will have the use of that money from the day that he gets it on. It is an amount that we call the present worth of damages suffered in the future.[31]

The jury are instructed that, if you find that plaintiff is still suffering pain, she is entitled to be compensated for the pain and suffering which she will endure in the future. As I have told you in other cases, and I call your attention to it again, we have no rule by which you may calculate that amount. I can give you very little instruction as to how you may arrive at that amount. The law leaves it to your sound judgment as to what she ought to receive in money, because the law only knows to compensate in money. What ought she to receive in money for the pain and suffering which she has endured, or will endure in the future?[32]

§ 2045(7). Texas

The jury are instructed that, if the plaintiff sustained damages by reason of the negligence of the defendant the ——— Railway Company, as alleged, and you find for plaintiff, then the measure of his damage to his person is such sum in money as you may be-

[29] Schmitt v. St. Louis Transit Co., 90 S. W. 421, 115 Mo. App. 445.

[30] Chilton v. City of St. Joseph, 44 S. W. 766, 143 Mo. 192.

[31] Samarra v. Allegheny Valley St Ry. Co., 86 A. 287, 238 Pa. 469.

[32] Samarra v. Allegheny Valley St. Ry. Co., 86 A. 287, 238 Pa. 469.

lieve from the evidence will compensate him for the injury sustained, if any, and in estimating his damages you should take into consideration the mental and physical pain, if any, which plaintiff has suffered, and which he may hereafter suffer, as a result of his injuries, if any; and if you believe from the evidence that the injuries to plaintiff, if any, are of a permanent nature, and will impair his capacity to perform labor in the future, then in addition to the above you should find such sum as will compensate plaintiff for such diminished capacity, if any, to perform labor in the future.[33]

§ 2045(8). Washington

You are instructed that, if you find for the plaintiff in this action, and if you find by a fair preponderance of the proofs that he will suffer pain in the future, and will be subject to loss of time and expenditures because of such injuries, then you are instructed that you can, in estimating his damages, take into consideration the probable amount of pain he will suffer, the probable loss of time and the probable amount of expenditure he will be put to in the future on account of such injuries, all of which may be in addition to the other items, if any, that may enter into your calculations, but in no event shall the amount of your verdict exceed the sum sued for by the plaintiff, to wit, $———.[34]

§ 2045(9). Wisconsin

The jury are instructed that, if you are satisfied from the evidence that the injury that the plaintiff has suffered is permanent in its nature, and will continue to affect his health and physical condition in the future, and cause him pain and suffering in the future, you should allow him, in addition, such sum as will reasonably compensate him for such pain and suffering and impairment of ability to earn a livelihood as he must suffer in the future.[35]

§ 2046. Loss of profits of business

You are instructed that, where the facts disclose such a preponderance of the business element over the personal equation, or such an admixture of the two that the question of personal earnings could not be safely or properly segregated from returns upon capital invested, the income or profits from a business should not be considered in determining the amount of the damages to which the plaintiff is entitled.[36]

[33] Missouri, K. & T. Ry. Co. of Texas v. Aycock (Civ. App.) 135 S. W. 198.

[34] Cole v. Seattle, R. & S. Ry. Co., 85 P. 3, 42 Wash. 462.

[35] Kenyon v. City of Mondovi, 73 N. W. 314, 98 Wis. 50.

[36] Singer v. Martin, 164 P. 1105, 96 Wash. 231.

§ 2047. Recovery by minor

§ 2047(1). Georgia

The jury are instructed that, where a minor has suffered a permanent injury, and such minor is too young to have selected an avocation or to begin to illustrate her earning capacity, in such cases there is no measure as to the amount of damages, where such minor is entitled to recover therefor, except the enlightened consciences of impartial jurors, guided by all the facts and circumstances of the particular case.[37]

§ 2047(2). Iowa

You are instructed that, in estimating the damages, if any, you will take into consideration the physical and mental pain, if any, plaintiff has sustained, by reason of such injuries, if any, and, if you believe from the evidence that his injuries, if any, are permanent, and that it is reasonably certain that he will hereafter suffer pain and anguish therefrom, then you will take this into consideration in estimating the damages, if any. However, you will exclude from your consideration any loss or impairment of earning power, if any, during plaintiff's minority.[38]

§ 2047(3). Kentucky

The court instructs the jury that if they find for the plaintiff, the measure of damages is a sum of money equal to the difference between what plaintiff will earn after he is 21 years old and what he would have earned after his arrival at said age had he not received the injuries described in the proof, not exceeding, however, $———.[39]

§ 2047(4). Missouri

The court instructs the jury that, if you find for the plaintiff, you will, in assessing her damages, take into consideration the physical condition she was in before her injuries in question, the physical pain and mental anguish she has suffered, occasioned by said injury, and the physical pain and mental anguish, if any, you believe from the evidence she is likely to suffer in the future because of said injury, and, in addition to this, you may also consider to what extent, if any, plaintiff's capacity for earning a livelihood, after her majority, will be impaired by said injuries, and you will return a verdict for her in such sum as you believe to be just and reasonable, not exceeding the sum of $———.[40]

[37] Atlanta, K. & N. Ry. Co. v. Gardner, 49 S. E. 818, 122 Ga. 82. In this case there were no averments nor evidence as to any earning capacity.

[38] Fuller v. Illinois Cent. R. Co., 173 N. W. 137, 186 Iowa, 686. Not obnoxious to objection that it authorizes allowance of damages for loss or impairment of earning power after attaining by plaintiff of his majority.

[39] South Covington & C. St. Ry. Co. v. Herrklotz, 47 S. W. 265, 104 Ky. 400.

[40] Lange v. Missouri Pac. Ry. Co., 106 S. W. 660, 208 Mo. 458.

The jury are instructed that, if the jury find for the plaintiff, they should assess his damages at such sum as they may believe from the evidence will be a fair compensation to him: (1) For any pain of body or mind which the jury may believe from the evidence he has suffered or will suffer by reason of said injuries and directly caused thereby. (2) For any loss of the earnings of his labor after he shall have arrived at the age of 21 years which the jury may believe, from the evidence, the plaintiff has sustained by reason of said injuries and directly caused thereby. But you will not allow any sum for any earnings of his labor you may believe he may lose up to the time he becomes 21 years of age, and you will not allow any sum for loss of earnings of his labor thereafter unless you believe and find, from the evidence, that he will be disabled from labor and lose the earnings of his labor after he arrives at the age of 21 years as a direct result of his alleged injuries.[41]

§ 2047(5). Nebraska

The jury are instructed that, if you find for the plaintiff, it will be your duty to determine from the evidence the amount of his damages, which should be actual compensation for his injuries. In doing so, you should carefully consider, from the evidence, the nature, extent, and character of the injuries sustained; you should also determine whether or not the injuries to the plaintiff are permanent; and you should allow him for all damages which naturally and directly result from his injuries, whether in the past or in the future. You should allow him such damages for bodily pain and mental anguish as, under the evidence, you believe him entitled to; and you should allow him such damages for physical and mental disability, if any such there be, as, from the evidence, you believe him entitled to. The law establishes no rule by which to fix the amount of damage for bodily pain and mental anguish, but leaves it to you to determine from the evidence the reasonable amount thereof. If you should find from the evidence that the plaintiff will suffer damage by reason of impaired capacity to earn money, if any such impaired capacity you find, then, in estimating this element of the plaintiff's damage, you must bear in mind the fact that under the law the plaintiff would not be entitled to his earnings until after he became twenty-one years of age, and you should not allow plaintiff any damages for what he might otherwise have earned before coming of age. There is no testimony in this case upon which you can allow plaintiff anything for expenses occasioned by his injuries.[42]

[41] Wise v. St. Louis Transit Co., 95 S. W. 898, 198 Mo. 546.

[42] City of South Omaha v. Sutliffe, 101 N. W. 997, 72 Neb. 746.

§ 2047(6). Oklahoma

You are instructed that, in the event you find for the plaintiff, in arriving at the amount of his recovery you may take into consideration and allow him reasonable compensation for mental and physical suffering, if you find that he suffered any, and you may take into consideration the reasonable and probable effects in the future upon the health of the plaintiff and the effect, if any, upon his ability to earn a living after he reaches the age of 21 years.[43]

§ 2047(7). Texas

You are instructed that, in the event you find in favor of plaintiff in estimating the actual compensatory damages to which he is entitled, you may take into consideration and award him such a sum of money as will fairly compensate him for physical and mental suffering which he has suffered or may suffer in the future, if any, and his diminished capacity, if any, to earn money after he shall have arrived at the age of 21 years. You must not allow him anything for diminished earning capacity during the period of his minority, and you will award him as a whole only such a sum of money as, if paid now, would actually compensate him for the injuries, if any sustained.[44]

The jury are instructed that, if you find for the plaintiff, you will assess his damages at such a sum of money as in your opinion will be a reasonable and just compensation for the injuries he has sustained. In estimating the damages, you will take into consideration the physical and mental pain, if any, he has sustained by reason of such injuries, if any; and if you believe from the evidence that plaintiff has not yet recovered, and that his injuries are permanent, and that he will hereafter suffer pain and anguish therefrom, and that his ability to labor and earn money subsequent to his majority is and will be impaired by reason of said injuries, if any, then you will take this into consideration in estimating the damages; but you will exclude from your consideration any loss or impairment of earning power, if any, during his minority.[45]

§ 2047(8). Virginia

The jury are instructed by the court that, if they believe from the evidence that the defendant company is liable in this action, then, in estimating said damages, they should take into consideration the bodily injury, if any, sustained by the plaintiff, the pain and suffering undergone, the effects on the health of the sufferer, according to its degree, and its probable duration as being tempo-

[43] Folsom-Morris Coal Mining Co. v. De Vork, 160 P. 64, 61 Okl. 75, L. R. A. 1917A, 1290.

[44] Texas & N. O. R. Co. v. Brouillette (Civ. App.) 130 S. W. 886, 61 Tex. Civ. App. 619.

[45] Cameron Mill & Elevator Co. v. Anderson, 78 S. W. 8, 34 Tex. Civ. App. 105.

rary or permanent, and the pecuniary loss sustained by the plaintiff through his inability to attend to his business affairs after his arrival at the age of 21 years.[46]

§ 2047(9). Wisconsin

The jury are instructed that you will assess such sum as will fairly and reasonably compensate the plaintiff for the pain and suffering the injury caused him, the humiliation or mental suffering, if any, the deformity has caused him, and such, if any, as it will cause him in the future. You will also consider such inconvenience as the injury has caused, and such, if any, as it will cause him in the future, the extent, if any, to which it has diminished his earning capacity, and the extent, if any, to which it has affected his ability to play the piano or engage in other pastimes, but excluding from your consideration any loss of earning capacity during the minority of plaintiff.[47]

§ 2048. Same—Female minor

You are instructed that, if you find from a preponderance of the evidence that the plaintiff is entitled to recover, then you will determine the amount of damages, if any, that she has sustained. In determining such damages you should take into consideration the mental and physical pain, if any, suffered by the plaintiff and occasioned by the injury complained of, her health and the condition thereof before the injury complained of, and the effect, if any, of said injury on her health; and in case you find that the plaintiff has, to any extent, been permanently injured, you should take that into consideration in determining her damages. You cannot allow the plaintiff anything for loss of time from the time of the accident until she reaches the age of ———, and you cannot allow her for loss of time in any amount, unless you find that she has sustained a permanent injury from this accident, of such a character as will reasonably be expected to interfere with her work and cause her to suffer loss of time after she has reached the age of ——— years; and if she has established by a preponderance of the evidence a permanent injury of such a character as will interfere with her work after she reaches the age of ———, and cause her damage by loss of time, then such loss of time after she reaches the age of ——— years is an element that you should take into consideration in reaching your verdict. Another element that you may consider under this question of permanent injury is the scar or scars on the person of the defendant, which would tend to dis-

[46] Richmond Traction Co. v. Wilkinson, 43 S. E. 622, 101 Va. 394. Washington, A. & Mt. V. Elec. Ry. Co. v. Quayle, 95 Va. 741, 30 S. E. 391.

[47] Sharon v. Winnebago Furniture Mfg. Co., 124 N. W. 299, 141 Wis. 185.

figure her and detract from her general appearance, if any such there are. Another matter that you may take into consideration, if proven by a preponderance of the evidence that it was caused by the accident in question, is the claimed interference with and irregularities of plaintiff's menstruation.[48]

§ 2049. Recovery by parent for injuries to minor child

§ 2049(1). Delaware

You are instructed that the father is entitled to the services of a minor child, and, if such services were lost or impaired by the negligence of the defendant, the father is entitled to be reasonably compensated for such loss or impairment. But even if the defendant is liable, by reason of its negligence, for such loss of services, a recovery can be had only for such a sum as the evidence shows the father actually sustained on account of the injuries complained of, caused by the defendant's negligence, and not for any loss of services caused by affliction, sickness, disease, or anything else that did not result from the accident and defendant's negligence. In estimating the value of the daughter's services to the father, you may consider her earnings and ability to labor.[49]

§ 2049(2). Kentucky

The court instructs the jury, if they find for the plaintiff, the measure of damages is the difference between the said minor's ability to earn money in his present condition, and his ability to earn money had the injury not happened, during his minority, as shown by the evidence, not to exceed $———.[50]

§ 2049(3). Missouri

The court instructs the jury that if under the other instructions you find the issues in this case for the plaintiff, you should assess her damages at such sum as you believe from the evidence will be fair and reasonable pecuniary compensation to her. First. For any sum she has necessarily expended or incurred liability for in the treatment of the injuries of her said son, ———, directly caused by the negligence of the defendant, as defined in other instructions; for physicians and surgeons, if any, to the reasonable value thereof, not to exceed on that account the sum of $———; and for nurses, medicines, and appliances at the hospital and hospital bills, if any, to the reasonable value thereof, not to exceed on that account the sum of $———; and for medicines and appliances other than at the hospital, if any, to the reasonable value thereof in a sum not to exceed $———. Second. And also for

[48] Willis v. Schertz, 175 N. W. 321, 188 Iowa, 712.

[49] People's Ry. Co. v. Baldwin, 72 A. 979, 7 Pennewill, 383.

[50] Union News Co. v. Morrow, 46 S. W. 6.

loss of services of her said son during his minority, and until he arrives at the age of 21 years, if any, directly caused by the negligence of the defendant, as defined in these instructions, to the reasonable value thereof, not to exceed on that account the sum of $———, and the reasonable expense, if any, of caring for her said son in the future, and during his minority, up to the time he arrives at the age of 21 years, from which should be deducted the reasonable cost of keeping her said son from the date of his injury until he arrives at the age of 21 years. The plaintiff's damages, however, cannot exceed in all the sum of $———.[51]

§ 2049(4). Texas

The jury are instructed that neither physical or mental suffering of the boy, nor the mental anguish of the mother, in consequence of the accident, if any, are items or elements of damage to be considered by you, and the value of the boy's services during the period of his minority, if you should find for the plaintiff, is to be ascertained by you as best you can from your own judgment, common sense, and sound discretion, and the evidence before you.[52]

The jury are instructed that, if you find any damages for plaintiff, you may, if the proof warrants, allow her a just and reasonable compensation for expenses incurred by her for necessary medicines, medical and surgical attention, in the caring of the child, and also a reasonable, just, and proper compensation for such services of said son, if any, as the plaintiff will probably be deprived of by reason of the boy's inability, if any, to labor for her and to do her bidding before he reaches the age of twenty-one years, not to exceed the sum sued for.[53]

The jury are instructed that, under the law, the father is entitled to the services of his minor children during their minority. Minors cannot, without their father's consent, make legal contracts. If you believe, from the evidence, that ——— was a minor, under twenty-one years of age, that, without the knowledge or consent of his father, he engaged himself to defendant, and whilst so engaged received the injury alleged, then if such injury was not caused by said ———'s own negligence, plaintiff is entitled to recover for the loss of his son's services whilst under medical treatment, for his necessary expenses in perfecting a cure, including medicine and extras required in effecting a cure, also for all reasonable medical bills for which the father is liable, and for such dam-

[51] Meeker v. Union Electric Light & Power Co., 216 S. W. 933.

[52] El Paso Electric Ry. Co. v. Kitt (Civ. App.) 90 S. W. 678.

[53] El Paso Electric Ry. Co. v. Kitt (Civ. App.) 99 S. W. 587. This instruction is correct as far as it goes. The omission to state that the amount fixed on by the jury in respect to loss of services should be lessened by a fair discount, because of payment to be made now, cannot be complained of, in absence of a request therefor.

ages as result and flow directly from the injury, such as the diminished value of services up to the arrival at the age of majority of said minor.[54]

§ 2050. Recovery by husband for injuries to wife

§ 2050(1). Missouri

You are instructed that, when a married woman without fault on her part, is personally injured by the negligence of another, two causes of action arise,—one for the wife, for the pain and suffering and the expenses she has herself paid, and the other by the husband, in his own favor, for what he has actually lost. Now, this is the husband's suit, and not the wife's; and a decision of this case on its merits in no wise affects, or has anything to do with, the wife's case. That case must be independently tried, upon its own merits, and this case must be tried upon its merits alone, on the testimony introduced here; and none of the things mentioned above, for which the wife can sue, can be considered in this case.[55]

§ 2050(2). Pennsylvania

The jury are instructed that the husband is entitled to the services of his wife. If he loses those services or any part of them, through the negligence of another, then to the extent of his loss in money he is entitled to be compensated in money. And if you find that she is still suffering from an injury received in this accident, and will continue to suffer in the future, then, to the extent that he is damaged through the loss of her services, he is entitled to recover for loss in the future.[56]

§ 2050(3). Washington

You are instructed that, in estimating the damage to plaintiffs, if you find for them, you should, in so far as is shown by the evidence take into consideration the physical pain and mental suffering of the plaintiff wife, the temporary and permanent injuries, if any, suffered by her; and if you find plaintiffs are husband and wife you will also take into consideration what loss the husband has or will sustain by reason of the inability of the wife to perform the duties of a wife, in so far as the evidence shows such loss.[57]

§ 2051. Recovery by husband for injuries to himself and wife

You are instructed that plaintiff husband claims that by reason of the accident, his nervous system was so shocked and injured that he has been unable to perform work as he did before that time. He also claims for the loss of the services of his wife, and for expenses incurred in his efforts to cure her and himself. In es-

[54] H. & G. N. R. Co. v. Miller, 49 Tex. 322.

[55] Thompson v. Metropolitan St. Ry. Co., 36 S. W. 625, 135 Mo. 217.

[56] Samarra v. Allegheny Valley St. Ry. Co., 86 A. 287, 238 Pa. 469.

[57] Zolawenski v. City of Aberdeen, 129 P. 1090, 72 Wash. 95.

timating his damages, your verdict should be for such a sum as will reasonably compensate him for his injuries, including therein, his pain and suffering in the past and such as may come in the future, arising from these injuries, and also for any permanent loss of ability to earn a living. It should also include any expenses that he has incurred in attempting to cure himself, and his wife, and for such loss for the services of his wife, as he may have sustained in the past, or as may result in the future, by reason of the injuries complained of.[58]

§ 2052. Recovery by married woman for personal injuries

§ 2052(1). Delaware

You are instructed that the plaintiff wife claims that by the accident her collar bone was broken, her right arm damaged, and her back and spine became injured. She claims damages, in this suit, for these injuries, as well as for the loss of money that she might make outside of her family duties. The laws of this state provide that a married woman may recover the wages for her personal labor, not performed for the family, and may maintain an action therefor, in her own name and her own right, against her husband or any other person. Your verdict in the case of plaintiff wife, therefore, should be for such sum as will reasonably compensate her for her pain and suffering in the past, and such as may come to her in the future, by reason of the injuries complained of, also for any permanent disability arising therefrom, and for any loss of wages she may have sustained from her personal labors performed, not for the family, but which she would have otherwise earned.[59]

§ 2052(2). Indiana

You are instructed that, in determining the amount of damages to be awarded, you have a right to consider the nature of the injury, if any, loss of time, if any, loss of wages, if any, together with any physical pain or mental anguish that the plaintiff may have endured, and you have a right to consider the effect of such injury upon her health, if any, and as to whether the injury, if any, will be permanent or temporary. All injury must be proximately produced by the negligent acts complained of.[60]

§ 2052(3). Michigan

The jury are instructed that, in addition to such damages, if you find any, you may consider in connection therewith the question of the loss of services and her doctors' bills, and I will say to

[58] Townsend v. Wilmington City Ry. Co. (Del.) 78 A. 635, 7 Pennewill, 255.

[59] Townsend v. Wilmington City Ry. Co., 78 A. 635, 7 Pennewill, 255.

[60] P. B. Arnold Co. v. Buchanan, 111 N. E. 204, 60 Ind. App. 626.

you if you find by a preponderance of the evidence in the case that the plaintiff has paid, or has agreed to pay, the charges for medical treatment for the injuries which she sustained by reason of the negligence of the defendant, out of her own personal estate, and that such expenses were charged to her individually, and she was given sole credit for the same, she would be entitled to recover such sum so expended or incurred for such medical treatment. But before you can allow her anything for her medical treatment and for her loss of services, you must find that the agreement existed between her and her husband that she should have her earnings; and on the question of her doctors' bills you must find first that the credit was given to her solely and individually without any expectation of coupling somebody else with her in paying the doctors' bills.[61]

§ 2052(4). Missouri

The court instructs the jury that if you find a verdict for the plaintiff you are, in estimating her damages, to consider any change in her physical condition which you may believe from the evidence resulted from the injury to her; the physical or mental anguish, if any, suffered by her on account of her injuries at the time of and since such injuries, as shown by the evidence, and such damages, if any, as you may from the evidence find it is reasonably certain she will suffer in the future therefrom; and you will find a verdict for such sum as in your judgment will under all the evidence reasonably compensate her for such injuries, including compensation for such sums of money, if any, as the evidence shows she herself has heretofore paid out for medicines, nursing and medical treatment, but not including any amount not already actually paid by her.[62]

The jury are instructed that plaintiff cannot recover any sum whatever on account of her inability to perform her household duties, or for any loss of time from her household duties, which she may have heretofore sustained or may hereafter sustain.[63]

§ 2052(5). Nebraska

You are instructed that if, from the evidence and the law given you in these instructions, you find for the plaintiff, you may take into consideration the bodily pain and suffering caused by the injury, if any has been shown, and the pain and suffering which will result therefrom in the future, if you find from the evidence that such will probably be the result; also the probability of the injuries she has received being permanent, and the extent, if any, to

[61] Boyle v. City of Saginaw, 82 N. W. 1057, 124 Mich. 348.

[62] Haywood v. Kuhn, 151 S. W. 204, 168 Mo. App. 56.

[63] Newell v. St. Louis Transit Co., 84 S. W. 195, 108 Mo. App. 530.

which the injury has incapacitated her for labor; also the reasonable expenses paid or incurred for services of a surgeon or physician, made necessary by such injuries—and assess her damages in such sum as you believe, from all the evidence, will compensate her for the injury so sustained. You should allow no speculative damages, but such as are compensatory merely.[64]

§ 2052(6). Texas

The jury are instructed that, if the jury find for the plaintiffs, they will assess the damages at such amount as they may find will fairly compensate for the physical pain, if any, and mental pain, if any, suffered by the plaintiff wife as a result of said injuries, and for what they may find she will probably suffer hereafter, if any, on account of such injuries, and for the value of her services, if any, heretofore lost, or which may be lost hereafter, if any, because of her injuries of the kind the loss of which is complained of in the plaintiffs' petition, taking into consideration the extent of her injuries, if any, and their probable duration, and whether permanent or not, and for such expenses of medical treatment as may have been reasonably incurred by her husband on account of such injuries.[65]

§ 2053. Damages for deceit in inducing female plaintiff to leave home and accompanying assault

You are instructed that this is not an action for slander or libel, but an action for damages by reason of the alleged assault and assault and battery, and deceit practiced upon plaintiff by defendant to induce her to accompany him from her home, and if you find for the plaintiff, in determining the amount of her damages, you will in no manner consider or allow any sum as damages by reason of any alleged injury to her character and reputation by any statements concerning the same made by defendant or other persons.[66]

The court instructs the jury that, if you find for the plaintiff, you will assess her damages at only such sum as you believe and find, from a full and fair consideration of all the facts and circumstances in evidence before you, will compensate her for the physical and nervous pain, mental distress and agony, if any you find, resulting from such deceit and unlawful acts of the defendant, which you find were committed by him, and, in determining the amount of such damages, you will also consider mental pain and suffering, re-

[64] L. W. Pomerene Co. v. White, 97 N. W. 232, 70 Neb. 171. In this case no pecuniary damages were asked because of loss of plaintiff's wages, nor was any testimony offered tending to show the money value of her services.

[65] Houston & T. C. R. Co. v. Dotson, 38 S. W. 642, 15 Tex. Civ. App. 73.

[66] Kurpgeweit v. Kirby, 129 N. W. 177, 88 Neb. 72, 33 L. R. A. (N. S.) 98.

sulting from communications, which you find were made to her, that she was a subject of public notoriety and scandal in the community where she lived, naturally resulting from such wrongful act of defendant, such damages however in no case to exceed the sum of $———.[67]

The court instructs the jury that, notwithstanding you may find from the evidence that the plaintiff bore no outward sign of physical suffering and pain, yet if you find from the evidence that plaintiff has by reason of defendant's acts and conduct toward and concerning plaintiff upon the night of ———, suffered mental pain and anguish, your verdict should be for the plaintiff, and you should assess full damages therefor not exceeding the amount claimed in her petition.[68]

§ 2054. Calculation of damages under rule of comparative negligence

Rule in actions for death by wrongful act, see post, § 2117.

§ 2054(1). Georgia

You are instructed that no person shall recover damages from a railroad company for injuries to himself or his property, where the same is done by his consent, or caused by his own negligence. If the plaintiff and the agents of the defendant company are both at fault, the plaintiff may recover; but the damages shall be diminished by the jury in proportion to the amount of default attributable to him. I charge you further that if the plaintiff, by the exercise of ordinary care, could have avoided the consequences to himself caused by the defendant's negligence, he is not entitled to recover; but in other cases the defendant is not relieved, although the plaintiff may have in some way contributed to the injury sustained.[69]

If you find, however, as I have before instructed you, gentlemen, that the plaintiff and the agents of the company are both at fault, and, though the plaintiff may have in some way contributed to the injury, that he could not have avoided the consequences to himself, caused by the defendant's negligence, if he had exercised ordinary care, then I charge you that he may recover damages of the defendant company, but the damages shall be by the jury trying the case diminished in proportion to the amount of default attributable to him.[70]

[67] Kurpgeweit v. Kirby, 129 N. W. 177, 88 Neb. 72, 33 L. R. A. (N. S.) 98.

[68] Kurpgeweit v. Kirby, 129 N. W. 177, 88 Neb. 72, 33 L. R. A. (N. S.) 98.

[69] Central of Georgia Ry. Co. v. Brown, 74 S. E. 839, 138 Ga. 107. In this instruction the court first states the general rule under the statute, and then the limitations specified by the statute.

[70] Central of Georgia Ry. Co. v. Brown, 74 S. E. 839, 138 Ga. 107.

§ 2054(2). Maryland

The jury are instructed that if they find a verdict for the plaintiff, and in so finding believe from the evidence that the injury was caused in part by the negligence of the plaintiff, and in part by the negligence of the defendant, the negligence of both contributing to cause the injury, then in estimating the damages they must subtract from the total damages they may find the plaintiff suffered, calculated according to the plaintiff's ——— prayer, such sum as they may believe from the evidence was proportionate to the amount of negligence attributable to the plaintiff in the causing of the injury; that is to say, for illustration: If the jury find that plaintiff's and defendant's negligence were equally efficient causes in producing the injury, then the jury can allow the plaintiff only one-half of the damages they may find he actually suffered by reason of the injury calculated according to the plaintiff's ——— prayer, or if they find that the plaintiff's negligence was one-fourth and the defendant's three-fourths of the total negligence, producing the injury, then the jury can allow the plaintiff the amount of damages they may find he suffered, calculated in accordance with the plaintiff's ——— prayer, less one-fourth attributable to him; or if they find that the plaintiff's negligence was three-fourths and the defendant's one-fourth of the total negligence producing the injury, then the jury can allow the plaintiff the amount of damages they may find he suffered, calculated in accordance with the plaintiff's ——— prayer, less the three-fourths attributable to him, and so on for any other proportionate negligence the jury may find, the above figures being used only for illustration, and from any amount the jury may find due the plaintiff under the prayers must be deducted any amount the jury may find was paid the plaintiff by way of relief.[71]

§ 2055. Instruction covering injuries both to property and to person

You are instructed that, if the jury find for the plaintiff, they will award him such damages as they may believe from the evidence he has sustained, including the reasonable value of the horse, wagon, and contents, and clothing injured or destroyed, not exceeding $——— for the horse, $——— for the wagon and contents, and $——— for clothing; for the amount expended, if any, for doctor's bills and medicine in effecting or attempting to effect a cure; and for loss of time directly caused by his injuries, not exceeding $———; and for the mental and physical pain, if any, that he has suffered or may suffer as the direct cause of the injuries sustained,

[71] Baltimore & O. R. Co. v. Branson, 98 A. 225, 128 Md. 678.

and for any permanent impairment of his power to earn money, if any, not exceeding in all the sum of $———.[72]

D. Injuries to Property

§ 2056. Injury to automobile

The court instructs the jury that the correct measure of damage in this case is the reasonable cost of repairing said plaintiff's automobile in order to put it in as good condition as it was in before the injury complained of, plus any depreciation in the value of said plaintiff's automobile, by reason of said injury, if any, plus any direct loss the said plaintiff may have sustained by reason of the loss of the use of said automobile during a reasonable length of time for its repair, but in no case an amount in the aggregate exceeding $———, the amount prayed for in the complaint.[73]

§ 2057. Injuries to motor truck and contents

The court instructs the jury that, if you find for the plaintiff, you will award to the plaintiff such sum in damages as you believe from the evidence will reasonably and fairly represent the difference in the reasonable market value of the motor truck just before it was injured and its reasonable market value immediately after it was injured; and if you believe from the evidence that the motor truck could be repaired at a less cost than its reasonable market value before it was injured, then you will also award to the plaintiff the reasonable net rental value upon the market in ——— of the truck in question, or other trucks of like capacity and equal performance, the lessee furnishing the driver and bearing all such other expenses as the owner himself would have to bear in the operation of his truck for such length of time as would be reasonably necessary to make such repairs, not to exceed a period of ——— weeks, at $——— a day, and not to exceed $———. If you believe from the evidence that the motor truck could not be repaired, then, in addition to the difference between the market value of the truck just before it was injured, not exceeding $———, and the market value of the truck immediately after it was injured, not less than $———, you will award to the plaintiff the rental value of a truck, as in this instruction defined, for such time as you believe from the evidence would necessarily elapse until a truck of like capacity to the truck in question could be purchased and delivered for use in ———, not to exceed on that account ——— days, at $——— a day, and not exceeding $———. Your verdict in no event, for injury to the motor truck, shall exceed what you believe from the evidence was the reasonable market value of the truck immediately before it was

[72] Cross v. Illinois Cent. R. Co. (Ky.) 110 S. W. 290.

[73] Hunter v. Quaintance (Colo.) 168 P. 918.

injured, not to exceed $———. If you find for plaintiff, you will further award to the plaintiff the reasonable value of the milk and milk cans destroyed, not to exceed on that account $———.[74]

§ 2058. Injuries to horse

The court instructs the jury that, if you find for plaintiff under instruction No. ———, you will allow her as damages the difference, if any, in the fair market value of the horse immediately before the alleged injury and its fair market value after the alleged injury, not exceeding $———, the amount sued for in the petition.[75]

§ 2059. Injury to horse and cab

The jury are instructed that, in assessing damages, if they should find for the plaintiffs, they may consider whether the plaintiffs were for any period of time deprived of the use of said horse and cab by reason of any injury sustained to said horse and cab in said collision, and the reasonable value of the use of said cab and horse during said period of time, all as shown by the evidence in the cause.[76]

§ 2060. Injury to boat

Regarding the rule of damages, in case you find for plaintiff, you are instructed to allow the amount shown to have been paid by plaintiff for repairs, together with ——— per cent. interest from the day of the beginning of the suit, which was on the ——— day of ———, and for such a reasonable amount of charter rent, during the time the boat was repairing, as you may deem right under the testimony.[77]

§ 2061. Injuries to building by fire

§ 2061(1). Indiana

The court instructs the jury that, if you find from the evidence in this case that the plaintiff is entitled to recover from the defendant railroad company, you will fix the amount of the present value of said house at the time of the fire. Compensatory damages only may be given. The then present value of said house is the amount in cash it was reasonably worth in the market at that time and at that place. Not necessarily what a new house would cost to erect. but, taking into consideration the evidence which has been detailed to you regarding the fair cash value of said house, its condition. age, and situation, what was its fair cash market value at that time. Then, if you find that the plaintiff is entitled to recover, he is en-

[74] Louisville & I. R. Co. v. Schuester, 209 S. W. 542, 183 Ky. 504, 4 A. L. R. 1344.

[75] Bromley v. Langhorne, 139 S. W. 949, 144 Ky. 761.

[76] Horace F. Wood Transfer Co. v. Shelton, 101 N. E. 718, 180 Ind. 273.

[77] Missouri River Packet Co. v. Hannibal & St. Joseph R. Co. (C. C. Mo.) 2 F. 285.

titled to recover such fair cash market value, to which the jury may in their discretion allow interest at the legal rate of ——— per cent. per annum, and out of the sum which plaintiff recovers, provided he does recover, the defendant insurance company is entitled to be allowed the amount which it has paid by reason of its insurance policy thereon, if it recovers at all, to which you may allow interest in your discretion as above stated.[78]

§ 2061(2). Michigan

You are instructed that plaintiff is entitled to recover from the defendants as damages such sum as will fairly compensate it for its loss by reason of said fire, which sum is measured by the fair cash value at said time and place of said property which was destroyed by said fire, and the diminution in value of property injured and not destroyed, caused by said fire, not exceeding the amount claimed by the plaintiff. There has been evidence here as to the price paid by the plaintiff for the real property—and by that it means the building or the land on which the building stood—and evidence of repairs and remodeling of the interior of such building, and there has been evidence as to the amount of material in the construction of the building at the time of the said fire, and the worth and value of the material, if new, and evidence as to the labor and material required to replace such a building, and also evidence as to the fair cash market value of the building. All these matters have been received as bearing on the one question of its fair cash value at the time and place of the fire.[79]

§ 2062. Injuries to land from casting débris thereon

The court instructs the jury that the true measure of damage to the land on which débris is thrown is the cost of the removal of débris, if that does not exceed the value of the land, but, if it does, and the land is destroyed by it, then the value of the land would be the measure of damage; but if any part of the land covered is the necessary passway to adjoining lands of the owner, this fact is to be taken into account, and it would be proper to estimate as damage the cost of opening the way over the land of the plaintiff so covered, or the cost of constructing a different way, if practicable, and less expensive, in determining the value of the land covered.[80]

§ 2063. Measure of damages for injuries to growing crops

§ 2063(1). Texas

You are instructed that if, under the foregoing instructions, you find for the plaintiffs, you will assess the damages, if any, as fol-

[78] New York, C. & St. L. Ry. Co. v. Roper. 96 N. E. 468, 176 Ind. 497, 36 L. R. A. (N. S.) 952.

[79] William R. Roach & Co. v. Blair, 155 N. W. 696, 190 Mich. 11.

[80] Norfolk & W. R. Co. v. Carter, 22 S. E. 517, 91 Va. 587.

lows: You will first ascertain the reasonable market value, if any, at ———, at the time of their maturity of the crops of millet, oats, corn, and cotton, that plaintiffs would have made on the premises in question during the years ——— and ———, respectively, if defendant had provided the necessary sluices, culverts, or ditches on its right of way, if you find they were not so provided. From this amount you will deduct the reasonable market value at ———, at the time of their maturity of the crops of millet, oats, corn, and cotton actually raised by the plaintiffs on the premises in question during the years ——— and ———, respectively. From the balance, if any there be, you will further deduct the reasonable value of additional work or expense, if any, that plaintiffs would have performed in cultivating, gathering, preparing for market, and marketing the additional amounts of said oats, millet, corn, and cotton, if any, that would have been raised during said years, but for defendant's failing to construct the necessary sluices, culverts, or ditches, if you find defendant did so fail to construct them, and, after making said deductions, the balance so found by you, if any, you will assess as plaintiffs' damages, if you find they are entitled to damages.[81]

§ 2063(2). Utah

You are instructed that the measure of damage is the difference between the market value of the crop before the alleged damage was done and the market value of the crop after the alleged damage was done. This may be calculated by finding the market value the entire crop would have at maturity if no injury thereto had been done, and deducting therefrom the entire market value of the crop at maturity, in its alleged injured state. The difference, if any, will enable you to calculate the amount of damage. From this amount so found, if you so find, you must deduct its proportion of the cost of harvesting, marketing, and bringing the crop to maturity.[82]

§ 2064. Injuries to growing timber

§ 2064(1). Iowa

You are instructed that if you believe from the evidence that there was unnecessary trimming and cutting off of the branches you must take into consideration, in determining the amount of damages, if any, therefor, the cutting and trimming of limbs which was necessary, for that the defendant had the right to do reasonably necessary trimming; and to the extent such trimming and cutting of branches was reasonably necessary plaintiff is not en-

[81] Missouri, K. & T. Ry. Co. of Texas v. Gilbert, 124 S. W. 434, 58 Tex. Civ. App. 467.

[82] Naylor v. Floor, 170 P. 971, 51 Utah, 382.

titled to damages, and you must separate and distinguish the damages suffered, if any, by unnecessary cutting, from the injury by reason of the necessary trimming, so that you will not allow damages, if any, caused by the cutting which was reasonably necessary to be done in the construction of the telephone system.[83]

§ 2064(2). Minnesota

You are instructed that the difference in the value of the premises before the fire, including the timber thereon, and its value after the fire in the condition that it then was, would be the damages, if any, sustained by the plaintiff in this case. In other words, in determining plaintiff's damages, if any, you will compare the actual value of plaintiff's land with the trees and timber thereon just before the fire and before the trees were burned with the actual value of the same premises after the fire and after the trees were burned. The difference in value will be the amount that plaintiff is entitled to recover in this action, if anything. Considerable evidence has been introduced during the trial of this case with reference to the condition of the tracts of land involved, the condition of the timber, and the value of the particular kinds of timber on these tracts. This evidence was admitted as tending to aid you in reaching a conclusion upon the question as I have stated it to you, upon the question of the condition and value of the tracts before the fire and the condition and value of the tracts after the fire, and you will take into consideration all of the evidence in the case in reaching a conclusion in this regard.[84]

§ 2065. Injury to growing fruit trees

You are instructed that growing fruit trees, which are attached to the soil and have no value separate and apart from the soil, are a part of the land upon which they are growing. Under the pleading in this case, should you find for the plaintiff, in assessing his damages, if any, you will find for him only the reasonable value of such of his fruit trees as you may find from the evidence were capable of being removed from the soil, as plaintiff cannot recover for any trees shown to have been of no value detached from the ground upon which they were growing.[85]

You are instructed that, should you find for the plaintiff under the instructions contained in the court's general charge, in estimating his damages, if any, you will not consider any damages that may have been caused to any of his trees which have been

[83] Meyer v. Standard Telephone Co., 98 N. W. 300, 122 Iowa, 514.

[84] Reynolds v. Great Northern Ry. Co., 138 N. W. 30, 119 Minn. 251, 52 L. R. A. (N. S.) 91.

[85] Galveston, H. & S. A. Ry. Co. v. Warnecke, 95 S. W. 600, 43 Tex. Civ. App. 83. This was an action for the value of trees destroyed by fire, not an action for injury to the land.

shown by the evidence to have been of no value when removed from the ground where they were growing, and you will assess his damages, if any, at the reasonable value of such fruit trees as had a market value when removed from the premises where they were growing.[86]

E. Breach of Contract

§ 2066. In general

The jury are instructed that the first question for you to determine is whether or not there was a breach of the alleged agreement between the parties. If you find that there was a breach, then the next question for you to determine would be the amount which you would allow, if any, and this amount would be such as you would agree upon according to the evidence introduced in this case. It will be impossible for you to arrive at the amount, if you have occasion to estimate it, with mathematical accuracy. Simply do the best you can, according to all the evidence that has been introduced, and allow some sum, anywhere from one cent up to the full amount claimed by the plaintiff, if you allow anything.[87]

§ 2067. Motive for breaking contract as affecting question of damages

The jury are instructed that, even if the defendant refused to transport said cattle solely from malicious motives, plaintiff cannot, in this action, recover any additional sum for that reason.[88]

§ 2068. Loss of profits

§ 2068(1). Kentucky

You are instructed that, if the failure to deliver the said frames was not caused by a strike or strikes, or delays in transportation, nor any other circumstances beyond the plaintiff's reasonable control, as mentioned in instruction No. ———, and the plaintiff was informed or had notice from the defendant when the said contract was entered into that the defendant's distillery could not begin to operate until the said frames were delivered to it, and the delay in starting up the distillery after the day when the said frames should have been delivered by the terms of the contract was caused wholly by the failure of the plaintiff to deliver them, then they should find for the defendant on its counterclaim in such a sum as they may believe from the evidence it is reasonably certain the defendant would have realized as profits from the products of the said distillery; that is, the whisky and storage charges there-

[86] Galveston. H. & S. A. Ry. Co. v. Warnecke, 95 S. W. 600, 43 Tex. Civ. App. 83.

[87] Duncan Lumber Co. v. Willapa Lumber Co., 182 P. 172, 93 Or. 386.

[88] Duche v. Wilson (N. Y.) 37 Hun, 519.

on and the slop therefrom, if any, which it is reasonably certain the defendant could and would have made during the period, if any there was, that the distillery was idle wholly by reason of the failure of the plaintiff to deliver the said frames on the contract time, not exceeding the sum claimed in the cross-petition in that behalf.[89]

§ 2068(2). Washington

You are instructed that, if you find in favor of the plaintiff in this case, the plaintiff would be entitled to recover, as damages, the amount of his expenditures in the performance of the contract up to the time of the stoppage; that is to say, he would be entitled to reimbursement for his expense in so far as he proceeded with the performance of the contract, and, in addition to his expenses, he would be entitled to recover the profits which he would have realized by performing the whole contract, if he had performed it. The plaintiff's recovery, if he recovers at all, should include these two items, namely, the expense incurred in part performance, with a further item of the profits which he would have made by the performance of the whole contract.[90]

§ 2069. Breach of contract to pay for services in preferred stock of a prospective corporation

The jury are instructed that, as a matter of fact, the company was organized and the company did issue stock; and by that same company the ——— property was taken on, and the railroad concession was taken, and the property was improved in various ways, in the buildings and fixtures of all kinds, boats and what not. If that company had provided for preferred stock, and had issued it and it had gone upon the market and had been dealt in, of course you would have a very convenient method of ascertaining what that preferred stock was worth. But no preferred stock was provided for in the organization of that company, none was issued, and none ever has been issued; therefore, what you have to do, if you can, is to determine what was, at the time that that preferred stock should have been turned over, its fair and reasonable value if it existed. Even although no preferred stock was issued, if this common stock had been put upon the market, and bought and sold, you might have something very tangible to enable you to reach some sort of an opinion as to what would have been the value of ——— shares of preferred stock, superior to the common stock. But there had been no sale, no transaction, no dealings in the stock, so far as we know; and the problem which

[89] American Bridge Co. of New York v. Glenmore Distilleries Co., 107 S. W. 279.

[90] Anderson v. Hilker, 80 P. 848, 38 Wash. 632.

you have before you is an extremely difficult one, I must concede, and I think you will agree with. ——— dollars worth of preferred stock does not necessarily mean $——— in money. You are business men enough to know that; that there is preferred stock of old and established companies, which have been going on for years and have been making considerable money, that is not worth par. And with regard to new companies, it is within your knowledge that the face value of stock, whether it is common or preferred, rarely imports that that is its real value. All that was promised to the plaintiff was, not $——— in money but ——— per cent. preferred stock of the company, which should be organized to operate this particular property. Another way of approaching this subject is to see what property there is. So far as appears, all the property that the company has ever owned consisted of this mine and the railroad concession, the railroad that it has built, the improvements on the property and the plant that it has made down there, the improvements that it has put in the way of equipment, and so forth. If all that there was to be issued was $——— of preferred stock, and you could find out, reasonably and satisfactorily to yourselves as to what the value of all the property of the company was, then perhaps you might be able to make a calculation which would satisfy your own minds that you were making a fair and reasonable appraisement of this $——— worth of preferred stock. But, unfortunately for that method of proceeding, this contract does not contain restrictions with regard to that preferred stock which would enable you to adopt that method. It engages that the plaintiff in the event of the carrying out of the contract, should have $——— of the preferred stock, but there is no promise or guaranty as to whether the total preferred stock of the company shall be $——— or $———. Moreover, there is no restriction in this contract as to whether or not the company which is to issue the $——— of preferred stock to ———, and to others if necessary, shall not issue bonds. Of course, you as business men are perfectly aware that $——— of preferred stock, when that is the total issue of preferred stock, is worth much more, when it is bottomed on property worth any given amount than if the total issue of preferred stock is $———. You know perfectly well that if you have a certain property, which is the total property of the company, and you have common and preferred stock out against it, the value of the preferred stock would be one thing if there were no bonds at all outstanding and that the value of the preferred stock would be a different thing if there were bonds; and it is perfectly possible that bonds may be out which are superior to the preferred stock to an amount so large as to reduce the preferred stock prac-

tically to nothing at all. As I told you before, the burden of proof here is upon the plaintiff, and he must satisfy you on each branch of the case. He is under obligation to furnish you with satisfactory testimony from which you can determine the damages, not as a mere matter of blind guesswork, but by a process of reasoning and examination which will enable you to satisfy your minds, as intelligent business men, that you are reaching a fair and proper conclusion upon the evidence. All the property that we have any evidence of is that in ———, this mine and railroad concession, and the railroad that was built and the improvements that were made, and the improvements in equipment and plant. The total amount of bonds that were issued is $———. It makes no difference in regard to the common stock whether it was issued to a large amount or a small amount, because that would not affect the value of preferred stock. If the preferred stock had been issued, that would be superior to the common stock. If the officers of the company chose to violate the laws of ——— by issuing common stock to the value of $——— when the property was not really worth $———, or was not worth anything at all, that has no bearing on the plaintiff's claim here. The only question here for you is, have you such evidence here that you as intelligent business men can say that, ——— months after the date of that concession, $——— of the preferred stock of that company, if issued to ———, would have been worth so much money. You must reach such result, not by blind guessing, but by some process of reasoning.[91]

§ 2070. Breach of contract by hotel to let plaintiff have garbage

The court instructs the jury that, if you find from the evidence that the plaintiff notified the defendant that he had a certain number of hogs, and he would suffer damages if the contract by the defendant hotel company to let the plaintiff have its garbage was breached by the defendant, then you will find for the plaintiff in such sum as will compensate him for any and all loss which you may find he sustained by being unable to prepare said hogs for market. And in arriving at such amount of damages you may take into account what it would have cost the plaintiff to feed the hogs until they were ready for market under the contract with the defendant, and what it has actually cost him by reason of not being able to get the garbage, and the difference would be the amount of the verdict which you should render in favor of the plaintiff, if you find for the plaintiff.[92]

[91] Crichfield v. Julia (C. C. A. N. Y.) 147 F. 65, 77 C. C. A. 297, certiorari denied 27 S. Ct. 781, 203 U. S. 593, 51 L. Ed. 332.

[92] Marion Hotel Co. v. Dickinson, 216 S. W. 1049, 141 Ark. 188.

The court instructs the jury that, if you find from the evidence that the defendant breached the contract on some ground other than the work was not carried out to its satisfaction, then you will find for the plaintiff such damages as you may find he sustained by breach of the contract, and in ascertaining the proper amount you may take into consideration whatever profits you may find from the evidence to a reasonable certainty, he would have made if the contract had not been breached. And if you find from the evidence that the plaintiff was to have a year's notice before the contract should be terminated, and the garbage and trash given him as long as he did the work to the satisfaction of the defendant, and if you further find that a year's notice was not given, and the plaintiff did the work to the satisfaction of the defendant, then you will find for the plaintiff in such amount as you may find his entire profits would have amounted to if the contract had been carried out.[93]

§ 2071. Contract to divide commissions with another

The court instructs the jury that, if you find for the plaintiff, you should allow him what you may believe from the evidence was one-third of the value of the stock of the ——— Timber Company, which the jury may believe from the evidence the defendant received as a commission for procuring a sale of the lands to be made to ———, the value of the stock to be estimated as of the date the defendant received same, but the finding for the plaintiff, if any, should not exceed $———, the amount claimed by the plaintiff in the petition; and, if there is any finding for the plaintiff, the jury may or may not, in their discretion, provide in their verdict that interest on the sum they find shall run from ———.[94]

§ 2072. Contract by railroad company to build depot in certain locality

You are instructed that the measure of damages the plaintiff is entitled to recover under instruction No. ———, if any, is the difference in the market value, if any, of the plaintiff's land without said depot, and what its market value would be had said depot been constructed and maintained, and used by said defendant as a depot for freight and passengers, as depots are ordinarily used for such purposes at such places; and, in determining this difference in value, if there be such difference, the jury shall not consider the profits which might have been made by the plaintiffs, or either of them, in any business they might have established at said point, but the jury may consider the reasonable adaptation

[93] Marion Hotel Co. v. Dickinson, 216 S. W. 1049, 141 Ark. 188.

[94] White v. Jouett, 144 S. W. 55, 147 Ky. 197.

of the point for business purposes, which would enhance the market value of the said lands.[95]

§ 2073. Contract to furnish services of particular physician

The jury are instructed that, if you find for the plaintiff, you will assess her damages at such sum as you believe, from all the evidence in the case, will fairly compensate her for the injury, if any, which she has sustained by the failure of defendant to furnish her the personal care and services of ———.[96]

§ 2074. Breach of contract to grade land

You are instructed that you will find for plaintiffs, and award them such a sum in damages as you may believe from the evidence will fairly represent the difference between the market value of plaintiffs' farm in its present condition and what its market value would have been if the land from which the earth and stone were removed had been reduced to the level of the railroad grade and left in condition for building purposes.[97]

§ 2075. Contract to reduce land to certain level

The court instructs the jury that, if you find for plaintiffs, you will award them such sum in damages as you may believe from the evidence it will reasonably cost to reduce the land from which the earth and stone were taken to a level with the railroad grade and in condition for building purposes, not exceeding, however, the sum of $———.[98]

§ 2076. Violation of agreement with respect to water rights

You are instructed that, if the jury find that the defendant has failed to convey the water from the spring mentioned in the deed to the south limit of defendants' land so as to be accessible to stock on the plaintiffs' land, then the damages which the plaintiffs are entitled to recover for this failure on the part of the defendants is the damage sustained by the plaintiffs in not having water for the use of their stock.[99]

§ 2077. Right to claim a forfeiture of moneys advanced on contract

You are further instructed that the defendant in this case admits the execution of the contract and the payment of the $——— on the purchase price of the cattle, and claims that he offered to deliver to the plaintiff the cattle called for by the terms of the contract, and that plaintiff refused to receive said cattle and pay the

[95] Louisville, St. L. & T. Ry. Co. v. Neafus, 18 S. W. 1030, 93 Ky. 53.

[96] McDaniel v. United Rys. Co. of St. Louis, 148 S. W. 464, 165 Mo. App. 678.

[97] Sandy Valley & E. Ry. Co. v. Hughes, 194 S. W. 344, 175 Ky. 320.

[98] Sandy Valley & E. Ry. Co. v. Hughes, 188 S. W. 894, 172 Ky. 65.

[99] Chamberlain v. Baltimore & O. R. Co., 8 A. 267, 66 Md. 518.

balance of the purchase price, and that within a few days he sold all the cattle to another person, and further claims that he was damaged by reason of plaintiff's refusal to accept and pay for the cattle when offered to him. If you find from the evidence that the defendant's claims in this respect are true, and that he was damaged by reason of plaintiff refusing to accept the cattle, but find that his damages so sustained did not amount to $——, the amount paid him by the plaintiff, then you should find for the plaintiff for the difference between defendant's damages and the amount so paid him.[1]

F. Exemplary Damages

§ 2078. When recoverable in general

§ 2078(1). United States

You are instructed that, if you can say from the evidence in the case that the defendants dishonestly overrode the rights of the plaintiff for their own purposes, knew that these boxes of flowers were his, and not theirs, and, disregarding his right to have them go on to his customers, they took them and sent them to their own customers, you can look at all that, and say whether you think they ought not to pay a further sum in damages, to stamp upon their conduct what you think of such things, to let the defendants know how a jury of honorable men view such things. Give such further sum as you think would be just about right to teach them and other folks how a jury look at such things, to teach them and everybody else better. You will notice that you are not to go to that extent—not to allow anything for that—unless you see that the defendants are guilty of wantonly overriding the plaintiff's rights. Do not give anything unless you see that they were willfully wrong; that they knew better than to send the plaintiff's goods to their customers. You will not allow anything unless you see that. But if you do see that the defendants themselves understood this, and knew that these were not their flowers, and that they had no right, under any circumstances, to send them to their customers, if you can see that they were dishonest about it, and were not fair about it, and did not give the customers of plaintiff a fair chance, and did not recognize his right, then give just as much as you think is right and proper to stamp on that conduct your condemnation. You will not allow anything unless you can see something that deserves it.[2]

[1] Briscoe v. Johnson (Okl.) 176 P. 214. In Oklahoma there is a statute providing that every stipulation in a contract by which the amount of damages for breach of the contract is fixed in advance is void, except in certain cases.

[2] Downing v. Outerbridge (C. C. A. N. Y.) 79 F. 931, 25 C. C. A. 244.

§ 2078(2). Illinois

The jury are instructed that, if you believe from the evidence that the wheat in question was the property of the plaintiff, and that defendant willfully and maliciously cut and carried away the same, the jury, in assessing the plaintiff's damages are not confined to the actual value of the wheat taken, but may award the plaintiff such sum by way of damages as in their discretion they may deem just.[3]

§ 2078(3). Missouri

The court instructs the jury that if they shall find for the plaintiff, and shall further find from the evidence that the acts and things done by the defendants were willfully and maliciously done, then, in addition to the actual damage sustained by her, they may assess against the defendants by way of punishment for such wrongful act exemplary or punitive damage in such sum as they may see proper, not to exceed the sum of $———. The word "maliciously," as used in the above instruction does not mean hatred, spite, or ill will as commonly understood, but means a wrongful act intentionally done without just cause or excuse, and by the word "willful" is meant intentionally and not by accident or mistake.[4]

The court instructs the jury that, if you find from the evidence that such acts of the motorman, if any, were done by said motorman, willfully and without legal justification or excuse or provocation, then the jury may further assess plaintiff's damages against defendant in such sum as the jury may believe from the evidence will be suitable punishment to the defendant for such wrongful conduct.[5]

The court instructs the jury that if your finding is for the plaintiff, then, in assessing his damages you are not limited to the physical injury inflicted, if any, by said wrongful acts, if any, of said motorman, but in addition thereto, if you find that the wrongful acts, if any, of the said motorman were malicious (and by the term "malicious" is not meant spite or ill will, but the intentional doing of a wrongful act without just cause or excuse), you may allow such further damages, known in law as punitive damages, as will be fair and just punishment to defendant, and a wholesome warning to others.[6]

§ 2078(4). South Carolina

You are instructed that this is an action for punitive or exemplary damages. In such an action the jury may allow such an

[3] Bull v. Griswold, 19 Ill. 631.

[4] Stansberry v. McDowell (App.) 186 S. W. 757.

[5] Kennelly v. Kansas City Rys. Co. (App.) 214 S. W. 237.

[6] Kennelly v. Kansas City Rys. Co. (App.) 214 S. W. 237.

amount as they deem proper, within the limit of the amount demanded in the complaint, by way of punishment to the defendant, and to deter the defendant and all other persons from the commission of similar wrongs in the future by the example thereby afforded. Punitive or exemplary damages are recoverable where there is evidence of gross negligence or recklessness or wanton disregard of the rights of others.[7]

§ 2079. Wrongful appropriation of property by railroad company

In addition to this, gentlemen, if you should determine that the railroad company has acted high handedly and maliciously, I say if you should determine that, with a total disregard of the rights of the plaintiff in this case, they have taken possession of his property in utter disregard of his social rights as a citizen, and as a man, then in addition to the actual damages he has sustained, you would have a right to assess what are known as punitive or exemplary damages to deter this company, and all other people, from doing acts of this kind in the future. But you must remember, gentlemen, that in no sense can you take up the question of punitive or exemplary damages, unless you should determine that the act of this company was malicious, and was done in total disregard of the social rights of the plaintiff, as a citizen and as a man.[8]

§ 2080. Conscious or reckless disregard of plaintiff's rights

The jury are instructed that punitive damages are not only recoverable for a wanton, highhanded, or willful invasion of plaintiff's rights, but that the jury are authorized to find punitive damages, if they believe there was a conscious disregard on the part of the defendant, its agents, and servants, to do their duty, a conscious failure to observe due care, which was the proximate cause of the injury.[9]

The jury are instructed that not only is the conscious invasion of the rights of another, in a wanton, willful, and reckless manner, an act of wrong, but that the same result follows when the wrongdoer does not actually realize that he is invading the rights of another, provided the act is committed in such a manner that a person of ordinary reason and prudence would say that it was in reckless disregard of another's rights.[10]

[7] Brasington v. South Bound R. Co., 40 S. E. 665, 62 S. C. 325, 89 Am. St. Rep. 905.

[8] Kingsley v. United Rys. Co., 133 P. 785, 66 Or. 50.

[9] Calder v. Southern Ry. Co., 71 S. E. 841, 89 S. C. 287, Ann. Cas. 1913A. 894.

[10] Tolleson v. Southern Ry. Co., 70 S. E. 311, 88 S. C. 7.

§ 2081. Liability for gross negligence resulting in personal injuries

§ 2081(1). Alabama

You are instructed that, if you find for plaintiff under the ——— count of the complaint, you may award him, in addition to compensatory damages, such damages as in your sound discretion you see fit to punish defendant for its said action, and to deter others in like business for such wrongdoing in the future.[11]

§ 2081(2). Kentucky

You are instructed that, if you find from the evidence that the negligence which produced plaintiff's injury was "gross," as hereinafter defined, then, in addition to compensatory damages, you may or not in your discretion award such further sum as you deem proper from the evidence, by way of punishment; but the total amount of your verdict may not exceed $———, the amount claimed in the petition.[12]

You are instructed that, if the conduct of the conductor under all the circumstances was such as to indicate wantonness or recklessness of the plaintiff's safety, you may in your discretion award him such exemplary damages as you think proper, not to exceed the sum in all of $———.[13]

The court instructs the jury that, if the jury shall believe from the evidence that the derailment of the car was brought about by the gross negligence of the defendant's agents in the management thereof, then the jury may, in addition to compensatory damages as above, award the plaintiff such exemplary damages as they may think proper under all the circumstances of the case.[14]

By the term "gross negligence" as used in the foregoing instruction is meant the absence of slight care.[15]

§ 2081(3). South Carolina

I charge you, as a matter of law, that it is the settled law of this state that it takes more than negligence, and also more than gross negligence, to make out a case of willfulness or wantonness. One cannot be said to be guilty of willfulness or wantonness unless he has been guilty of misconduct and malice, or of some act from which misconduct and malice ought to be inferred.[16]

[11] Clinton Mining Co. v. Bradford, 76 So. 74, 200 Ala. 308.

[12] Louisville & N. R. Co. v. Lynch, 126 S. W. 362, 137 Ky. 696.

[13] Louisville & E. R. Co. v. McNally, 105 S. W. 124.

[14] Louisville St. Ry. Co. v. Brownfield, 96 S. W. 912.

[15] Louisville St. Ry. Co. v. Brownfield, 96 S. W. 912.

[16] Hull v. Seaboard Air Line Ry., 57 S. E. 28, 76 S. C. 278, 10 L. R. A. (N. S.) 1213

§ 2082. Liability of corporation for acts of servant

§ 2082(1). South Carolina

The jury are instructed that, where the acts of the servant of a corporation are not only negligent, but wanton and willful—that is, in plain disregard of a known duty, or in a conscious failure to observe due care in such case—the jury may award in addition to compensatory damages other damages, known as punitive, exemplary, or vindictive damages. Such damages are for the purpose of deterring a defendant, or other persons in like conditions, from committing the same wrongs and injuries.[17]

§ 2082(2). Texas

The court charges the jury that, if they find from the evidence that the accident by which plaintiff sustained the injuries complained of was the result of fast running of the train, and that the train was so run against the orders of defendant's superior officers, and against regulations made in that respect by defendant, then, in that event, plaintiff will not be entitled to recover more than his actual damages in this suit.[18]

G. Pleading and Evidence

§ 2083. Necessity that award conform to pleading and evidence

Right of recovery for aggravation of pre-existing disease by personal injuries, see ante, § 2025(9).

The court instructs the jury that the expenses incurred by the plaintiff for the services of physicians and surgeons and the value of any time lost are subjects of direct proof, and are to be determined only on the evidence which the jury has before it, and must not exceed the amounts specifically claimed therefor in the complaint. The other elements of damages are from necessity left to the sound discretion of the jury, but in no event must the amount of damages exceed the amount alleged, $———.[19]

§ 2084. Presumptions and burden of proof

§ 2084(1). Iowa

You are instructed that it is claimed by the plaintiff that the injuries of which he complains will result in permanent pain and disability, and in permanent deformity and disfigurement of his right leg. As to this, you are instructed that the burden is upon the plaintiff to show the character and extent of the injuries received by the plaintiff by reason of the accident in question, and unless the plaintiff has shown by a preponderance of the evidence that

[17] Calder v. Southern Ry. Co., 71 S. E. 841, 89 S. C. 287, Ann. Cas. 1913 A. 894.

[18] Texas Trunk Ry. Co. v. Johnson, 12 S. W. 482, 75 Tex. 158.

[19] Haun v. Tally, 181 P. 81, 40 Cal. App. 585.

the injuries of which he complains are permanent, or that he will in the future suffer pain therefrom, or that he will suffer permanent disability therefrom, or that he will be permanently deformed or disfigured thereby, substantially as alleged in the petition, then in such event you are instructed that you cannot allow the plaintiff anything for and on account of said claim.[20]

§ 2084(2). Montana

The court instructs the jury that a party who claims compensation for an alleged wrong done must show, not only that he has suffered a loss on account of the injury, but also what was the amount of the loss, and the burden of proving both these things is upon the party alleging the wrong.[21]

§ 2084(3). Nevada

The jury are instructed that, while defendant admits that plaintiff received a slight bruise while a passenger upon one of its trains, it denies that plaintiff sustained any damage or injury beyond such slight bruise; and the jury are instructed that as to all matters in dispute between plaintiff and defendant as to the nature and extent of plaintiff's injuries, and as to the damage, if any, resulting therefrom, the burden of proof is upon the plaintiff. In other words, plaintiff must establish to your satisfaction by a preponderance of evidence the truth of all things which are alleged to exist by him and which are denied by defendant. If, therefore, you should believe from the evidence that the plaintiff received a bruise or abrasion caused by a collision between two of the defendant's trains while plaintiff was a passenger upon one of such trains, but the plaintiff has failed to establish by a preponderance of the evidence to your satisfaction that the injuries which he is now suffering from are the direct result of such bruise, without any intervening cause brought about by his own want of reasonable care and attention, your verdict should only assess such damages as you may think just and proper for the bruise or abrasion received by plaintiff while upon the train, and should exclude all other damages based upon or resulting from any injury that plaintiff may now have.[22]

§ 2085. Same—Distinction between general and special damage

The jury are instructed that general damages are those which the law presumes to flow from an unlawful act. Special damages are those actually shown to have been sustained. General damages

[20] Collinson v. Cutter, 170 N. W. 420, 186 Iowa, 276.

[21] Haggerty Bros. v. Lash & Shaughnessy, 87 P. 907, 34 Mont. 517.

[22] Murphy v. Southern Pac. Co., 101 P. 322, 31 Nev. 120, 21 Ann. Cas. 502.

may be recovered, without proof of any special amount. Special damages, in order to be recovered, must be proved as to amount.[23]

§ 2086. Burden of proof as to proximate cause

The jury are instructed that, with respect to the alleged ailments and disabilities claimed for the plaintiff in this case, the burden of proof is upon the plaintiff, as it is with respect to the question of liability, to show by a preponderance of the evidence, not only that such ailments really exist, or have existed, but also that such ailments and disabilities are the result of the occurrence in question, and the burden is not upon the defendant to show that such ailments or disabilities do proceed or arise from any other cause. You are further instructed that you have no right to guess or conjecture that any ailments complained of are the result of this accident. You are not to understand from this instruction that the court intends to intimate that plaintiff has such disabilities as are claimed, or that defendant is, or is not, in any manner liable, or to intimate any opinion upon that or any other question of fact in this case.[24]

§ 2087. Matters considered in determining impairment of earning capacity

You are instructed, gentlemen of the jury, that in determining the extent to which the earning capacity of the plaintiff has been impaired by his injuries, you may take into consideration, if you see fit, what he has been earning in the immediate past and the probabilities of what his earnings would have been in the future if he had not received his injury; and in this connection, you may consider the physical condition of the plaintiff at the time of his injury and what it would have been but for his injury.[25]

§ 2088. Matters considered in determining expectancy of life of plaintiff

§ 2088(1). Iowa

The court instructs the jury that testimony has been received in evidence which tends to show that the expectancy of life of a man ——— years old, according to the tables of mortality, is ——— years. These tables of mortality, however, do not necessarily apply to the plaintiff, but are based upon the observed expectancy among persons in ordinary pursuits and in ordinary condition of health, and in determining the expectancy of plaintiff you must

[23] Bibb County v. Ham, 35 S. E. 656, 110 Ga. 340.

[24] Craw v. Chicago City R. Co., 159 Ill. App. 100.

[25] Cook v. Danaher Lumber Co., 112 P. 245, 61 Wash. 118.

take into consideration the condition of his health at the present time so far as shown by the evidence or so far as you have been able to observe the same, his prior habits with reference to the use of intoxicating liquors, as well as all other facts and circumstances in evidence and bearing thereon.[26]

§ 2088(2). Virginia

The court further instructs the jury that if they find for the plaintiff they may, in estimating his damages, if they believe his injuries permanent, also take into consideration the plaintiff's probable duration of life, and to show this they may take into consideration the standard mortality tables as showing the probable duration of plaintiff's life under all the proof in this case, and they may also consider the fact that plaintiff is engaged in railroad service, a more hazardous occupation than ordinary vocations of life.[27]

§ 2089. Effect of table of expectancy

§ 2089(1). Georgia

The court instructs you that certain tables have been introduced in evidence for your consideration, and these are called mortality tables. You may use them or you may not, and then it is left to you as to what use you will give them. The court instructs you, further, the only material information you can derive from them is the time which an average person of equal age with the one under consideration in the present case may be expected to live.[28]

§ 2089(2). Virginia

The court instructs the jury that the table of expectancy of life given in evidence by the plaintiff, by which it appeared that the expectancy of life of ——— was ——— years and that of ——— was ——— years, is not conclusive or binding upon the jury, but is only evidence to be considered by them, along with all the other evidence in the case, in arriving at the amount of damages, if any.[29]

§ 2090. Sufficiency of evidence as to damages

The jury are instructed that if, from the evidence in the case and under the instructions of the court, the jury shall find the issues for the plaintiff, and that the plaintiff has sustained damages as charged in the declaration, then, to enable the jury to estimate the amount of such damages, it is not necessary that any witnesses should have expressed an opinion as to the amount of such damages, but the jury may themselves make such estimate from the

[26] Hughes v. Chicago, R. I. & P. Ry. Co., 129 N. W. 956, 150 Iowa, 232.

[27] Virginia & S. W. Ry. Co. v. Bailey, 49 S. E. 32, 103 Va. 205.

[28] Pidcock v. West, 102 S. E. 360, 24 Ga. App. 785.

[29] Norfolk & W. Ry. Co. v. Denny's Adm'r, 56 S. E. 321, 106 Va. 383.

facts and circumstances in proof, relating to the subject of the extent of plaintiff's damages.[30]

The jury are instructed that if, from the evidence of the case, and under the instructions of the court, the jury shall find the issue for the plaintiff, and that the plaintiff has sustained damages as charged in the declaration, then, to enable the jury to estimate the amount of such damages, it is not necessary that any witness should have expressed an opinion as to the amount of such damage, but the jury may themselves make such estimate from the facts and circumstances in proof, and by considering them in connection with their knowledge, observation, and experience in the business affairs of life.[31]

You are instructed that you are not at liberty to guess or conjecture about the amount of actual damages, if any, suffered by the plaintiff; you can allow for no item of actual damages which has not been established by a preponderance of the evidence in the case, even though you should find the defendant guilty.[32]

§ 2091. Sufficiency of evidence as to cause of injuries for which compensation sought

You are instructed that if you believe from the evidence that plaintiff received any injury substantially as alleged by her, and you further find from the evidence that prior to the time of receiving such injury, if any, she had received injuries from being thrown from a street car, and you should be unable to determine from the evidence whether her present condition results from said former injuries or the accident complained of, you will let your verdict be for the defendant as to such present injuries, if any.[33]

[30] Thompson v. Northern Hotel Co., 99 N. E. 878, 256 Ill. 77.

[31] North Chicago St. Ry. Co. v. Fitzgibbons, 54 N. E. 483, 180 Ill. 466.

[32] Johnson v. Chicago City Ry. Co., 166 Ill. App. 79.

[33] Texas & N. O. R. Co. v. Jones (Tex.) 138 S. W. 209. This instruction does not, as contended, permit recovery in the hypothetical case for prospective damages growing out of the later accident.

CHAPTER CI

DEAD BODIES

§ 2092. Criminal liability for receiving.
2093. Liability for unlawfully removing body of one killed in accident from place of accident.

§ 2092. Criminal liability for receiving

You are instructed that one of the essential allegations in the indictment is that the defendant received said body of ———; and concerning this you are informed that to have received the body is to have taken or acquired possession of the same, or exercised direction or control over the same, after its disinterment, by transfer from some one else—and this may be done either exclusively by the defendant or knowingly in conjunction with others; and if you believe from the evidence, beyond a reasonable doubt, that the said defendant did acquire, by transfer, control over said body, or exercised acts of possession over the same by transfer from some one else, either by himself or in conjunction with others, or knowingly aided, counseled, abetted, or assisted others in so doing, then you will consider the fact of the receiving of said body by the defendant as established in this case.[1]

You are further instructed that another essential fact in this case is that the defendant, if he received said body, knew at the time that the same had been removed from its grave for the purpose of dissection without the consent of the near relatives of the said ———; and this knowledge must be shown in him beyond a reasonable doubt, but this knowledge may be shown, as any other fact, by either direct or circumstantial evidence.[2]

§ 2093. Liability for unlawfully removing body of one killed in accident from place of accident

You are instructed that if, on the other hand, you find that what was done by the servants of the defendant with the dead body was done in good faith and solely for the purpose of accomplishing an early return thereof to the plaintiffs, and that the acts and conduct of the defendant's servants were not characterized by recklessness or heartlessness, then the plaintiffs cannot recover, and your verdict should be for the defendant.[3]

[1] State v. Johnson, 50 P. 907, 6 Kan. App. 119.

[2] State v. Johnson, 50 P. 907, 6 Kan. App. 119.

[3] Wilde v. Milwaukee Electric Ry. & Light Co., 132 N W. 885, 147 Wis. 129.

CHAPTER CII

DEATH BY WRONGFUL ACT

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A. GROUNDS OF ACTION

§ 2094. In general

The court instructs the jury that if they believe from the evidence that on ———, D. came to his death, while in the exercise of ordinary care for his own safety, in the manner and by the means set forth in the amended declaration filed herein, and if the jury further believe from the evidence that the death of the said D. was caused by the negligence of the defendant as charged in the declaration, and if the jury further believe from the evidence that the said D. left, him surviving, a widow and children, as charged in the declaration, and that such widow and children by the death of the said D. have been and are deprived of their means of support, then, in law, the plaintiff is entitled to recover.[1]

The jury are instructed that, if you believe from the evidence that it was negligence for defendant to run its cars without fenders or life guards and that the child, ———, was killed because of such negligence, and that the parent or custodian of said child was not guilty of negligence in permitting the child to be on the street at the time of the accident, and that the child left surviving next of kin as alleged, then the jury should find defendant guilty.[2]

§ 2095. Reckless management of automobile by defendant in attempt to escape arrest by deceased

The jury are instructed that, under the uncontradicted evidence in this case, P., deceased, on ———, was sheriff of ———, and had in his possession a warrant for the arrest of the defendant, and on said date saw the defendant driving on ——— avenue, in the town of ———, in his motor car, and the said defendant then and there knew that the said P. had a warrant for

[1] Economy Light & Power Co. v. Stephen, 58 N. E. 359, 187 Ill. 137.

[2] Englund v. Mississippi Valley Traction Co., 139 Ill. App. 572.

his arrest; and if the jury believes from the evidence that the defendant understood that the said P. then and there wanted to arrest him, and that the said defendant while driving said car on ——— avenue saw the said P. approach his car as he believed for the purpose of arresting him, but that the said defendant then and there made an effort to escape from arrest, by speeding up his automobile, and further find that the said P. thereupon stepped on the running board of the said automobile in order effectually to place said defendant under arrest, and further find that the said defendant then and there had his car under control, and could have stopped his car, but, on the other hand, increased the speed of the said automobile for the purpose of escaping from arrest, and further find that in his effort to escape arrest the car of the said defendant was driven at a dangerous, reckless, and unlawful speed by the defendant, and so negligently and recklessly that the said car was run against one of the iron supports of the bridge leading from ——— to ———, and that as a result thereof the said P. was so seriously injured that from the effects thereof he died soon thereafter, then the verdict of the jury shall be for the plaintiff.[3]

The jury are instructed that unless they shall find by a fair preponderance of the evidence that the defendant, in a willful attempt to escape arrest, intentionally increased the speed of his automobile with a view of escaping from the state of ———, or, with such intent, failed to use means (if such were accessible to him) which a reasonably prudent and law-abiding person would under the circumstances have used to stop the car, then the plaintiff cannot recover and your verdict should be for the defendant.[4]

§ 2096. Proximate cause

§ 2096(1). Arkansas

You are instructed that if ——— died from pneumonia, and the pneumonia was wholly or in part caused or superinduced by the burns, then ———'s death was in law caused by the burns. In such case, if you find for the plaintiff, you should find for her for both the suffering and death of ———.[5]

You are instructed that the plaintiff alleges that the deceased was injured in a mine by the explosion of gas; that he lived for a period of ——— days thereafter, and then died from the effects of the injuries received in the explosion. In order to justify you in finding for the plaintiff, you must find from a preponderance of the evidence that the death of the deceased was the direct or proximate result of the injuries received, and you must further find that the injuries

[3] Weissengoff v. Davis (C. C. A. Md.) 260 F. 16, 171 C. C. A. 52, 7 A. L. R. 307.

[4] Weissengoff v. Davis (C. C. A. Md.) 260 F. 16, 171 C. C. A. 52, 7 A. L. R. 307.

[5] Sterling Anthracite Coal Co. v. Strope, 197 S. W. 858, 130 Ark. 435.

alleged to have been received in the explosion were caused by the negligence of the defendant as set out in the complaint.[6]

You are instructed that, before you can find for the plaintiff, the proof must show, not only the acts complained of, and that they were negligent, as defined in these instructions, but the proof must further show that such negligence directly caused the injury, and that such injury resulted directly in the death of deceased; and unless you have such proof you should find for defendant.[7]

§ 2096(2). Illinois

The jury are instructed that, if you find that through some mistake of the surgeons, or of competent nurses and attendants, infection resulted from and followed said operation through no act of said ———, and thereafter said ——— died on ——— from said infection resulting from the wound made by said surgeon in said operation and the treatment thereof by the said surgeon and nurses, then the said acts, mistakes, or errors of the surgeon and nurses should be considered by you as a part of the immediate and direct result produced by the injuries received by the said ——— in said collision.[8]

§ 2097. When death deemed caused by accident within meaning of statute

The court instructs the jury that, if you find upon all the evidence that C.'s death was hastened by this accident, then the plaintiff has sustained the burden of proving that her death was caused by the accident within the meaning of this statute. If you find that she was confined to her bed and had become weak and enfeebled, and if owing to that weakness and confinement hyperstatic pneumonia developed which caused her death, then you would also be warranted in finding that her death was due to the accident. If you should further find that she had some kidney trouble prior to the accident and that owing to the accident it was aggravated and made acute and that her death was materially hastened by the accident, then you would properly be warranted in finding that her death was caused by the accident.[9]

B. Defenses

§ 2098. Liability for intentional killing—Self-defense

§ 2098(1). Missouri

The court instructs the jury that, when danger is threatened and impending, a person is not compelled to stand, with arms fold-

[6] Sterling Anthracite Coal Co. v. Strope, 197 S. W. 858, 130 Ark. 435.

[7] Sterling Anthracite Coal Co. v. Strope, 197 S. W. 858, 130 Ark. 435.

[8] Horney v. St. Louis & Northeastern R. Co., 165 Ill. App. 547.

[9] Charles v. Boston Elevated Ry. Co., 120 N. E. 69, 230 Mass. 536.

ed, until it is too late to strike, but the law permits him to act on reasonable fear; and in this case, if the defendant had reasonable cause to apprehend that S. had a design to do him some great personal injury, and that there was reasonable cause to apprehend immediate danger of such design being accomplished, then defendant had a right to act on appearances, and kill S. to prevent such design being accomplished; and such killing would be justifiable, although it should afterwards turn out that the appearances of danger were false and unfounded, and the finding should be for the defendant.[10]

You are instructed that, although the jury may believe from the evidence that the deceased took hold of defendant, and held him, and may believe from the evidence that he attempted to follow him, when released, with the intention of again taking hold of him, yet that would not justify the defendant in taking his life, unless the jury believe, from all the evidence before them, that the defendant had reasonable cause to believe that the deceased was then about to take his life, or do him some other great personal injury.[11]

You are instructed that, if the jury believe from the evidence that the defendant had no reasonable cause to apprehend that deceased intended to take defendant's life, or do him any other great bodily harm, and that thereupon the defendant fired the pistol shot in revenge, or in a reckless and vindictive spirit, then there is no self-defense in the case, and the jury cannot find for the defendant on that ground.[12]

§ 2098(2). Texas

You are instructed that, if you believe from the evidence in this case that the defendant provoked a difficulty with the deceased, as above explained to you, but you believe from the evidence that such difficulty was provoked (if any such was provoked) without any intention to kill or inflict serious bodily injury upon deceased, or if you have a reasonable doubt as to defendant's intention to kill or inflict serious bodily injury upon deceased, and you believe from the evidence that defendant by his acts or language or both did provoke a difficulty with deceased, which caused deceased to attack defendant, and the defendant, under the influence of sudden passion which rendered the mind of the defendant incapable of cool reflection, did shoot with a pistol and thereby kill the deceased, you are instructed that such killing would be unlawful, and, if you find the facts so to be, your verdict should be rendered accordingly.[13]

[10] Nichols v. Winfrey, 2 S. W. 305, 90 Mo. 403.

[11] Nichols v. Winfrey, 2 S. W. 305, 90 Mo. 403.

[12] Nichols v. Winfrey, 2 S. W. 305, 90 Mo. 403.

[13] Gray v. Phillips, 117 S. W. 870, 54 Tex. Civ. App. 148.

You are instructed that, to justify the killing of ——— by the defendants, or either of them, there must have been some act then done by him, or some words then spoken, coupled with his acts, sufficient to produce upon the minds of the defendants, or either one of them, a reasonable apprehension that they, or one of them, were in immediate danger of losing life, or of suffering serious bodily injury, at the hands of ———; and the killing must have been done while such danger or apparent danger existed for, if the killing was done after such danger or apparent danger had ceased, then it would be illegal and wrongful.[14]

C. Measure of Damages and Recovery of Penalty

§ 2099. Recovery for benefit of estate of decedent

§ 2099(1). Iowa

The jury are instructed that if, under the evidence and instructions given you in this charge, you should find for the plaintiff, you will then proceed to determine from the evidence and assess the amount of her recovery herein, and the measure of such recovery, if any, will be the present worth or value of the estate which the said ——— would reasonably be expected to have saved and accumulated if he had lived out the natural term of his life. The measure of recovery, in cases of this character, is not the sum which, when placed at interest will yield an amount equal to the income of the deceased at the time of his death; nor the amount necessary for the support of his family. But, as already stated, it is that amount estimated at its present worth, which under all the circumstances disclosed in the evidence, you believe would have come to his estate at the end of his natural life. In estimating such damages, if any you award the plaintiff, you may and should consider, so far as shown by the evidence, the age and occupation of the said ——— at the time of the injury which caused his death, his bodily health and ability to earn money, his habits as to industry, thrift, and economy, if any such have been shown, the contingencies of life, such as ill health, nonemployment, increase or diminution in earning capacity as age advances, and all the other facts and circumstances in evidence tending to show the amount, if any, that the estate might have accumulated if he had lived out the term of his natural life, and award the plaintiff such a sum as you believe from the evidence, under the rules as herein stated, will be a fair and reasonable compensation for the loss sustained by the estate of the said ———, as a result of his death.[15]

You are instructed that, if you find for the plaintiff, you will es-

[14] Wallace v. Stevens, 12 S. W. 283, 74 Tex. 559.

[15] Hamner v. Janowitz, 108 N. W. 109, 131 Iowa, 20.

timate the damages to which he is entitled; and, in so doing, you will not allow anything for pain and suffering of deceased, nor wounded feelings, nor grief of his relatives, nor anything by way of exemplary damages or punishment of defendant, nor infer any fortuitous circumstance whereby the income or fortune of deceased might be increased or improved had he lived. This suit is brought only to recover a pecuniary loss, namely, what the estate of the deceased had lost in consequence of his untimely death, and no more.[16]

§ 2099(2). Kentucky

You are instructed that, if you find for the plaintiff, you will award him damages in such sum as you believe from the evidence will reasonably compensate the estate of the deceased for the destruction of her power to earn money, not exceeding the sum of ——— dollars, the amount sued for.[17]

You are instructed that, if you find for the plaintiff, you will award her such sum in damages as you may believe from the evidence will fairly and reasonably compensate the estate of said decedent for the destruction, if any, of his power to earn money, not exceeding, however, the sum of $———, the amount claimed in the petition.[18]

§ 2099(3). Michigan

You are instructed that, if you find for plaintiff, you will render a verdict for all damages sustained in consequence of the injury to and death of the young man. These will comprise a reasonable amount for any pain and suffering he endured from the time of the injury to his death, and, in addition, a reasonable amount for all sums that he would probably have earned during the years that he would probably have lived, but for the injury. Your verdict will be the sum of these two. You are not concerned with the amount of earnings that the young man would probably have saved during his probable life, but only with the probable earnings themselves. The table of expectancy put in evidence shows that, if of good health, he might have lived ——— years longer than he did. Estimate the present worth of his probable earnings during the time that he would probably have lived at ——— per cent. simple interest for each year, and the sum of these for the several years that he

[16] Spaulding v. Chicago, St. P. & K. C. Ry. Co., 67 N. W. 227, 98 Iowa, 205.

[17] Louisville & N. R. Co. v. Englemans Adm'x, 141 S. W. 374, 146 Ky. 19. It was objected to this instruction that it failed to tell the jury that the earning power of deceased from the time of her death to her majority could not be taken into consideration; deceased being 16 at her death.

[18] Illinois Cent. R. Co. v. Dallas' Adm'x, 150 S. W. 536, 150 Ky. 442; Cincinnati, N. O. & T. P. Ry. Co. v. Lovell's Adm'r, 132 S. W. 569, 141 Ky. 249, 47 L. R. A. (N. S.) 909.

would probably have lived will be the amount of your verdict for loss of earnings.[19]

§ 2099(4). Montana

The court instructs the jury that if under all the evidence and all of the instructions of the court your verdict should be for the plaintiffs and against the defendant, then it will be necessary for you to assess and write into that verdict the amount of damages caused proximately to ——— by the acts, if proved, of the hoisting engineer. In determining this amount you are limited to a sum of money which would have compensated ——— for the pain and suffering of mind and body which the injuries caused (if any such pain and suffering were caused), between the time that he was injured and the time he died, if he survived the injuries for any length of time, and to the further sum that would have compensated him, unless you find that death was instantaneous, for the impairment, if any, which was caused by the injuries, of his capacity to earn money in the future if he had not been injured. Now gentlemen, the amount sued for and claimed in the complaint of $——— must not be to you any criterion in determining the amount of your verdict, if you do render any, in favor of the plaintiffs, but I charge you that in no event shall your verdict be in excess of the amount of $———.[20]

§ 2100. Recovery for loss sustained by next of kin or other designated beneficiaries

§ 2100(1). California

I charge you that damages can only be given for the actual pecuniary injury or loss suffered by the parties complaining; in other words, in a case such as the present, should you find that plaintiffs are entitled to damages, then damages can only be given for the pecuniary injury or loss the plaintiffs have sustained, or will sustain, by the death of said ———. And in this regard I charge you that no damages can be given to plaintiffs for the grief or sorrow, or pain of mind, or injury to their feelings, or for loss of society of deceased, or for his pain or suffering, or for the loss of his comfort or protection. The law simply measures the injury complained of by the loss it has caused or will cause in dollars and cents. In passing upon this question you are not allowed to speculate or indulge in presumptions not warranted by the evidence, but you must determine this question solely by the evidence introduced before you. If you are not able to determine from the evidence that the plaintiffs have suffered a pecuniary injury or loss

[19] Davis v. Michigan Cent. R. Co., 111 N. W. 76, 147 Mich. 479.

[20] Beeler v. Butte & London Copper Development Co., 110 P. 528, 41 Mont. 465.

in the death of ———, it becomes your duty to return a verdict for defendant. And in passing upon the extent of the pecuniary injury or loss sustained by the plaintiffs you must be governed solely by the evidence introduced. You must not indulge in conjectures or speculations not supported by the evidence.[21]

§ 2100(2). Illinois

You are instructed that this is an action to recover damages to the next of kin of the deceased. Under the statute the next of kin can only recover, even where the defendant is guilty, such damages as are a fair and just compensation with reference to the pecuniary injuries resulting to the next of kin of said deceased person from such death, and even if you believe from the evidence, under the law as stated in the instructions of the court, that defendant is guilty as charged in the declaration, you can allow to the plaintiff only such damages as will compensate the next of kin for the pecuniary injury, if any are shown by the evidence, resulting from the death of plaintiff's intestate.[22]

You are instructed that, if you find the defendant guilty under the evidence and the instructions of the court, then it is your duty to assess the plaintiff's damages, and in assessing the damages you have a right to take into consideration all of the testimony, and that only, bearing upon that question, and allow such damages, if any, as you may deem a fair and just compensation with reference to the pecuniary injuries resulting from the death of the plaintiff's intestate to his next of kin; and in estimating the plaintiff's damages you have a right to take into consideration whatever you may believe, from the evidence, the next of kin might have reasonably expected, in a pecuniary way, from the continued life of the intestate.[23]

The jury are instructed that if the jury find from the evidence, and under the instructions of the court, that the defendant corporation is guilty of the wrongful acts, neglect, or default as charged in the plaintiff's declaration, then the plaintiff is entitled to recover such damages as the jury may deem, from the evidence and proof, a fair and just compensation therefor, having reference only to the pecuniary injuries resulting from such death to the said plaintiff and next of kin, not exceeding the amount in the declaration. Sorrow or grief for the deceased, or any pain caused to the next of kin by reason of the manner of his death, is not to be considered by the jury, and the pecuniary value of the life of the deceased to the

[21] Burk v. Arcata & M. R. R. Co., 57 P. 1065, 125 Cal. 364, 73 Am. St. Rep. 52.

[22] McFarlane v. Chicago City Ry. Co., 123 N. E. 638, 288 Ill. 476.

[23] Schaffner v. C. F. Massey Co., 110 N. E. 381, 270 Ill. 207.

next of kin, himself surviving, is all for which damages can be assessed.[24]

You are instructed that, if the jury should find from the evidence that the defendant is guilty of the wrongful act, neglect or default, as charged in the plaintiff's declaration, and that the same resulted in the death of ———, then the plaintiff is entitled to recover in this action, for the benefit of the next of kin of such deceased, such damages as the jury may deem, from the evidence and proofs, a fair and just compensation, with reference to the pecuniary injuries resulting from such death, to such next of kin, not exceeding $———.[26]

The jury are instructed that the jury in this case, if they should find for the plaintiff, can only allow such damages as the statute authorizes. The measure of damages it adopts is simply a compensatory one; that is, that which will make good the loss sustained. That loss must be a pecuniary loss, and be measured by that standard, and arrived at as nearly as the circumstances will admit. The mental sufferings or grief of survivors, or loss of domestic or social happiness, or the degree of culpability of the party in fault, are not proper elements in the calculation of damages. The jury cannot award exemplary or vindictive damages. They must ascertain from the evidence the pecuniary loss sustained, as nearly as they can approximate thereto, and make that good; and to do this the testimony in the case must have furnished the data upon which the jury may calculate or approximate to an estimate of the pecuniary value of the life to the persons for whose benefit the plaintiff is entitled to damages. To ascertain this value of the life or the loss sustained, the jury is not entitled to go outside of the evidence and indulge in mere speculation and conjecture, not reasonably made from the evidence, and justifiable thereby, but must found their estimate upon such facts in proof as tend to show the pecuniary extent of the loss sustained; but to enable the jury to arrive at such an estimate, it is not necessary that any witness should have expressed an opinion as to the amount of such pecuniary loss, but the jury may themselves make such an estimate from the facts proved, taking into consideration the age of the deceased, and such other evidence as may afford them the means of making the estimate.[27]

§ 2100(3). Missouri

The court instructs the jury that if you find in favor of the plaintiff, you will, in assessing her damages, award her such sum, not

[24] Chicago, M. & St. P. Ry. Co., v. O'Sullivan, 32 N. E. 398, 143 Ill. 48. To same effect, see Pennsylvania Co. v. Marshall, 10 N. E. 220, 119 Ill. 399.

[26] Chicago, B. & Q. R. Co. v. Payne, 59 Ill. 534.

[27] City of Chicago v. Major, 18 Ill. 349, 68 Am. Dec. 553.

exceeding $———, as you find from the evidence will fairly and justly compensate her for all, if any, pecuniary loss you find from the evidence she has sustained, or will sustain, as a necessary result of the death, if any, of ———.[28]

The court instructs the jury that if you find a verdict in favor of the plaintiffs you should award them such sum as, in your discretion, you may deem proper, under the circumstances in evidence, but not less than $——— and not exceeding $———.[29]

§ 2100(4). Texas

The jury are instructed that if, under the foregoing instructions, you find that plaintiff is entitled to recover, the measure of damages is such sum as represents the present worth or value of the pecuniary contributions, if any, that you find and believe from the evidence said plaintiff had a reasonable expectation that the said ——— would have made to her, had he lived; but you will not allow said plaintiff, if you find for her, anything for any grief or sorrow on account of the death of said ———, or for the loss of his society, affection, and companionship.[30]

You are instructed that if, from the evidence, you find for plaintiffs, and you award them damages, then in fixing the amount of your verdict you will allow the plaintiff husband, and ——— and ———, minor children of deceased, such sum of money, if paid now, as will be a fair compensation to them for the loss of pecuniary benefits sustained by them in the death of Mrs. ——— (and by "pecuniary benefits" is meant not only money, but such loss as the evidence shows that the plaintiffs have suffered, directly and proximately, from the death of Mrs. ———, and which can be valued in money, and in case of minor children includes the reasonably pecuniary value of nurture, care and education which they would have received from their deceased parent during their minority had she lived); and you will separate or apportion in your verdict the sum, if any, which you will allow the surviving husband and the sums, if any, which you allow to each of the minor children, ——— and ———. You cannot allow plaintiffs anything by way of consolation for the death of Mrs. ———, or for any sorrow, anguish or grief suffered by them as the result of her death, or for the loss of the society, affection or companionship of deceased, and you will exclude all such consideration from your verdict.[31]

As to the plaintiff, ———, you are instructed to return a verdict

[28] Morton v. Southwestern Telegraph & Telephone Co., 217 S. W. 831, 280 Mo. 360.

[29] Compton v. Missouri Pac. Ry. Co., 147 S. W. 842, 165 Mo. App. 287.

[30] Missouri, K. & T. Ry. Co. of Texas v. Henderson (Civ. App.) 148 S. W. 822.

[31] Missouri, K. & T. Ry. Co. of Texas v. Hurdle (Civ. App.) 142 S. W. 992.

in her favor, and assess her damages at such a sum of money as in your judgment from all the facts and circumstances in the case will reasonably and fairly compensate her for the pecuniary aids and benefits she had a reasonable expectation of receiving from said ——— had he lived, also, the reasonable and necessary expense incurred on account of the burial of deceased; but you will exclude from your consideration in estimating the damages any mental distress, if any, incurred because of his death.[32]

§ 2100(5). Virginia

The court instructs the jury that, if they find for the plaintiff, in assessing the damages they are not limited to the actual loss of service of deceased, but they may assess such sum as to them may seem fair and just, looking to all the circumstances of the case, not exceeding the amount claimed in the declaration.[33]

§ 2100(6). West Virginia

The jury are instructed that, if they find for the plaintiff, they are not limited in estimating the damage to the loss actually sustained at the precise period of his death, but may include also prospective losses, provided they are such as the jury believe from the evidence shall actually result to the distributees as the proximate damages arising from the wrongful death.[34]

The court instructs the jury that in this case, if they find for the plaintiff, they will assess his damages at such sum as they may deem just and right so as not to exceed ——— dollars.[35]

§ 2101. Same—Present value of contributions which plaintiff would have received had decedent lived

You are instructed that the measure of damages in this case is the present value of the amount of money which the plaintiff and the minor children, during the continuance of decedent's life, would have received from her had she lived. The present valuation of a sum of money payable in the future is what that sum is worth if paid presently—paid now. For example, the present value of one dollar at ——— per cent. at the end of one year is found by dividing one dollar by one dollar and ——— cents; the present value of one dollar at the end of two years is found by dividing one dollar by one dollar and ——— cents, etc.[36]

[32] Chicago, R. I. & G. Ry. Co. v. Trippett, 111 S. W. 761, 50 Tex. Civ. App. 279.

[33] Norfolk & W. R. Co. v. De Board's Adm'r, 22 S. E. 514, 91 Va. 700, 29 L. R. A. 825.

[34] Wigal v. City of Parkersburg, 81 S. E. 554, 74 W. Va. 25, 52 L. R. A. (N. S.) 465.

[35] Davidson v. Pittsburg, C., C. & St. L. Ry. Co., 23 S. E. 593, 41 W. Va. 407.

[36] Nelson v. Lake Shore & M. S. Ry. Co., 62 N. W. 993, 104 Mich. 582.

§ 2102. Same—Rule under federal Employers' Liability Act

§ 2102(1). Connecticut

You are instructed that, if you should find that the plaintiff is entitled to damages, you should measure the damages from the point of view of the surviving wife and child. The rule of damages is not the ordinary one familiar in this state of loss to the estate of the deceased, but the financial loss to those he leaves behind him.[37]

The jury are instructed that in estimating the damages to the plaintiff's wife and child, if you find that they are entitled to damages, you should bear in mind that it is the financial loss alone to them which is to be considered. You are not to take into consideration for any purpose the grief or sorrow of the survivors, but only the financial loss which they have suffered in the death of ———.[38]

§ 2102(2). Kentucky

The jury are instructed that, if the jury should find for plaintiff, they should fix the damages at such sum as would reasonably compensate the dependent members of the family of said ———, if any there be, for the pecuniary loss, if any, shown by the evidence to have been sustained by them because of said ———'s injury and death. In fixing said amount, the jury are authorized to take into consideration the evidence showing the decedent's age, habits, business ability, earning capacity, probable duration of life, and also the pecuniary loss, if any, which the jury may find from the evidence that the dependent members of his family, if any, have sustained because of being deprived of such maintenance or support or other pecuniary advantages, if any, which the jury may believe from the evidence they would have derived from his life thereafter.[39]

§ 2103. Matters considered in determining pecuniary loss

§ 2103(1). Arkansas

The jury are instructed that, in fixing the amount of damages, they will take into consideration deceased's character and business qualifications, his capacity for earning money, and the value, if any, of his instructions and training to his children.[40]

§ 2103(2). Connecticut

The jury are instructed that, in considering the financial loss, if any, which ———'s death caused to his wife and child, you should consider, not only what his earnings had been, and what they

[37] Farley v. New York, N. H. & H. R. Co., 87 A. 990, 87 Conn. 328.

[38] Farley v. New York, N. H. & H. R. Co., 87 A. 990, 87 Conn. 328.

[39] Chesapeake & O. Ry. Co. v. Kelly's Adm'x, 169 S. W. 736, 160 Ky. 296.

[40] St. Louis, I. M. & S. Ry. Co. v. Sweet, 31 S. W. 571, 60 Ark. 550.

were likely to have been in the future, but the amount which he had actually contributed to their support in the past, and the amount which, under all the circumstances, he would have been likely to contribute in the future, his character, habits, and health, and any other facts and circumstances appearing in the evidence which enable you to say how much financial loss his death actually caused to his wife and child.[41]

§ 2103(3). Florida

The jury are instructed that the law imposes upon the husband the duty of supporting the wife, and gives to the wife a legal claim, in addition to such support, to the society, comfort, and protection of her husband, and the deprivation of these are proper elements to be considered by the jury in assessing damages.[42]

§ 2103(4). Georgia

The jury are instructed that, in making this calculation as to the amount plaintiff would be entitled to recover, you would have the right, and it would be proper for you, to consider whether or not the capacity of the plaintiff's husband to labor and earn money would have, by reason of advancing years, decreased, and if you believe, under the evidence, that it would have decreased, then it would be proper and right to diminish your verdict for plaintiff, if you find for her, in the same proportion as you believe the capacity of her husband to labor and earn money would have diminished.[43]

§ 2103(5). Iowa

You are instructed that this suit is brought only to recover a pecuniary loss, namely, what the estate of the deceased had lost in consequence of his untimely death, and no more. And, in determining what amount you will allow, you should take into consideration the age of the deceased, his occupation, the wages he was receiving, the condition of his health, his ability, if any, to earn money, his expenditures, and habits as to industry, sobriety, and economy, the amount of property which he had accumulated at the time of his death, if any, the probable duration of his lifetime, and all these in connection with all the evidence before you, throwing light on this question, and determine therefrom the probable pecuniary loss to the estate caused by his death, and allow the plaintiff such sum, and such only, as will compensate the estate for such loss.[44]

[41] Farley v. New York, N. H. & H. R. Co., 87 A. 990, 87 Conn. 328.

[42] Florida Cent. & P. R. Co. v. Foxworth, 25 So. 338, 41 Fla. 1, 79 Am. St. Rep. 149.

[43] Georgia Railroad v. Pittman, 73 Ga. 325.

[44] Spaulding v. Chicago, St. P. & K. C. Ry. Co., 67 N. W. 227, 98 Iowa, 205.

§ 2103(6). Kentucky

You are instructed that, if the jury find for the plaintiff, they will fix the damages at such a sum, not exceeding $———, as would be a fair compensation to the estate for the destruction of the power of the deceased to earn money; and in fixing such damages the jury should take into consideration the age of deceased at the time of his death, and the probable duration of his life.[45]

§ 2103(7). Missouri

You are instructed that if you find for plaintiff, and find from the evidence that deceased was not guilty of contributory negligence, then you will award plaintiff, as administratrix, such sum in damages as the jury shall find and believe from the evidence will reasonably compensate the widow of deceased ——— for any necessary pecuniary loss, if any, sustained by her in her necessary support and maintenance, if any, resulting from the death of her husband, and such further sum as will reasonably compensate the children of deceased, ——— and ———, for any necessary pecuniary loss, if any, sustained by them during their minority in their necessary maintenance, education, and support, if any, as the direct result of the death of the deceased, and in this connection the jury may take into consideration the age of deceased and the members of his family above mentioned, and his habits, earnings, and his expectancy in life. The jury will also take into consideration the personal expenses of deceased, and can only award such sum in the aggregate as the jury shall believe from the evidence the said members of his family had reasonable grounds to expect from deceased, if any, in the way of actual pecuniary assistance, as above, had he lived, if any, and your whole award cannot exceed $———.[46]

§ 2103(8). North Carolina

You are instructed that the measure of damages is the present value of the net pecuniary worth of the deceased, to be ascertained by deducting the cost of his own living and expenditures from the gross income, based upon his life expectancy. As a basis on which to enable the jury to make their estimate, it is competent to show, and for them to consider, the age of the deceased, his prospects in life, his habits, his character, his industry and skill, the means he had for making money, the business in which he was employed; the end of it all being to enable the jury to fix upon the net income which might be reasonably expected if death had not ensued,

[45] Smith's Adm'x v. Middleton, 66 S. W. 388, 112 Ky. 588, 56 L. R. A. 484, 99 Am. St. Rep. 308.

[46] Hurlburt v. Bush, 224 S. W. 323.

and thus arrive at the pecuniary worth of the deceased to his family. You do not undertake to give the equivalent of human life. You allow nothing for suffering. You do not attempt to punish the railroad, but you seek to give a fair, reasonable pecuniary worth of the deceased to his family, under the rule which I have laid down. You should rid yourself of all prejudice, if you have any, and of sympathy. It is not a question of sympathy. It is just a plain, practical question, and you should give a reasonable and fair verdict upon all the issues.[47]

On the question of damages, submitted in the second issue, if you find the first issue "Yes," then you are instructed in that event only that the measure of damages in this case is the present value of the net income of the deceased, which you would ascertain by deducting the cost of living and expenditures of the deceased from his gross income; and the jury cannot allow more than the present value of accumulation arising from such net income based upon the expectancy of life. In considering this question of what a man's life is worth, his habits, whether a sober or drinking man, his health, whether diseased and likely to die soon, or sound, and in robust health, are matters which it is the duty of the jury to consider.[48]

§ 2103(9). Texas

You will assess the plaintiff's damages, if any, at such a sum of money as, if paid in hand at this time, will be fair and adequate compensation to her for the pecuniary loss, if any, which you may believe from the evidence she has sustained by reason of the death of the said ———, based upon her reasonable expectation or pecuniary benefits, if any, from the continuance of ———'s life, had she lived. "Pecuniary benefits" means not only money but everything that can be reasonably estimated in money, and may include labor, services, kindness, and attention of a child to its parents.[49]

You are instructed that, if you find from the evidence and under the law given you in this charge for the plaintiffs, or either of them, you will assess their recovery of damages at such amount, if paid now, as would fully compensate them for the actual damages, if any, sustained by them, as shown by the evidence, and such as is fairly proportioned to the injury sustained, if any, and may include such pecuniary benefits as the plaintiff Mrs. ——— had a reasonable expectation of receiving from the deceased, had he lived, and in addition to such pecuniary benefits to the plaintiffs ———, ———, ———, and ———, you may also include

[47] Mendenhall v. North Carolina R. Co., 31 S. E. 480, 123 N. C. 275.

[48] Coley v. City of Statesville, 28 S. E. 482, 121 N. C. 301.

[49] Houston Electric Co. v. Flattery (Civ. App.) 217 S. W. 950.

the reasonable value of the nurture, care, and education that such children would have received from such parent had he lived, if any they would have received, provided you find such four last named plaintiffs to be minors and entitled thereto, and, if you find for plaintiffs or either of them any damages whatever, you will not allow actual damages for any other purpose than as above enumerated in this paragraph of this charge.[50]

You are instructed that, if you find that the plaintiffs are entitled to recover, then you will apportion the sum so found among them in such sums as you may determine each is entitled to receive; and you are instructed that the measure of damages, if plaintiffs are entitled to recover, is such sum as would represent the worth or value of the future earnings of the deceased, which his daughters, who are plaintiffs herein, had a reasonable expectation he would have contributed to them had he lived, and in determining the amount of damages, if any, sustained by them on account of the death of the said deceased, you may consider said deceased's capacity for earning money, his age at the date of his death, and the probable expectancy and duration of his life.[51]

The jury are instructed that, in case you find for the plaintiffs, the amount plaintiffs would be entitled to recover would be a sum equal to the pecuniary benefit, if any, which they would have had a reasonable expectation of receiving from said ———, had he not been killed by defendant's cars; and in estimating such sum, if any, the jury may consider, under the evidence before them, the age of the deceased at the time of his death, his habits of industry, economy, and sobriety, his actual ability and capacity for earning money, as well as the probable duration of his life, together with the ages and probable duration of the lives of the plaintiffs at the time of his death.[52]

§ 2104. Deformity of plaintiff as affecting measure of recovery

The jury are instructed that if the jury believe, from the evidence, that the plaintiff, at the time of the death of said ———, had a deformity of her left hand, partially impairing the use of said hand, and that such deformity had existed from the time of her birth, such fact cannot increase or diminish the amount of damages which she will be entitled to recover in this suit, in case the jury find the issue for her, and if the jury should find the issue for the plaintiff, they are instructed, in the assessment

[50] Gray v. Phillips, 117 S. W. 870, 54 Tex. Civ. App. 148.

[51] St. Louis Southwestern Ry. Co. of Texas v. Bowles, 72 S. W. 451, 32 Tex. Civ. App. 118.

[52] Galveston, H. & S. A. Ry. Co. v. Hughes, 54 S. W. 264, 22 Tex. Civ. App. 134.

of damages, to disregard all the testimony in the case as to such deformity.[53]

§ 2105. Financial circumstances of plaintiff

You are instructed that the pecuniary circumstances of the plaintiff and her infant daughter, at the time of and since the death of said ———, cannot increase or diminish the amount of damages which the plaintiff is entitled to recover in this suit, in case the jury find the issue for her, and if the jury so find, they are instructed, in the assessment of damages, to disregard all the testimony as to the pecuniary circumstances of said plaintiff and her infant daughter, at the time of and since the death of said ———.[54]

§ 2106. Recovery for grief, loss of companionship, etc.

§ 2106(1). California

You are instructed that sorrow and mental anguish caused by death are not elements of damage. You cannot award any damage to the plaintiff, as a solace for his wounded feelings, because of the death of his boy.[55]

§ 2106(2). Illinois

You are instructed that even if you find for the plaintiff, you can allow only such damages as will make good the pecuniary loss, if any is shown by the evidence, sustained by the next of kin of the person deceased. Mental suffering or loss of domestic or social happiness or the degree of the culpability of the defendant, if any, are not proper elements in the calculation of damages. You cannot award exemplary or vindictive damages.[56]

You are instructed that, with reference to the question of damages, if you reach a conclusion where you will have to consider them at all the feelings of the children or other relatives, or their wealth or poverty, cannot be considered in assessing damages in a case like this. You cannot allow anything for solace or comfort or sorrow of the family. It is only the pecuniary or money loss which the evidence may show the next of kin have suffered by the death of the deceased. If the evidence shows that they have suffered any pecuniary or money loss by reason of said death, that can be considered in this case.[57]

The jury are instructed that if the jury find for the plaintiff, and find that the next of kin of deceased has sustained any damages by reason of his death, in estimating such damages the jury

[53] Illinois Central R. Co. v. Baches, 55 Ill. 379.

[54] Illinois Central R. Co. v. Baches, 55 Ill. 379.

[55] Bond v. United Railroads of San Francisco, 140 P. 982, 24 Cal. App. 157.

[56] McFarlane v. Chicago City Ry. Co., 123 N. E. 638, 288 Ill. 476.

[57] McFarlane v. Chicago City Ry. Co., 123 N. E. 638, 288 Ill. 476.

cannot consider the mental sufferings or grief of the surviving kindred, or loss of domestic or social happiness, or culpability of the defendants; but the jury, if they find for the plaintiff, must be governed solely by the actual pecuniary money loss that the next of kin of deceased have sustained by reason of his death.[58]

The jury are instructed that, in considering the damages in this case, it is your duty to dismiss from your minds all consideration of the grief, sorrow, and mental affliction of the widow and children of the deceased, to dismiss from your minds all personal feelings and sympathy which may have been aroused by the recital of the circumstances of the casualty and consider only the pecuniary injury.[59]

§ 2106(3). Maryland

The court instructs the jury that in estimating damages in this case they cannot allow anything for the pain and suffering which ——— may have endured after his accident, nor for the grief and mental anguish of his wife occasioned by his death.[60]

§ 2106(4). Texas

You are instructed that, if you find for the plaintiffs, it will be your duty to ascertain from the evidence what pecuniary loss, if any, has been sustained by the plaintiffs by reason of the death of said ———, and you will make that sum the amount of your finding. The plaintiffs are not permitted to recover anything on account of grief, nor on account of the loss of the society of the said ———; but their right to recover, if any, then, must be limited to the pecuniary loss sustained.[61]

§ 2106(5). Virginia

The jury are instructed that, if they shall find for the plaintiff, in estimating his damages they may take into consideration compensation for the loss of his care, attention, and society to his family, together with such sum as they may deem fair and just by way of solace and comfort to them for the sorrow, suffering, and mental anguish occasioned by his death, not to exceed, however, the sum of $———.[62]

§ 2107. Recovery for death of father

§ 2107(1). Maryland

You are instructed that, in estimating the damages which the said minor child, ———, has sustained and will sustain, they may

[58] Wabash R. Co. v. Smith, 44 N. E. 856, 162 Ill. 583.

[59] Chicago, etc., R. Co. v. Harwood, 80 Ill. 88.

[60] Consolidated Gas, Electric Light & Power Co. v. State, 72 A. 651, 109 Md. 186.

[61] San Antonio & A. P. Ry. Co. v. Brock, 80 S. W. 422, 35 Tex. Civ. App. 155.

[62] Portsmouth St. R. Co. v. Peed's Adm'r, 47 S. E. 850, 102 Va. 662.

consider what pecuniary loss she has sustained by reason of the negligent killing of her father, ———, the prospective damages to be estimated up to the majority of the said ———, and that the jury shall by their verdict find and direct what shall be the share of the said wife and what shall be the share of the said minor child of the amount of their verdict.[63]

§ 2107(2). Texas

The court instructs the jury that it is the legal duty of the father to support his children during their minority according to their station and condition in life, and if such child is, by the negligence of another, deprived of this right, he may recover the amount of damages thereby sustained, and such right or the amount of the damages does not depend on whether the father had supported, or intended to support, the child. Therefore you are instructed that, if you believe from the evidence that A. B. is the child of H. B. and the deceased, G. B., and you further believe that the defendant was negligent in any of the matters as hereinbefore charged you, and that said negligence was the proximate cause of the death of G. B., then you will allow his mother, as next friend the amount of damages thereby sustained by said child, A. B., and be governed by the rule in the assessing of same as hereinafter given you; but, on the other hand, if you believe that A. B. is not the child of the plaintiff H. B. by G. B., then you will find for the defendant, as to said A. B.'s cause of action by H. B. as next friend.[64]

You are instructed that by pecuniary aid is meant not only money, but everything that can be valued in money, and, in the case of the infant child, E. J. G., it includes the reasonable pecuniary value of the nurture, care, and admonition, if any, you believe from the evidence said child would have received from the said E. H. G., deceased, had he lived during its minority. If you find for plaintiffs, or any of them, you will not allow anything for any grief or sorrow on account of the death of the said E. H. G., or the loss of his society, affection, or companionship. If you should find for plaintiffs or any of them, then you will apportion the amount so found among them in such sum as you may determine each is entitled to receive.[65]

§ 2107(3). Virginia

The court instructs the jury that, if you shall find that the plaintiff is entitled to recover in this case under the law and the evidence, then in ascertaining the damages you may consider: First.

[63] Chesapeake & Potomac Telephone Co. v. State, 93 A. 11, 124 Md. 527.

[64] San Antonio & A. P. Ry. Co. v. Boyed (Civ. App.) 201 S. W. 219.

[65] St. Louis, S. F. & T. Ry. Co. v. Geer (Civ. App.) 149 S. W. 1178.

The pecuniary loss sustained by the decedent's infant child, by his death, fixing the same at such sum as would be equal to the probable earnings of the said ———, taking into consideration his age, business capacity, experience, and habits, health, energy, and perseverance, during what would probably have been his lifetime, if he had not been killed. Second. By adding thereto compensation for the loss of his care, attention, and society to his infant child, but not to exceed $——— in all.[66]

§ 2108. Recovery for death of mother

§ 2108(1). California

The jury are instructed that, in determining the amount of damages to the children, you have a right to consider the value of the nurture and instruction, moral and physical, and intellectual training, if any, which the mother gives to the children; and, in determining such value, you are not limited to a case of similar services rendered by a hired servant, but may take into consideration the value of such services when rendered by the mother to her children, having regard to the evidence in this case, if there be any, as to the ability and willingness of the deceased to nurture, care for, train, and educate her children. The pecuniary interest of children in the lives of their parents does not necessarily end with their arrival at the age of majority; but you may allow for the probable loss of any benefit, if any, of a pecuniary value, which the child would probably receive from its mother after its arrival at majority.[67]

§ 2108(2). Illinois

The court instructs the jury that, if the jury find a verdict in favor of the plaintiff under the evidence and the instructions of the court, then the jury will be required to assess the plaintiff's damages. In assessing the plaintiff's damages, if any, the jury should allow such damages as will compensate the daughter and two sons of ———, deceased, for such pecuniary loss, if any, as shown by the evidence, as the children of the deceased have sustained by reason of her death, not exceeding, however, the sum of $———.[68]

§ 2109. Recovery for death of wife

The court instructs the jury that it is difficult to adduce direct evidence of the exact pecuniary loss occasioned the plaintiff by the death of his wife, or to show the exact value of her services, and you are permitted to determine the question of damages from your own observation, experience, and knowledge conscientiously ap-

[66] Southern Ry. Co. v. Vaughan's Adm'r, 88 S. E. 305, 118 Va. 692, L. R. A. 1916E, 1222, Ann. Cas. 1918D, 842.

[67] Redfield v. Oakland Consolidated St. Ry. Co., 42 P. 822, 110 Cal. 277.

[68] McFarlane v. Chicago City Ry. Co., 123 N. E. 638, 288 Ill. 476.

plied to the facts and circumstances of the case. In this connection, however, you are instructed that in awarding damages you must consider the age, health, condition of life, and probable duration of the life of the deceased, her habits of industry and frugality, her mental and physical capacity to render services, her ability to earn money, and her disposition to aid or assist the plaintiff; but that the recovery allowable is in no sense a solace for the grief or injured feelings of plaintiff occasioned by the death of his wife, but must be limited to the net pecuniary benefit which the plaintiff might reasonably have expected to receive from a continuance of the life of the deceased, and that this pecuniary benefit would be the value of the wife's services less the cost of properly and suitably maintaining her.[69]

§ 2110. Recovery for death of wife and mother

§ 2110(1). California

The court instructs the jury that in determining the damages sustained by the husband they have a right to take into consideration the pecuniary loss, if any, sustained by him in being deprived of the services, society, and comfort of his wife, and in determining the pecuniary loss sustained by the children they have a right to consider the value of the mother's services to her children, her care and labor bestowed upon them, her ability to care for, train, and assist them, and her efforts for their welfare.[70]

The jury are instructed that you are to award the plaintiffs such damage as will fairly and fully equal the pecuniary value to them of the life of the wife and mother. In fixing the damage to the husband, you have a right to allow for the loss of the services of the wife, suffered by him, if any, from the time of the death of the wife to this date, and also for the value of future services, considering her age and his age, and the probable duration of their lives. In determining the value of the services of the wife to the husband, you are to consider her ability and willingness to perform such services, and the relations existing between her and her husband, as disclosed by the evidence. In other words, you are not limited, in determining the value of a wife, to the estimate of the value of similar services performed by a hired servant, but you are at liberty to consider the value of such services in the light of the character of the wife and companion in which they are performed. And so, in determining the amount of damages to the children, you have a right to consider the value of the nurture and instruction, moral and physical, and intellectual training, if any, which the mother gives to the children. If you find a verdict for plaintiffs, you must award

[69] Denver & R. G. R. Co. v. Gunning, 80 P. 727, 33 Colo. 280.

[70] Valenti v. Sierra Ry. Co., 111 P. 95, 158 Cal. 412.

such a lump sum for damages as will fully compensate the plaintiffs, both husband and children, for the pecuniary value to them of the life of the wife and mother. In other words, you may give such damages as under the circumstances of the case may be just. Sympathy and pity must not guide you in your verdict. Neither the desire to help plaintiffs nor to punish the defendants should be exercised. You are at liberty to determine what pecuniary loss the plaintiffs suffered by the death of the deceased, and to find in that amount, and no greater amount. The measure of damages in this case is, as we have seen, the pecuniary loss suffered by the plaintiffs, without allowance for distress of mind, sorrow, or mental anguish. In this connection, therefore, the plaintiffs, the husband and the children of the deceased, if entitled to recover under the evidence, should get what the deceased would have probably contributed by her labor, instruction, training, comfort, society, and protection, to the support of the plaintiffs, taking into consideration her age, ability, and disposition to labor.[71]

§ 2110(2). Ohio

You are instructed that in this case the plaintiff's damages, if any, should be fair and just compensation for the pecuniary injury resulting to the husband and children from the death of ———. In no case can the jury, in estimating the damages, consider the bereavement, mental anguish, or pain suffered by the living for the dead. The damage is exclusively for a pecuniary loss, not a solace. The reasonable expectation of what the husband and children might have received from the deceased had she lived, is a proper subject for the consideration of the jury, if they find for the plaintiff. What the husband and children might reasonably expect to receive by reason of the services of this woman, in a pecuniary point of view, is to be taken into account in determining the amount of damages, if you find for the plaintiff. It should be said that it is the present worth as a gross sum in money for the loss of the services of this woman that you are to find, if you find a loss. It is that same which, put in money, is a compensation for what you find this woman would reasonably have saved for her family. Of course, in determining this, these things are all to be considered,—that is, the age, health, probability of length of life, or death, if she had not died from taking this drug.[72]

§ 2111. Recovery for death of husband

§ 2111(1). Delaware

If you find for the plaintiff, it should be for such a sum of money as will reasonably compensate her for any and all damages that

[71] Redfield v. Oakland Consolidated St. Ry. Co., 42 P. 822, 110 Cal. 277.

[72] Davis v. Guarnieri, 15 N. E. 350, 45 Ohio St. 470, 4 Am. St. Rep. 548.

she has sustained, or may hereafter sustain, by reason of the death and loss of her husband, governed by what portion of the gross earnings or income the plaintiff would probably have received from the deceased if he had lived.[73]

You are instructed that as the plaintiff, during the trial of this case, has expressly limited her claim for damages to the loss of the support which she would have received, or which by law she could have enforced from her husband, had he lived, we instruct you that if you should find for the plaintiff, in estimating her damages, you are not to be governed by what would probably have been the gross earnings or income of the deceased, but by what portion of the gross earnings or income the plaintiff would probably have received from the deceased as his wife, if he had lived, and you should base the estimate of her damages upon the number of years the deceased would probably have lived, had he not been killed, and render a verdict for such pecuniary damages as you may find that as his widow, she has suffered or will suffer as a direct consequence of her husband's death in the loss of her husband's support, either voluntarily given or legally enforceable.[74]

§ 2111(2). Illinois

The jury are instructed that in assessing the damages sustained by the plaintiff, should they find for her, they should allow such pecuniary damages as were the direct result of the death of her husband, and in making the estimate of such damages they may take into consideration whether or not deceased left surviving him, in addition to the widow, any children.[75]

§ 2111(3). Indiana

The court instructs the jury that, if you find from a preponderance of the evidence in this action that the plaintiff should recover against the defendants, then it will be your duty to award plaintiff such damages as will compensate said testator's widow for the pecuniary loss sustained by her as a result of his death, and in fixing the amount it will be your duty to take into consideration said testator's age at the time of his death, his health and expectancy of life, and his earning capacity; your verdict, however, not to exceed $———.[76]

§ 2111(4). Kentucky

You are instructed that the measure of recovery, if you find for the plaintiff, is such an amount in damages as will fairly and rea-

[73] Fulmele v. Forrest (Super.) 86 A. 733, 4 Boyce, 155.

[74] Wood v. Philadelphia, B. & W. R. Co., 76 A. 613, 1 Boyce, 336.

[75] Kulvie v. Bunsen Coal Co., 97 N. E. 688, 253 Ill. 386.

[76] Indianapolis Traction & Terminal Co. v. Lee, 118 N. E. 959, 67 Ind. App. 105.

sonably compensate the widow of the said ———, deceased, for the loss of pecuniary benefits she might reasonably have received, if the deceased had not been killed, not exceeding the amount claimed.[77]

The court instructs the jury that, if they shall find for the plaintiff under instruction No. ———, then and in this event they will find for her such a sum of money as they may find and believe from the evidence will fairly and reasonably compensate ———, the widow of the decedent, for the pecuniary loss, if any, sustained by her by reason of his death. And in fixing said amount, if any, the jury are authorized to take into consideration the decedent's age, his habits, business ability, earning capacity, and the probable duration of his life, and also the pecuniary loss, if any, which the said ——— as his wife has sustained by reason of being deprived of such support and maintenance, or other pecuniary advantage, if any, which the jury may find and believe from the evidence she would have derived from decedent but for the accident in question, not exceeding, however, the sum of the aggregate probable earnings of decedent but for the accident in question, nor more than the sum of $———, the amount claimed in the petition. And in the event the jury should find for and allow plaintiff any damages under this instruction, then and in this event they will confine or limit such recovery of damages to the period of her dependency, if any, as the widow of decedent and, in no event, for a longer period than her said husband would have probably lived but for the injury complained of and in question. The court instructs the jury that they cannot allow plaintiff any sum in damages for any pecuniary loss sustained by the children of the decedent, ———, as the result of his injury and death. Said children are not entitled to recover any damages for the injury and death of the decedent, and in the event that the jury should find for the plaintiff they will consider only the pecuniary loss, if any, sustained by his widow, ———, by reason of the death of the decedent, ———.[78]

§ 2111(5). Maryland

The court instructs the jury that, if the jury should find a verdict for the plaintiff, they may, in estimating the damages to be allowed, consider what was the pecuniary loss which the said ———, widow, has sustained by reason of the negligent killing (if the jury so find) of her said husband, and may consider the reasonable probabilities of the continuance of the joint lives of said ——— and ——— but for the negligent killing of her husband (if the jury so

[77] Louisville & N. R. Co. v. Holloways' Adm'r, 173 S. W. 343, 163 Ky. 125.

[78] Chesapeake & O. Ry. Co. v. Dwyer's Adm'x, 172 S. W. 918, 162 Ky. 427.

find), and may allow her such damages as in their judgment would compensate her for such pecuniary loss as she has sustained, and reasonably will sustain, by reason of said killing of her husband.[79]

You are instructed that, if the jury should find a verdict for the plaintiffs, they may, in estimating the damages to be allowed, consider what was the pecuniary loss which the said ———, wife, has sustained by reason of the negligent killing of her husband, and may consider the reasonable possibilities of the continuance of the joint lives of said ——— and ———, but for the negligent killing of her husband, and may allow her such damages as in their judgment will compensate her for such pecuniary loss she has sustained by reason of said killing of her husband.[80]

§ 2111(6). Missouri

The jury is instructed that if the jury find for plaintiff on either count of the petition, and find under the evidence that by reason of her husband's death, resulting from his injuries, she was deprived of support, maintenance, and ministration to her physical needs and comforts, they will assess her compensatory damages at such sum as they shall find from the evidence will compensate her for such loss of support, maintenance, and ministration to her physical needs and necessary comforts from the date of her husband's death to the present time, and during such future time as the jury shall believe from the evidence, she will probably continue to live, and he most probably would have continued to live (but for his injuries aforesaid), and would have continued to support, maintain, and minister to her physical needs and comforts as his wife, living with him, not exceeding $———.[81]

The court instructs the jury that, if you find for the plaintiff, you should assess her damages at a sum not less than $——— and not exceeding $———, in the discretion of the jury; and in determining the amount of your verdict you may take into consideration the evidence before you as to the age, condition of health, and earning capacity of plaintiff's deceased husband, and the consequent loss, if any, that will result to her from the death of her husband, including the additional burden, if any, which may fall upon her for the support of the minor children of the deceased husband by reason of his death.[82]

You are instructed that, if you find the issues for the plaintiff, you should assess her damages at such sum, not exceeding $———, as you may deem just and fair under the evidence of this cause

[79] Director General of Railroads v. State, 109 A. 321, 135 Md. 496.

[80] Chesapeake & Potomac Telephone Co. v. State, 93 A. 11, 124 Md. 527.

[81] Tibbels v. Chicago Great Western R. Co. (App.) 219 S. W. 109.

[82] Bybee v. Dunham (App.) 198 S. W. 190.

with reference to the necessary injury resulting to her from the death of her husband; and in estimating such damages, you may take into consideration his age, the condition of his health, and his earning capacity at the time of his death, as shown by the evidence.[83]

§ 2111(7). Oklahoma

You are instructed that the measure of damages in this case, in the event you find the defendant to be liable, is the pecuniary loss suffered by the plaintiff and the minor children by reason of the loss of the deceased. You cannot allow for grief or anguish of mind arising from the death of the deceased; but you may take into consideration the position the deceased occupied, and the support and protection that he would have afforded to the plaintiff and her minor children had he lived, and, in arriving at this, you will take into consideration his earning capacity, physical condition, his habits, and all the surrounding circumstances as you find them to be from the evidence.[84]

§ 2111(8). Oregon

The court instructs the jury that if you find, from a preponderance of the evidence, that the plaintiff is entitled to recover in this case, it will then become your duty to consider and assess her damages. In determining the amount of the damages, you are instructed that if she is entitled to recover she is entitled to damages equal to the pecuniary loss resulting to her from the death of her husband. The value of the decedent's life is the net amount which the decedent would have saved from his earnings by his skill and bodily labor in his calling during the residue of his life, had he survived, taking into consideration, from the evidence submitted, his age, health, ability, habits of industry and sobriety, and mental and physical skill so far as they affect his capacity for earning money by rendering service to others or accumulating property. All this must depend upon the evidence that has been produced before you on that subject. The amount of damages, however, shall not exceed that asked for in the complaint.[85]

§ 2111(9). Utah

The court instructs the jury that, if you find the issues in favor of the plaintiff, it will then be your duty to assess such damages as should be awarded to the plaintiff for the benefit of the widow of ———, deceased, if you find he did leave a widow. In assessing such damage you are not to take into consideration any grief or

[83] Hach v. St. Louis, I. M. & S. Ry. Co, 106 S. W. 525, 208 Mo. 581.

[84] Big Jack Mining Co. v. Parkinson, 137 P. 678, 41 Okl. 125.

[85] Rorvik v. North Pac. Lumber Co., 190 P. 331.

mental suffering on the part of the widow because of his death, or her loss of his society, companionship, or affection, but you have a right to take into consideration the age of the deceased at the time of his death, his occupation, the wages he was receiving. the support which he was furnishing to the widow, the condition of his health, his probable earnings during his probable duration of life, and from such considerations, in connection with the evidence before you throwing light upon the probable pecuniary loss which the widow has sustained in the death of her husband, it will be your duty to assess such damages as shall be fair and just, not exceeding the sum of $———. If you find any damages for the plaintiff, such damages must be strictly limited to the financial loss sustained by the widow of the deceased. You cannot award any damages for any pain or suffering that the deceased may have suffered between the time of being precipitated into the wash and the time of his death.[86]

§ 2112. Recovery for death of father and husband

See, also, ante, § 2111(7).

§ 2112(1). Illinois

The jury are instructed that, in estimating the pecuniary injury, if they believe from the evidence that the widow and minor children of said ———, deceased, have sustained any injury for which defendant is liable, you have a right to take into consideration the support of the said widow and minor children of the deceased, and the instruction and physical, moral, and intellectual training of said minor children, of which they have been deprived by the death of deceased, and also the ages of the said minor children, and the pecuniary condition of the said minor children and widow of deceased in determining the amount of damages in this case, if you believe from the evidence that said ——— left a widow and minor children.[87]

§ 2112(2). Kansas

You are instructed that, if you find for the plaintiff, you must allow the plaintiff in your verdict for the use and benefit of herself, as wife, and her minor children, if you find that she has such children, such sum as in your judgment under the proof will be just compensation for the pecuniary loss they have sustained by reason of the death of said deceased. In estimating such sum, you should consider the age of the deceased, together with his capacity for earning money, his disposition to contribute, to care for, and to furnish his wife money as shown by the evidence, the ages of

[86] Kipros v. Uintah Ry. Co., 146 P. 292, 45 Utah, 389.

[87] Illinois Cent. R. Co. v. Weldon, 52 Ill. 290.

the children, and the probable expectation of the life of the parties concerned.[88]

§ 2112(3). Maryland

The court instructs the jury that, if they find for the plaintiffs, then in assessing the damages they are to estimate the reasonable probability of the life of the deceased, and give his widow, ———, and his child, ———, the equitable plaintiffs, such pecuniary damages, not only for past losses, but for such prospective damages as the jury may find that they have suffered, or will suffer, as a direct consequence of the death of said ———, and in estimating the pecuniary loss or prospective damages sustained by the widow they are to take into consideration her age and health, and the probable duration of her life, and in estimating the pecuniary loss or prospective damages sustained by the said child, the jury are to take into consideration its age and condition in life, and what it could have reasonably expected to have received from the deceased for its support and education up to the time of its attaining 21 years of age; the verdict to be apportioned between the said widow and child in such amounts as to the jury may seem right and proper.[89]

The court instructs the jury that, on "assessing the damages, they are to estimate the reasonable probabilities of the life of the deceased, and give the equitable plaintiffs such pecuniary damages as the jury may find that they have suffered, or will suffer, as the direct consequence of the death of the said ———; that for his children these prospective damages may be estimated to their majority, and in estimating the prospective damages to the widow the jury will take into consideration the probable duration of the joint lives of herself and her husband.[90]

§ 2112(4). Missouri

The court instructs the jury that, if you find for plaintiff, then you should assess her damages, if any, at such sum, if any, as you believe and find from the evidence to be a fair and just pecuniary compensation only for damages, if any, to her and her daughter, ——— occasioned by the death of ———, not exceeding the sum of $———.[91]

§ 2112(5). Oklahoma

The jury are instructed that, if you find for the plaintiff in this case, then, in assessing the damages which she is entitled to re-

[88] Griffith v. Midland Valley R. Co., 166 P. 467, 100 Kan. 500.

[89] Consolidated Gas, Electric Light & Power Co. v. State, 72 A. 651, 109 Md. 186.

[90] President, etc., of Baltimore & R. Turnpike Road v. State, 18 A. 884, 71 Md. 573.

[91] Powell v. Union Pac. R. Co., 164 S. W. 628, 255 Mo. 420. Sufficient, in absence of request for instructions explaining what is meant by pecuniary compensation.

cover, the jury should assess the same with reference to the pecuniary loss sustained by the widow and children of the deceased, and, in determining this, you may consider the probable earnings of the deceased, his age, experience, habits, health, and bodily qualifications, during what would probably have been his lifetime, if he had not been killed, so far as these matters have been shown by the evidence; but the amount you allow cannot exceed the sum mentioned in the plaintiff's petition.[92]

§ 2112(6). Pennsylvania

You are instructed that if, under all the evidence, the jury find for the plaintiff, the proper measure of damages is the pecuniary loss suffered by her and her two children; and that loss is what her husband would have probably earned by his labor in his business during his lifetime, and which would have gone for the benefit of the plaintiff and her two children, taking into consideration his age, ability, and disposition to labor, and his habits of living and expenditure.[93]

§ 2112(7). South Carolina

The jury are instructed that you must consider in estimating damages, if any damages are awarded, the probable duration of the contributions which husband and father would have made to his wife and children, and in arriving at this, you should consider the probable expectancy of the life of the husband and father, how long he would have lived to have given them money, you must also bear in mind the probable duration of the contributions to the children, and you must consider that there is no legal responsibility resting upon the father to support the children that arrive at the age of 21 years, and if you should find that one of the children is married and the other a boy ——— years of age, if you should find those to be the facts, then you are to take into consideration those facts in determining how long the father would have probably contributed to their support in getting at the amount.[94]

§ 2112(8). Wisconsin

You are instructed that, in fixing these sums, you will be reasonable and just, and fix such sums as will, in your honest and deliberate judgment, recompense or compensate the wife and children for such pecuniary or money loss as they actually sustained in consequence of the death of the husband and father. It is merely a matter of pecuniary loss, however. You cannot allow anything whatever for the grief or anguish of the wife or children by reason

[92] Missouri, K. & T. Ry. Co. v. West, 134 P. 655, 38 Okl. 581.

[93] Huntingdon & Broad Top R., etc., Co. v. Decker, 84 Pa. 419.

[94] Thornton v. Seaboard Air Line Ry., 82 S. E. 433, 98 S. C. 348. This action was brought under the federal Employers' Liability Act (U. S. Comp. St. §§ 8657–8665).

of the death. You will consider the age of the deceased and that of his wife and children, and the condition of the health of the deceased, his earning capacity, and his reasonable prospects at the time of his death. You should include the value of the support and protection by the deceased of the wife and dependent child or children, if any, that they would have received during the time that he probably would have lived. You should also consider the accumulation of property that the earnings of the deceased would probably have made had he continued to live, if you find that, and the reasonable expectation that the wife and children had of pecuniary advantage by ultimately receiving such accumulations, if such you find. The limit of the total compensation to both wife and children is such sum as, being put at interest, will each year, by taking a part of the principal and adding it to the interest, yield an amount sufficient for such support of the wife and the dependent child or children during the time the deceased would probably have lived as he would have furnished had he lived, together with such other sum as the evidence shows there is a reasonable expectation the wife and children would have received from his earnings.[95]

§ 2113. Recovery by parent for death of son

§ 2113(1). Arkansas

You are instructed that if you find for the plaintiff, for the benefit of the next of kin, your verdict will be for such a sum of money as will be a just and fair compensation to the mother by reason of the death of the deceased, and you are to arrive at this by taking what the proof shows that deceased would have contributed to his mother during her expectancy, and the present worth of this sum would be the amount of your verdict. If you find for the plaintiff and if you believe from the evidence that deceased suffered any conscious pain from the injury received, then you will find for the plaintiff, for the benefit of the estate of the deceased, in whatever sum you believe from the evidence in your sound discretion and judgment plaintiff is entitled to recover for pain and suffering.[96]

§ 2113(2). California

The jury are instructed that, if your verdict shall be for the plaintiff, such damages may be given by you as, under all the circumstances of the case, may be just; and, in determining the amount of such damages, you have the right to take into consideration the pecuniary loss, if any, suffered by the mother of ——— by his death, if you find that his mother is living. And the loss which

[95] Sweet v. Chicago & N. W. Ry. Co., 147 N. W. 1054, 157 Wis. 400. The word "protection," which was objected to in this instruction, must be understood as meaning pecuniary protection from want.

[96] St. Louis, I. M. & S. R. Co. v. Evans, 137 S. W. 568, 99 Ark. 69.

the plaintiff is, in such a case as this, entitled to recover, is what the deceased would have probably earned and accumulated by his labor in his business or calling during the residue of his life, and which would have gone to the benefit of his mother or heirs or personal representatives, taking into consideration his age, health, habits of industry, ability and disposition to labor, and the probability of his length of life.[97]

§ 2113(3). Iowa

You are instructed that, if you find for the plaintiff, you will assess the damages to which you believe him entitled. In doing so you will bear in mind that this action is not brought for the personal benefit of the father of ———, but by the administrator of his estate, to recover in damages such sum of money as such estate has lost in consequence of his death. From the nature of the case, the law can give no rule by which this estimate can be accurately made, and the difficulty is increased by the fact that the deceased died so young, and before his business character was fully formed. The best that can be done is to consider the age of the boy at the time he died; the expectancy of his life, as shown by the Carlisle tables; the physical character of the boy; his mental and moral character and attainments, so far as they affect the promise given by the boy, in a business point of view; the business in which his father was engaged; and the business character of the boy, in so far as such character was formed—and, considering these things, make the best estimate you can of the loss in money suffered by his estate in consequence of his being taken off at so early an age by this accident.[98]

§ 2113(4). Missouri

The court instructs the jury that, if their verdict is in favor of the plaintiff, such damages may be given by them to plaintiff, as, under all the circumstances of the case as disclosed by the evidence, may be just. And in determining the amount of such damages, if any, you may take into consideration the pecuniary loss, if any, suffered by this plaintiff in the death of ———, by being deprived of his support, if any, and the pecuniary loss, if any, sustained by her in the loss of his society, comfort, and protection, if any, in all not to exceed the sum sued for.[99]

§ 2113(5). Montana

You are instructed that, if you find from the evidence that the plaintiff is entitled to recover for the pecuniary loss and damages

[97] Munro v. Pacific Coast Dredging & Reclamation Co., 24 P. 303, 84 Cal. 515, 18 Am. St. Rep. 248.

[98] Andrews v. Chicago, M. & St. P. R. Co., 53 N. W. 399, 86 Iowa, 677.

[99] Miller v. Southern Pac. Co., 178 S. W. 885, 266 Mo. 19.

sustained by reason of the death of his son, then you may award to the plaintiff such damages as under all the circumstances of the case may be just; and, in fixing the amount of such damages, you may in the exercise of a sound discretion fix the same at such sum as would be required to purchase an annuity equal to the amount that such son might reasonably be expected to contribute yearly to the plaintiff during the period of expectancy of the plaintiff's life; but you cannot find such sum to be more than $———.[1]

§ 2113(6). Oklahoma

You are instructed that, if you find for the plaintiff, then the measure of her damages would be the pecuniary value of the life of her son to her. That is, the amount of money or value of any property which you may find the plaintiff would have received from her son had he lived. She cannot recover for any suffering on the part of the deceased, nor for any mental distress or grief upon her own part by reason of the death of her son, nor for any loss of his society, but only, as I have stated, for such money or property as you may find he would have contributed to her during his life. And in estimating such amount you may take into consideration the general health of the deceased, his general habits of life, his earning capacity, measured by what he ordinarily had earned, his disposition to contribute to the plaintiff, and his power to contribute in view of his manner of life, and also the probable duration of the life of the plaintiff.[2]

§ 2114. Recovery for death of minor child

§ 2114(1). Arizona

I instruct you that if you should find that the defendant is guilty of the wrongful act, as charged in the complaint, and that the same resulted in the death of the child, ———, then the plaintiff is entitled to recover in this case, for the benefit of the estate, such damages as the jury may deem from the evidence and proofs, as fair and just compensation therefor, not exceeding the amount claimed in the complaint, and in arriving at your verdict, you should consider what pecuniary benefit the estate of said deceased would have derived, had said adobe wall not fallen upon him. You are to consider the probability of the said child living and growing to manhood and obtaining property, which the law, upon his death, if intestate, would have passed to his legal representatives; you are to consider the age and health of the child, his expectancy and probability of living and his mental and physical vigor and the probability of his accumulating property. You are to consider the damages that the said child's estate has sustained. I instruct you,

[1] Gilman v. C. W. Dart Hardware Co., 111 P. 550, 42 Mont. 96.

[2] Ft. Smith & W. R. Co. v. Knott, 159 P. 847, 60 Okl. 175.

in ascertaining the amount of damages, you will consider the evidence as to the age and sex of the child who was killed; also the evidence, if any, of the position of life of the parents and of the expectancy of life which the child had, and from these form an estimate of the amount which the child would have saved from his earnings between the time when he attained the age of 21 years and the date which he might reasonably be expected to live. Such estimate will be the measure of damages in this case.[3]

§ 2114(2). Idaho

The court instructs the jury that, in determining the amount of damages you may take into consideration the age, health, and intelligence of the child, the degree of intimacy existing between the father and the child, and the loss of companionship, if such be shown, together with what expenses may have been incurred, as shown by the evidence, by the father for the funeral and medical expenses.[4]

§ 2114(3). Indiana

You are instructed that, in estimating the plaintiff's damages the jury may consider the condition of his family at the time of the alleged accident, and take into account all the services that his child, alleged to have been killed, might reasonably have performed in his family until she attained her majority, and such services may include actual labor in helping to carry on the household affairs, and the pecuniary value of all acts of kindness and attention which it might reasonably be anticipated that she would have performed for the plaintiff and his family, until her majority, that would administer to their comfort, as well as to their necessities; but the jury should not consider acts of affection simply, and loss of companionship. The recovery is limited by the law to the actual pecuniary loss.[5]

§ 2114(4). Kansas

The court instructs the jury that if, after a full and fair consideration of all the evidence in this case, under the instructions herein given, you, the jury, shall find and believe from a preponderance of the evidence herein that the death of the minor child of plaintiffs was due to the fault and negligence of the defendant as charged, and without any fault or negligence on the part of the plaintiffs, or either of them, and that plaintiffs are entitled to recover in this action, then it would become your duty to ascertain what amount of damages, if any, plaintiffs have suffered, and upon

[3] De Amado v. Friedman, 89 P. 588, 11 Ariz. 56.

[4] Anderson v. Great Northern Ry. Co., 99 P. 91, 15 Idaho, 513.

[5] Louisville, N. A. & C. Ry. Co. v. Rush, 26 N. E. 1010, 127 Ind. 545. This is proper, in connection with other instructions prohibiting jury from considering loss of companionship or acts of affection.

this branch of the case you are instructed that they would be entitled to recover such sum, not exceeding $———, as you, after a full and fair consideration of all the evidence in the case, in your judgment honestly exercised, shall deem to be a reasonable and fair compensation for the value of the service of the minor child during its minority, less the sum that you shall find it would have cost them to support said child until it arrived at its majority, and also such reasonable sum as you may find from the evidence in this case they might reasonably have expected to receive from the deceased minor child as pecuniary benefits after she should have attained her majority and during the lifetime of the plaintiffs.[6]

§ 2114(5). Maryland

The jury are instructed that, if they find, under the first instruction, a verdict for the plaintiff, then in assessing the damages they are not to take into consideration the mental pain and suffering of the plaintiff's cestui que use in consequence of the death of the child, and are not to give against the defendants punitive, vindictive, or exemplary damages, but in estimating the damages they are confined to the pecuniary damage sustained by the plaintiff, and are to give to her such a sum as the jury may believe, from all the evidence in the case, will be an adequate compensation for the loss of her son's services from the time of his death to the period when, if he had lived, he would have attained the age of twenty-one years.[7]

§ 2114(6). Texas

In assessing plaintiff's damages, if any, you may be guided by the following instructions: Plaintiff is entitled to the services of her minor child, ———, during her minority, and to recover whatever sum, if any, ———, had she lived, would have earned from the time of her death until she became ——— years of age, less the reasonable cost of her maintenance and support during and to the time she reached ——— years of age. Plaintiff is further entitled to recover such sums of money, if any, as ——— would have likely voluntarily contributed to the support of her mother, if any, from the time she reached ——— years of age during the remainder of their lives. And in estimating such sum, if any, you may take into consideration the probable duration of her life, together with the age and probable duration of the life of plaintiff. In this connection, however, you are charged that you will not take into consideration nor allow anything to the plaintiff by way

[6] Warders v. Union Pac. R. Co., 181 P. 604, 105 Kan. 4. This instruction is said to be correct as far as it goes.

[7] State, to Use of Coughlan, v. Baltimore & O. R. R. Co., 24 Md. 84, 87 Am. Dec. 600.

of compensation on account of sorrow, mental distress, or for the loss of society or companionship.[8]

The court instructs the jury that the plaintiff is entitled to recover such sum as you may believe and find from the evidence to be the pecuniary loss resulting to her from the death of said ——— and not otherwise; the sum so assessed should as a present payment, be a fair compensation for the pecuniary loss, if any, thus sustained. The plaintiff is not restricted by law to the value of the pecuniary benefit she would probably have received from deceased during his minority, but the term includes besides the value of such aid, if any, as plaintiff may have had a reasonable expectation of receiving from the deceased, after he reached 21 years of age, if any.[9]

You are instructed that, if you find for the plaintiff, the measure of damages is what you find and believe from the evidence before you would have been the reasonable value of the services of the deceased boy to the plaintiff from the time of his death until he would have arrived at the age of 21 years.[10]

You are instructed that, if you find for the plaintiffs, you will find for them such damages as you may think proportioned to the injury resulting from the death of the child, not to exceed, however, the sum expended in an effort to have her relieved from the effects of the morphine, and the reasonable value of the services of the child from the time of her death until she would have attained the age of twenty-one years, not to exceed the sum sued for. Neither physical nor mental suffering of the deceased child, nor the mental anguish of the parents in consequence of the death of their child, are items or elements of damages to be considered by you. And the value of the child's services during the period of her minority (if you should find for plaintiff) is to be ascertained by you as best you can from your own judgment, common sense, and sound discretion, and the evidence before you.[11]

§ 2115. Profits realized by father on services of son as employee

If you come to the question of damages, I instruct you that, in determining the earnings of ———, you shall not take into consid-

[8] Houston Electric Co. v. Flattery (Civ. App.) 217 S. W. 950.

[9] Southwestern Portland Cement Co. v. Bustillos (Civ. App.) 216 S. W. 268.

[10] Texas & P. Ry. Co. v. Yarbrough (Civ. App.) 73 S. W. 844. This instruction is not erroneous for failure to direct a deduction of the boy's keep, since any jury would presumably so understand. No objection was made on the ground that the instruction did not include as an element of recovery sums of money which the deceased child would likely have contributed to the support of the parent after reaching majority.

[11] Brunswig v. White, 8 S. W. 85, 70 Tex. 504.

eration the profit of which ———, his father and employer, made upon the services of his son as an employé in his concern.[12]

§ 2116. Recovery for death of brother and son

The jury are instructed that, if the jury find for the plaintiff, in estimating the damages sustained by the next of kin of the deceased by reason of his death the jury can only estimate the damages to the brothers and sisters of deceased at such a sum as the evidence shows they have sustained by the death of deceased, and can only estimate the damages to the father of deceased upon the basis of what the son's services would have been worth to his father from the date of the injury to the time he would have arrived at the age of 21 years, deducting therefrom the costs and expenses of the father in his support and maintenance during that time; and, if the evidence does not show the ages of said brothers and sisters, nor that they were receiving support from him, or were in condition to require it, then the jury can only estimate the damages to said brothers and sisters at a nominal sum.[13]

§ 2117. Rule as to damages where doctrine of comparative negligence prevails

The court further instructs you that, even though you may believe from the evidence that the defendant by or through its officers, agents, or employers was guilty of negligence as above defined, if any there was, yet if you shall further believe from the evidence that the deceased, ———, was also negligent, that he failed to keep a lookout for signals, if he did so fail, or failed to use ordinary care to stop his train after discovering the work train was on the track, or failed to exercise ordinary care to leave his train and prevent injury to himself, if he did so fail, after discovering the danger, if any, and that but for such contributory negligence, if any, the accident and injury would not have occurred and his death resulted, yet such contributory negligence, if any, will not bar or prevent recovery by the plaintiff under the second instruction; but in such event the damages, if any, shall be diminished by the jury in proportion to the amount of negligence, if any, attributable to the said ——— by reason thereof. So that the plaintiff will not recover full damages, but only a proportional part, bearing the same relation to the full amount as the negligence attributable to the defendant bears to the entire negligence attributable to both the said ——— and the defendant.[14]

[12] Moers v. Michigan United Rys. Co., 123 N. W. 602, 158 Mich. 659.

[13] Wabash R. Co. v. Smith, 44 N. E. 856, 162 Ill. 583.

[14] Louisville & N. R. Co. v. Holloway's Adm'r, 181 S. W. 1126, 168 Ky. 262.

§ 2118. Recovery of damages as punishment—Killing by automobile

The court instructs the jury that the imposition of damages in this case would be by way of fine against defendant, and if the jury believe from the evidence that the circumstances surrounding the accident do not warrant the imposition of a large fine, then the jury could not, under the law and the evidence, impose such a fine.[15]

The court instructs the jury that the damages in this case are solely by way of punishment, and the jury has the right to take into consideration all the facts and circumstances surrounding the accident, the speed of the automobile, the speed of the motorcycle, the conduct of the driver of the automobile, and the conduct of the driver of the motorcycle on the occasion complained of in determining whether or not a large or small fine shall be assessed against defendant in the event a verdict is returned against defendant.[16]

§ 2119. Recovery of penalty in addition to compensatory damages

The court instructs the jury that, if the jury find for plaintiff, then, in addition to the damage, if any, which they may award to her under the preceding instruction numbered ———, they must assess against defendant, as a penalty, the further sum of $———, and in measuring the compensatory damages (if any), which they shall award to plaintiff under said instruction numbered ———, they should not take said penalty into consideration as affecting the amount of said compensatory damages. If the jury find for plaintiff, they should assess the compensatory damages, if any, unaffected by said penalty, and then add the two and bring in a verdict for one stated sum.[17]

The court further instructs the jury that, if you should find the issues for the plaintiff, you should not allow her any sum as a penalty in excess of $———, the minimum amount fixed by law, exclusive of her compensatory damages, if any.[18]

D. Evidence

§ 2120. Presumptions and burden of proof—Contributory negligence

§ 2120(1). Illinois

Upon the question of whether ——— was in the exercise of ordinary care for his own safety when he lost his life, the court instructs you that if you believe from the evidence that he was killed

[15] Karpeles v. City Ice Delivery Co., 73 So. 642, 198 Ala. 449.

[16] Karpeles v. City Ice Delivery Co., 73 So. 642, 198 Ala. 449.

[17] Tibbels v. Chicago Great Western R. Co. (Mo. App.) 219 S. W. 109.

[18] Bybee v. Dunham (Mo. App.) 198 S. W. 190.

while attempting to cross the railroad tracks on ——— street, and that no one saw the accident, then you are warranted in finding, from the well-known instinct which men ordinarily have to try to preserve their lives and not destroy them, that he was in the exercise of ordinary care for his own safety, unless you further believe from the evidence that said ——— was under the influence of intoxicating liquor to such an extent as to render him incapable of exercising such ordinary care, or as to make him reckless, or that there were other circumstances indicating a want of such ordinary care.[19]

The jury are instructed that you are not permitted to assume that the deceased was exercising due and proper care for his own safety at and about the time of the accident, but the burden is on plaintiff to prove such fact by a preponderance of the evidence, and, if he has failed to make such proof as is required by this instruction, then your verdict should be in favor of defendant.[20]

§ 2120(2). Iowa

You are instructed that, where a human being is killed by an accident, and there is no eyewitness to the same, the law indulges the inference that the instinct of self-preservation, of the love of life, was such as to prompt him to exercise ordinary care for his safety. This inference is not conclusive, but is a matter to be considered by the jury in connection with all the evidence in the case. It is not indulged in where there is direct credible testimony as to the party's conduct at and prior to the time of the accident, but is only to be considered in connection with the other circumstances shown in evidence with reference to those matters which are not accounted for by credible direct testimony.[21]

The jury are instructed that in this case, if you believe from the evidence that, owing to the darkness or the distance of the witness or witnesses who have testified upon the subject from the deceased, or for any other reason, they could not observe his acts and conduct or determine whether or not said deceased looked or listened for the approaching train, then you will have the right to consider the instinct of self-preservation in connection with the other facts and circumstances appearing in evidence in determining whether or not in that respect he exercised ordinary care for his safety when he came within the zone of danger. But if you believe that, while he was approaching said crossing, and during the time the duty devolved upon him to look and listen for approaching trains, he was under the scrutiny of some credible witness who

[19] Newell v. Cleveland, etc., R. Co., 179 Ill. App. 497.

[20] Boyer v. Northern Elevated R. Co., 174 Ill. App. 161.

[21] Platter v. Minneapolis & St. L. R. Co., 143 N. W. 992, 162 Iowa, 142.

observed the acts and conduct of said deceased at such time, then you are bound by the testimony given by such witness on such subject, and should not consider the inference that at the time covered by such testimony the said deceased was prompted in his conduct by the instincts of self-preservation, if such inference is inconsistent with the acts and conduct shown by such direct testimony.[22]

Upon the question of plaintiff's intestate's contributory negligence you are instructed that, where there are no eyewitnesses as to the manner in which he was conducting himself at the time he received the injuries, the law presumes that he was exercising such care and caution as men of ordinary prudence, judgment, and discretion exercise under like circumstances and in relation to the same matters, unless the facts and circumstances shown upon the trial negative such presumption; and you should indulge in such presumption in his favor, unless the facts and circumstances developed on the trial negative such presumption.[23]

You are instructed that, where there are no eyewitnesses to the accidental killing of a person by a railroad train, the presumption is, in the absence of other evidence and circumstances to the contrary, that the deceased was exercising due care, but this presumption is not conclusive, and may be rebutted by evidence to the contrary; and if then you find, taking into consideration the location of the highway with reference to said crossing, and the distance from said crossing on said highway, from which said approaching train could have been seen, and taking into consideration all other circumstances surrounding said injury, as disclosed by the evidence in this case, that plaintiff's intestate could not have been at or immediately prior to said accident in the exercise of reasonable care on his part, or if you find that by the exercise and use of his senses of seeing and hearing he could have discovered the approaching train in time to have avoided injury thereby, with the exercise of reasonable care on his part, then said presumption as to due care is not to be given any weight by you, and, unless there is other evidence from which you can find that plaintiff's intestate did not contribute to said injury by his own negligence, then your verdict should be for the defendant.[24]

§ 2120(3). Michigan

On the question of the deceased being guilty of contributory negligence as is alleged by defendant, you are instructed that, where there are no eyewitnesses as to the manner and way in which the

[22] Platter v. Minneapolis & St. L. R. Co., 143 N. W. 992, 162 Iowa, 142.

[23] Lunde v. Cudahy Packing Co., 117 N. W. 1063, 139 Iowa, 688.

[24] Rietveld v. Wabash R. Co., 105 N. W. 515, 129 Iowa, 249.

deceased was conducting himself at and immediately prior to the time he received the injuries, the law presumes that he was exercising such care and caution as men of ordinary prudence, judgment, and discretion would exercise under like or similar circumstances and in relation to the same matters, unless the facts and circumstances shown upon the trial negative such presumption, and you should indulge in such presumption in favor of the deceased, unless the facts and circumstances developed on the trial negative such presumption.[25]

§ 2120(4). Nebraska

You are instructed that where a person is injured through the negligence of another, and such injured person thereafter dies, and there is no witness to the happening of the injury, the law presumes that such injured person was exercising reasonable and ordinary care at the time of his injury with a view to his safety; but in this connection you are instructed that such presumption is not conclusive, if there is other evidence bearing on the subject.[26]

§ 2120(5). North Carolina

The jury are instructed that the law presumes that a person found dead and killed by alleged negligence of another has exercised due care himself.[27]

§ 2121. Same—Pecuniary loss

You are instructed that, if you find in favor of the plaintiff, then in estimating damages you eannot presume that the next of kin have suffered pecuniary loss because of the death of ———, but the pecuniary loss, if any has been sustained, must be proved.[28]

§ 2122. Expectancy of life of plaintiff or of deceased

You are instructed that in computing the expectancy of life, and in arriving at an amount sufficient to purchase an annuity, you may be guided by the evidence submitted respecting standard mortality and annuity tables. You should, however, bear in mind the uncertainty of life, and the possibility that the deceased might not have contributed to the plaintiff, if he had lived.[29]

You are instructed that if you find for the plaintiff, then, in fixing the amount of his damages, you may base your calculations upon the period of the probable life of the father, as shown by the evidence; and testimony as to the expectancy of life of the

[25] Anderson v. Chicago, R. I. & P. Ry. Co., 175 N. W. 583. The word "presumption" is used in this instruction in the sense of inference, and is properly so used, when accompanied with proper qualifications pertaining to the burden of proof.

[26] Albrecht v. Morris, 136 N. W. 48, 91 Neb. 442.

[27] Cogdell v. Wilmington & W. R. Co., 44 S. E. 618, 132 N. C. 852.

[28] Griffith v. Midland Valley R. Co., 166 P. 467, 100 Kan. 500.

[29] Gilman v. C. W. Dart Hardware Co., 111 P. 550, 42 Mont. 96.

deceased is proper only for the purposes of showing that he probably would have outlived his father.[30]

§ 2123. Effect of mortality tables

§ 2123(1). Alabama

The jury are instructed that, in assessing damages in a case like this, it devolves on the jury, upon consideration of all the circumstances bearing upon the subject, as disclosed by the evidence, to ascertain what the duration of the party's natural life would have been. There is no ascertaining it as a positive fact. The period fixed in any case is necessarily an inference drawn from many conditions and circumstances. In the same case different minds of equal intelligence might reach different conclusions. The tables of mortality, computed upon the experience of life insurance companies, which, being of such universal recognition, courts will judicially notice, place the life expectancy of plaintiff's intestate at ——— years, if you find from the evidence that he was ——— years old at the time of his death; but this is not conclusive.[31]

§ 2123(2). Iowa

You are instructed that the Carlisle Tables have been offered in evidence, but you are not to regard such tables as proving that plaintiff is to recover for ——— years of life. You are to bear in mind that ——— was liable to die at any time, and that there was no certainty that he ever would have lived until he was ——— years old. You are not to presume that he would be diligent in the acquisition of property, or successful in saving what he might acquire.[32]

§ 2123(3). North Carolina

You are instructed that there is no evidence offered by plaintiff in this case as to the life expectancy of plaintiff's intestate, except the age of the deceased and the condition of his health. But the jury have a right to consider the expectation of life as stated in the mortuary table in the Code, if the plaintiff has shown the age of her intestate at the time of his death. The plaintiff contends that her intestate's age was ——— years, and the court instructs the jury that the table in the Code states that the expectation of a man ——— years old is ——— years.[33]

§ 2124. Method of using mortality and annuity tables

In case you should find that the defendant is liable, it will be your duty to determine what amount of damages should be al-

[30] Gilman v. C. W. Dart Hardware Co., 111 P. 550, 42 Mont. 96.

[31] Northern Alabama Ry. Co. v. Key, 43 So. 794, 150 Ala. 641.

[32] Andrews v. Chicago, M. & St. P. R. Co., 53 N. W. 399, 86 Iowa, 677.

[33] Coley v. City of Statesville, 28 S. E. 482, 121 N. C. 301.

lowed. Certain tables are in evidence before you. One of them is the Carlisle mortality table, and the other is a table showing the value of annuities. We will call the first the "Mortality Table," and the second the "Annuity Table." They are not binding upon you, and you are not obliged to use them, or either of them. If you use neither, you need not consider the instructions now about to be given; but as these tables are in evidence, and you have the right to avail yourselves of the assistance to be derived from them, it becomes proper to explain them, and inform you in what manner and for what purpose each can be made serviceable. Care, however, must be taken to avoid confusion, and you should be very particular not to use one of them where the other ought to be used. You are also cautioned that you cannot advantageously use both in one and the same calculation. While the proper use of these tables separately ought to lead to the same result, using them conjunctively or indiscriminately in the same calculation, or without understanding the real purposes they are respectively intended to subserve, will surely lead to error. You should ascertain from the evidence the annual earning capacity of the deceased, —that is, seek honestly to reach a just conclusion from the facts before you as to what amount should be regarded as fairly representing his yearly income from his own labor to the end of his life, if he had not been killed; and, in so doing, give due weight to the various contingencies which will be pointed out before concluding these instructions. It is proper to remark just here that the age of the deceased at the time of the killing, and his probable expectancy of life, may be considered in arriving at his average yearly earnings, if in your opinion, in view of all the evidence, his earning capacity would have varied at different periods of his life between the time he was killed and the time he would have died in the course of nature. Another and more direct use which you can make of the figures representing such probable expectancy of life will presently be stated. In fixing upon this expectancy, you may consult the mortality table, which will now be explained. This table is designed to show the expectancy of life which may be entertained by average persons of given ages. The only material information you can derive from it is the time which an average person of equal age with the one under consideration in the present case may be expected to live. This table has two sets of columns, marked, respectively, "Age" and "Expectation Years." If it should be desired to ascertain how long a person of average health and constitution, aged 33 years, would probably live, you would look for the figures "33" in the "Age" column; and opposite these figures, in the "Expectation Years" column, on the right of the "Age" column, you would find the figures

"32.36," which would indicate that such a person probably had 32.36 years to live. In the nature of things, there can be no certainty whether any particular individual will live for a longer or shorter period than the probable expectancy of an average person of his age, as laid down in this table. In estimating the probable length of a given man's life, as compared with the average duration of life of one of the same age, his health, occupation, habits, and surroundings, just as they are disclosed by the evidence, ought to be considered; and the proper weight should be given to all of these things in fixing the expectancy of the life, diminishing or increasing the figures laid down in the table according to the facts in the particular case under investigation. The age "33 years" has been selected merely for illustration. You, of course, in using the table, would select the age appropriate to the present case. Having, from the evidence, fixed, as accurately and as fairly as you possibly can, upon the number of dollars representing the yearly earnings of the deceased, and having ascertained from the mortality table, in connection with all the other evidence, his expectancy (that is, the number of years which he would have probably have lived), you could, by multiplying one of these numbers by the other, determine approximately what would have been the gross amount of the earnings of his whole lifetime. This gross amount, when ascertained, would, of course, have to be reduced to its present value; that is, to a sum which, paid down all at once, would be the just and legal cash equivalent of such gross amount. The present value would necessarily be less than the gross amount, and the longer the life the greater would be the difference in these respective sums. If you pursue the course above indicated, and arrive at the gross amount in the manner which has just been explained to you, it would then be incumbent upon you to make the necessary calculations for ascertaining its present cash value. But, inasmuch as the proper result can be more readily reached by availing yourselves of the work which has been done in compiling the annuity table, you may prefer to resort to it. In that event, you would not find it necessary to arrive at a gross amount, and then reduce it to present value, for the use of the annuity table enables you to accomplish the same end by a shorter process. The following illustration will aid you in understanding how to use this table: Suppose a man 33 years old was killed, and at the time of his death was earning $40 per month, which would make $480 per year. If it was certain that he would continue to earn this amount every year as long as he lived, his labor would represent a yearly annuity of $480; and one entitled to recover the value of his life would have the right to receive such an amount as would be the fair cash equiv-

alent of an annuity of $480, payable in yearly installments, during the period the deceased would have lived but for the homicide. To arrive at such amount in the case supposed, the annuity table could be made available in the following manner: First, you would look in the column marked "Age" till you found the figures "33." Opposite these figures you would find, in a column marked "7 Per Cent." (it being on the right of the "Age" column), the figures "$11.448." The meaning is that an annuity of $1, in favor of an average person 33 years old, and to continue through life, would, on the 7 per cent. basis, be worth, cash down, $11.448. Therefore, multiplying $480 by the figures "11.448" would give the cash value of a like annuity of $480, viz. $5,495.04. This annuity table can be used for any age up to 103, and with reference to any sum of money representing, or standing in the place of, an annuity. The illustration shows you how to use the table, but you must not confuse the figures mentioned in it with the actual figures of the case now on trial. On the contrary, you should be governed as to these matters by the evidence. You will observe that the illustration given is based upon the assumption that the deceased would have actually earned $480 every year during the entire period of his life, if he had not been killed. It rarely, if ever, happens that a man labors every day until his death, or receives all the while a fixed and regular income from his labor; nor does his capacity to earn money often remain undiminished to old age. In arriving at the amount to be allowed as damages in any particular case, these things should be carefully borne in mind. The illustration given is also based upon the further assumption that the supposed person was one whose expectancy of life was that of an average man. If, in any case, the expectancy of the person under consideration would, under the evidence, have probably been greater or less than that of the average man, the amount of the damages to be allowed should be increased or diminished accordingly. In applying these instructions to the case which you are now trying, you will, of course, be governed by its facts and circumstances as proved. Feebleness of health, actual sickness, the loss of employment, voluntarily abstaining from work, dullness in business, reduction in wages, the increasing infirmities of age, with a corresponding diminution of earning capacity, and other causes, may contribute in greater or less degree to decreasing the gross earnings of a lifetime. In estimating damages, a proper allowance and deduction should be made in favor of the defendant for any diminution in income from labor which would have resulted from any of these sources. The defendant is not responsible for the consequences of the acts of others not its agents, nor for results which

would in any event, and without reference to the conduct or negligence of the defendant, have come to pass.[34]

§ 2125. Right of jury to consider matters of common knowledge

The jury are instructed that, in suits to recover damages for wrongfully causing death of another under the statutes, the injury sustained may be estimated from the facts proven, in connection with the knowledge and experience possessed by all persons in relation to matters of common observation. In this connection you are instructed that, in estimating damages, you must be governed by, and not go outside of, the evidence and the knowledge and experience possessed by all persons in relation to matters of common knowledge and observation.[35]

E. Verdict and Apportionment of Damages

§ 2126. Form of verdict

§ 2126(1). Missouri

You are instructed that, if you find for the plaintiff, you should give her such damage, not exceeding $———, as you may deem fair and just, under the evidence in this case, with reference to the necessary injury resulting to her from the death of her husband; and, in such case, your verdict should be in the following form: "We, the jury, find the issues for the plaintiff, and assess her damages at the sum of ——— dollars. ———, Foreman." [36]

§ 2126(2). Texas

If you find a verdict for the plaintiff, let the form thereof be: "We, the jury, find for the plaintiff, and assess her damages at ——— dollars" (naming the amount), one of your number signing as foreman. If you find a verdict for the defendant, you will let the form thereof be: "We, the jury, find for the defendant," one of your number signing as foreman.[37]

§ 2127. Separate verdicts for conscious pain and suffering of deceased and for loss sustained by next of kin

The court instructs the jury that, if you find for the plaintiff on the deceased's cause of action, that is, for the conscious pain and suffering he endured, if any, by reason of the injury, you will assess the damages in a separate verdict on this element of recovery at such a sum as you find from the testimony would be a fair and just compensation for the conscious pain and suffering which you find from the testimony the deceased underwent on ac-

[34] Florida Cent. & P. R. Co. v. Burney, 26 S. E. 730, 98 Ga. 1.

[35] Florida Cent. & P. R. Co. v. Foxworth, 25 So. 338, 41 Fla. 1, 79 Am. St. Rep. 149.

[36] Barth v. Kansas City El. Ry. Co., 44 S. W. 778, 142 Mo. 535.

[37] Houston Electric Co. v. Flattery (Civ. App.) 217 S. W. 950.

count of the injury, from the time of the injury to his death. And if you find for the plaintiff on the question of financial loss to the widow and child by reason of the deceased's death you will assess the damages in a separate verdict on this element of recovery at such a sum as you find from the evidence would be the present worth of what the deceased would have reasonably contributed to them in a financial way had he lived, limiting the child's right of recovery under this element to such a sum as you find would be the present worth of what the deceased would have contributed to it in a financial way up to the time it arrived at its maturity, and the widow's recovery under this element to such a sum as you find from the evidence would be the present worth of what the deceased would have contributed to her in a financial way during his life.[38]

§ 2128. Apportionment of damages between beneficiaries

§ 2128(1). Arkansas

You are instructed, if you find for the plaintiff, that in determining the financial loss sustained by the widow and child of deceased, you may assess the damages in a lump sum; but, when you have done so, if you do, you will then apportion the same between the widow and child, giving the child such a sum as you find from the evidence would be the present worth of what the deceased should have contributed to it in a financial way up to the time it reached its majority, and to the widow such a sum as you find from the evidence would be the present worth of what the deceased would have contributed to her in a financial way had he lived, during his life.[39]

§ 2128(2). Kentucky

The jury are instructed that, if the jury find for the plaintiff they will find a gross sum for the plaintiff against the defendant which must not exceed the probable earning of ——— had he lived. The gross sum to be found for plaintiff, if the jury find for the plaintiff, must be the aggregate of the sum which the jury may find from the evidence and fix as the pecuniary loss as above described, which each dependent member of ———'s family may have sustained by his death, stating the amount awarded his widow, ———, ———, ———, ———, and ———, if any for them, or any of them, but such findings in the aggregate must not exceed $———. They will not find any sum for ———. In other words, if the jury find for the plaintiff, you must, in your verdict,

[38] Kansas City Southern Ry. Co. v. Leslie, 189 S. W. 171, 125 Ark. 516.

[39] Kansas City Southern Ry. Co. v. Leslie, 189 S. W. 171, 125 Ark. 516.

state also the respective amounts awarded each dependent member of decedent's family.[40]

§ 2128(3). Texas

You are instructed that if the jury find for the plaintiffs, you will determine from the evidence that probable amount and value of the pecuniary aid, if any, which the said ——— would probably have contributed after the ——— day of ———, if he had not been killed, to the plaintiffs, ———, ———, and ———, or to any one or more of them, and the probable pecuniary value, if any, of the counsel and advice, if any, which the said ——— and the said ——— would probably have received from the said ———, if he had not been killed, and fix the damages, if any you find, in such sum as you find from the evidence, if paid in hand at this time, would justly and fairly compensate them, respectively, for the pecuniary loss, if any, resulting to them by reason of the death of the said ———; and you will apportion the damages so found, if any, between the plaintiffs in such shares as to you may seem just, stating in your verdict the amount, if any, you find for the respective plaintiffs; but in this connection you are instructed that, if you find for either or all of the plaintiffs, they are not entitled to recover any damages on account of grief or distress of mind or loss of society because of the death of the said ———, but can only recover damages for such pecuniary loss, if any, as the evidence may show they have sustained, respectively, on account of his death.[41]

[40] Chesapeake & O. Ry. Co. v. Kelly's Adm'x, 169 S. W. 736, 160 Ky. 296.

[41] International & G. N. R. Co. v. White (Civ. App.) 120 S. W. 958.

CHAPTER CIII

DEDICATION

§ 2129. What constitutes dedication in general.
2130. As against married woman or minors.
2131. Presumption of dedication of land for street purposes.
2132. Acquiescence by owner in public user as showing assent thereto.
2133. Matters considered on issue of dedication.
2134. Sufficiency of evidence of dedication—Use by public.
2135. Effect and extent of dedication.

§ 2129. What constitutes dedication in general

The jury are instructed that, if you find that the place where the accident happened was first opened to the public as a street by an agreement between G. and the ——— Bridge Company, whereby said bridge company was to have the use of said premises as an approach to and landing for said bridge, and paid rent to said G. while said company existed, and that said premises continued during that time the private property of said G., such use of said premises by said bridge company does not constitute a dedication to the public for a highway; and if you find, further, that ——— county, since its purchase of said bridge in ———, has paid rent for said premises to the administrator of the estate of G., the use of the premises by the county, under such circumstances, does not amount to a dedication to the public for a highway. While it may be, if you find such facts, a highway such as the ——— Bridge Company or its assignee, the county of ———, would be estopped from denying, yet it is not such a highway as the defendant city is required by law to maintain and keep in repair, although it is within the limits of said city.[1]

§ 2130. As against married woman or minors

The jury are instructed that, although the jury may believe from the evidence that, after the fence on the land in the petition mentioned was moved in, so as to leave a strip of 30 feet between said fence and the line of the right of way of the railway company, the said strip was, with the knowledge of Mrs. ——— and her children used by all persons desiring to pass over the same in going to and from ———, and although the jury may further find that Mrs. ——— and her children, themselves, passed over said strip in going to and from ———, such use of said strip does not operate, in law, as a dedication of said strip to the public use as a public highway.[2]

[1] Bishop v. City of Centralia, 49 Wis. 669, 6 N. W. 353.

[2] McBeth v. Trabue, 69 Mo. 642.

§ 2131. Presumption of dedication of land for street purposes

The jury are instructed that, if the jury believe, from the evidence, that a public road has been used by the public over the place of obstruction in question for 20 years without interruptions, and that the owners of the land acquiesced therein, the law presumes a dedication of the ground upon which the road runs to the use of the public, for such purpose.[3]

§ 2132. Acquiescence by owner in public user as showing assent thereto

The jury are instructed that, if the jury believe, from the evidence, that a public road was laid out over the place in question in ———, that it was used by the public as such until the spring of ———, that during said time it was worked and kept in repair by the proper public authorities, and that the owner or owners of the land assented to such use and keeping in repair, then it is a legal highway, and the jury may infer the assent of the owner or owners of the land from their acquiescence, if they did acquiesce.[4]

§ 2133. Matters considered on issue of dedication

The jury are instructed that highways may be acquired by dedication; and in this case, if the jury believe from the evidence that, after the highway in controversy was located, defendants set their hedges back, leaving room for the highway, and removed their fence from said highway, and permitted the public to use the same for a highway, these facts, if proved, may be considered by the jury in determining whether the defendants had dedicated this land to the public for a highway.[5]

§ 2134. Sufficiency of evidence of dedication—Use by public

You are instructed that 20 years of uninterrupted use of a road by the public is evidence of a dedication of the road by the landowners to the public. The reasonable inference in respect to such a road is, that if the owner of the land through which it runs will permit the public to use it without interruption or objection, for the space of twenty years, this is evidence of its gift or dedication to the public as a road. In this connection you are instructed that any act of the landowner prohibiting or restricting the public from uninterrupted use, will prevent such an inference of dedication, but the act must be such a one as is intended to restrict or limit the use of the road by the public.[6]

You are instructed that the public acquires a right to the use of a road or street over private property by any use of it as a road or

[3] Daniels v. People, 21 Ill. 439.
[4] Daniels v. People, 21 Ill. 439.
[5] Wragg v. Penn Township, 94 Ill. 11, 34 Am. Rep. 199.
[6] State v. Brown (Del.) 97 A. 590, 6 Boyce, 179.

street, accompanied by proof of actual dedication; and the making of improvements on land by the owner, tending to carry out the plan of a plot, on which are designated lots and streets, such as building fences along the lines of the streets as shown by such plot, are evidences of an actual dedication. If you find that S. did make an actual dedication of said ——— street or ——— avenue to public use as a street, and likewise the use of it by the public as a street, or if you find that prior to the erection of said fence across the street by the defendant the public had, so far as S. or any one claiming through him was concerned, an uninterrupted use of the street as a public highway for ——— years, then such use is evidence of a grant or dedication, and in either case your verdict should be guilty; otherwise, your verdict should be not guilty.[7]

§ 2135. Effect and extent of dedication

You are instructed that the line of ——— street, as fixed and determined by the dedication deed, can no more be changed by the city for street improvements or otherwise than by an individual.[8]

You are instructed that, if the jury believe, from the evidence, that a public road was used by the public over the place in question for the period of 20 years next before the plaintiff put his fence therein, without interruption, other than such temporary deviation as occurred by reason of bad roads, and that the plaintiff, and they who owned the land before him, acquiesced therein, then the law conclusively presumes that the owner of the land in question granted the same to the public for a highway, and in such case the jury must find the defendant not guilty. If, however, there was a surveyed and laid-out road ——— feet wide with the section line for the center of it, and if the travel was intended as a use of said laid-out road, and diverged from it merely because it was not fenced and worked, and merely because of the ignorance of the travelers as to its limits or for the convenience of said travelers to avoid bad places, then the road, by prescription or presumed grant of it as used for ——— years, would be the said laid-out road, and not one or more roads on such place or places as a track or tracks might have been made outside of the surveyed limits of said laid-out road. And it is the duty of said public authorities, when the limits of the highway are clearly defined, to see to it that the road labor is not done outside the limits of the road, and that fences are kept out of it.[9]

You are instructed that if the jury believe, from the evidence, that the plaintiff, about the year ———, fenced out a strip of his

[7] State v. Southard, 66 A. 372, 6 Pennewill, 247.

[8] Rehfuss v. Hill, 243 Ill. 140, 90 N. E. 187.

[9] Manrose v. Parker, 90 Ill. 581.

land, intending that it should be taken by the public for a highway, of which strip the place in question is a part, that the public accepted said strip of land by working and improving the same under the direction of the public highway officers, and by using the same as a public highway, and that plaintiff, well knowing such improvement and use, acquiesced therein for about ——— years without objection, then the place in question has been dedicated to the public, and the jury must find the defendant not guilty. If, however, there was a laid-out road ——— feet wide, with the section line as the center line of the road, and if the road was fenced by the plaintiff with intent to fence on the north line of said laid-out road, and if by mistake the fence was placed between ——— and ——— feet too far north, then the dedication would be of the north ——— feet in width of the road along the section line of plaintiff's land—if he only intended to dedicate the north half of the road as laid out on the south ——— feet only of his land north of the section line.[10]

[10] Manrose v. Parker, 90 Ill. 581.

CHAPTER CIV

DEEDS

§ 2136. Mental capacity of grantor.
2136(1). Massachusetts.
2136(2). North Carolina.
2137. Necessity of delivery.
2138. What constitutes delivery—Intention of grantor.
2138(1). Delaware.
2138(2). Indiana.
2139. Presumption as to delivery and acceptance.
2139(1). Delaware.
2139(2). Indiana.
2140. Necessity of record.
2141. Title of grantor.
2142. Avoidance on ground of duress.
2142(1). Alabama.
2142(2). Minnesota.
2143. Avoidance for undue influence.
2144. Liability of grantee for fraudulently procuring execution of deed.
2145. Property conveyed—Buildings, privileges, and appurtenances.

§ 2136. Mental capacity of grantor

§ 2136(1). Massachusetts

The jury are instructed that the deed of an insane person, being only voidable and not void, becomes a binding contract upon the grantor and those claiming under him, if, when he becomes sane, he adopts and ratifies it, and that if ——— availed himself of the contract by receiving the consideration or purchase money due upon it after his restoration to sanity and with an understanding of the contract, this would be a ratification and adoption, if you further believe from the evidence that such act of so receiving the consideration was the intelligent act of ———, knowing that he was acting under the contract contained in the deed and understandingly availing himself of the provisions of the contract in his favor.[1]

§ 2136(2). North Carolina

The jury are instructed that, in order to enable a man to make a deed of his property, so as to pass the title, he must have sufficient mental capacity to understand the nature of the act in which he is engaged in its full extent and effect, and this capacity must exist at the time of making the deed. If it does not then exist, the deed would not be valid, although the grantor might thereafter recover such capacity, unless he acquiesced in it or ratified it afterwards.[2]

§ 2137. Necessity of delivery

The court instructs the jury that the delivery of a deed is essential to its validity. The recording of a deed is not essential to its

[1] Bond v. Bond, 89 Mass. (7 Allen) 1.

[2] Wessell v. Rathjohn, 89 N. C. 377, 45 Am. Rep. 696.

validity as between the parties, and is important chiefly to maintain its priority and force against subsequent conveyances and incumbrances. A deed takes effect from its delivery, and not from its record, and without a delivery it is void from the beginning.[3]

§ 2138. What constitutes delivery—Intention of grantor

§ 2138(1). Delaware

You are instructed that the question of delivery is purely one of intention to be determined from all the circumstances of the case.[4]

The court instructs the jury that the mere possession of a deed by the grantee is not conclusive of its delivery, for he may have received it without the act or intention of delivery on the part of the grantor. Delivery is an act either by the grantor or by another under his direction or with his permission, accompanied with the intention of the grantor that the instrument pass from himself or from his control to the grantee. From the subsequent admissions and conduct of the grantor with reference to the property intended to be conveyed, as well as from the instrument of conveyance, the grantor's intention of delivery may be gathered and inferred.[5]

§ 2138(2). Indiana

You are instructed that, to constitute a delivery of a deed, there must be some affirmative acts or words on the part of the grantors showing that they intended to part with their title to the property conveyed by the deed. The delivery may therefore be by leaving the deed with the proper officer to be recorded with intent to deliver it. And it may be delivered without being actually handed over, and, if once delivered, its retention by the grantors does not affect the title of the grantees. So, if you find from the evidence in this case that the grantors of the deed in question, ——— and ———, caused the deed to be prepared, signed, and acknowledged, and that they then procured the deed to be placed on record in the recorder's office of the county where the real estate was situated, and that by the said acts they thereby intended to part with their title conveyed by the deed, subject to the life estate which they held in the land, then there was a delivery of the deed, notwithstanding they retained the deed in their possession after it was recorded. But if you find that the said ——— and ———. did the above acts, but that they did not thereby intend the said acts to be a delivery of the said deed, then the said deed was not delivered.[6]

[3] Doe ex dem. Littleton v. Roe (Del.) 81 A. 47, 3 Boyce, 97.

[4] Hitchens v. Ellingsworth, 94 A. 903, 5 Boyce, 497.

[5] Doe ex dem. Littleton v. Roe, 81 A. 47, 3 Boyce, 97.

[6] Petre v. Petre (App.) 121 N. E. 285, 69 Ind. App. 57.

§ 2139. Presumption as to delivery and acceptance

§ 2139(1). Delaware

You are instructed that the possession or control of a deed by the grantee is prima facie proof of the delivery of the deed by the grantor, but this may be rebutted by satisfactory evidence to the contrary.[7]

§ 2139(2). Indiana

You are instructed that, where a deed is found in the possession of the grantee, the jury may presume that it was delivered to and accepted by him, but such presumption, if any you find, may be overcome by evidence to the contrary. If the deed in question was found in the possession of the plaintiff, then the jury may presume that the said deed was delivered to and accepted by him, and the burden of overcoming this presumption, if any, of the delivery and acceptance of the deed, is on the plaintiff.[8]

§ 2140. Necessity of record

The jury are instructed that the fact, if it be a fact, that the deed in question was not recorded until after the death of ——— in no wise affects its validity. A deed, properly executed and delivered, is as effectual to pass the title between the parties without being recorded as if recorded.[9]

§ 2141. Title of grantor

The jury are instructed that if you believe from the evidence that the heirs of ——— had conveyed the land in question to ——— before they made a deed to P., then P. did not get any title from them, and did not have title when he conveyed to B., and the latter did not have title when he conveyed to C., and could not convey legal title to said C.[10]

§ 2142. Avoidance on ground of duress

§ 2142(1). Alabama

The jury are instructed that, even if the jury should believe from the evidence that G. and D. designed to execute the deed for the purpose of defrauding creditors, yet if Mrs. D. did not participate in such design, and if you should further believe that Mrs. D. executed said deed under coercion from D., participated in by G., before the execution of the deed, and that defendant knew of or was put on notice of the transaction between the D.'s and G., such as would have informed him of such coercion, your verdict should be for plaintiff.[11]

[7] Hitchens v. Ellingsworth, 94 A. 903, 5 Boyce, 497.

[8] Petre v. Petre (App.) 121 N. E. 285, 69 Ind. App. 57.

[9] White v. White (Or.) 55 P. 645, 34 Or. 141.

[10] Carter v. Tennessee Coal, Iron & R. Co., 61 So. 65, 180 Ala. 367.

[11] Gilley v. Denman, 64 So. 97, 185 Ala. 561.

I charge you that if such threats were made by D. and G., or by D. alone, of which G. knew before he received his deed, as overcame the mind and volition of Mrs. D., so as to cause her to execute the deed to G., then it would be void even if she went before the justice of the peace, and acknowledged that she signed it of her own free will and accord, and no title passed to the defendant generally, if defendant had notice of such threats, and of the circumstances under which Mrs. D. signed the deed, or had such notice as to put him on inquiry, which, if pursued, would have informed him of such threat.[12]

§ 2142(2). Minnesota

The jury are instructed that, to constitute duress which would avoid the deed, it is not necessary that the threats be of physical injury alone, but if the plaintiff, the wife of ———, was induced to execute the deed by the threats of ——— her husband, that he would separate from her as her husband and not support her, it is duress, and would avoid the deed. The threats must be such as she might reasonably apprehend would be carried into execution, and the act must have been induced by threats. It is not necessary that the threats be made at the time or immediately before signing, if they were made before such signing, and the circumstances satisfy you that the threats or their influence properly continued and influenced the plaintiff.[13]

§ 2143. Avoidance for undue influence

The jury are instructed that the question of determining whether the deed from ——— to ——— was obtained by fraud or undue influence is a question peculiarly within the province of the jury to decide from all the evidence, and in determining this question the jury must take into consideration the relationship existing between ——— and ——— at and before the time of the making of the deed, the ages of the respective parties, the amount of the consideration, if any, which was paid for the deed, the understanding of the parties as to the condition upon which the deed should be made, if there was any understanding, and all the other circumstances surrounding the transaction.[14]

§ 2144. Liability of grantee for fraudulently procuring execution of deed

You are instructed that, if you shall find from a preponderance of the evidence that on ———, M. made and delivered to ——— the defendant a deed to section No. ———, block ——— survey, in

[12] Gilley v. Denman, 64 So. 97, 185 Ala. 561.

[13] Tapley v. Tapley, 10 Minn. 448 (Gil. 360), 88 Am. Dec. 76.

[14] Stanley v. Housel, 52 N. W. 888, 35 Neb. 160.

——— county, ———, and at the time of doing so M. was insane and then incapable of comprehending or understanding the nature of such transaction; and if you find the defendant then knew M.'s mental condition, or was in possession of facts which, if pursued with reasonable diligence, would have led to such knowledge; and if you find that the consideration for said conveyance was to pay community debts owing by the community estate of M. and his deceased wife, ———; and if you further find that the defendant, through his influence over his brother M., while in that condition, if he in fact was insane, fraudulently induced him to make such conveyance; and if you find that the land was in value greatly in excess of the consideration paid thereon; and if you find, taking into consideration the condition of M. and the price paid for the land, that the same was unfair; and if you further find that in order to further secure such conveyance the defendant instituted suit in this court against M. and his children, the plaintiffs in this case; and if you find that at the time the judgment was rendered the said M. was insane—if you so find, your verdict should be for the plaintiffs herein.[15]

§ 2145. Property conveyed—Buildings, privileges, and appurtenances

The court instructs the jury that every deed conveying land shall, unless an exception be made therein, be construed to include all buildings, privileges, and appurtenances of every kind belonging to the land, and if they believe from the evidence that the telephone loop, consisting of a pole, wires, and attachments was installed on the K. property in ———, for the convenience of the owner of the said property, and that the telephone company did not own or retain any interest or exercise any acts of ownership over said telephone pole, wires, and attachments, and that they remained on said property after the telephone was taken out in ———, and were there when ——— and ——— executed the trust deed of ———, and when said trust was foreclosed on ———, and that the deed by which the property was conveyed to the defendant company contained no reservation of ownership of the pole, wires, and attachments, and that the owner of the said property during all the period between ———, and the time of the accident to the plaintiff had the right and privilege to use said pole, wires, and attachments for the installation of another phone, then the court instructs the jury that said pole, wires, and attachments passed under the deed of ———, to the defendant and became its property.[16]

[15] Pyle v. Pyle (Tex. Civ. App.) 159 S. W. 488.

[16] Shenandoah Valley Loan & Trust Co. v. Murray, 91 S. E. 740, 120 Va. 563.

CHAPTER CV

DEPOSITARIES

§ 2146. Liability for loss of bonds.

§ 2146. Liability for loss of bonds

The jury are instructed that, if the jury shall find from the evidence that the plaintiff did, on or about ———, deposit with the defendants for safe-keeping, ——— bonds of the United States, for $——— each, bearing interest payable in gold on the ——— day of ——— and the ——— day of ———, in each year, and that said deposit was made on the terms of the agreement set out in the paper marked "A," which has been given in evidence, and that the defendants were then doing business in the city of ———, as bankers and brokers, under the name and firm of ———, and that afterwards, on or about the ——— day of ———, the plaintiff demanded said bonds from the defendants, and they were not then, and have not since been, returned to the plaintiff, then the plaintiff is entitled to recover, unless the jury shall further find that the bonds in question were lost or abstracted from the possession and keeping of the defendants, and that such loss or abstraction did not occur from any failure on the part of the said defendants to use such care as persons of common prudence, in their situation and business, usually bestow in the custody and keeping of similar property belonging to themselves, and that the measure of damages is the value of said bonds at the time of the said demand, and also the value of the gold interest thereon on the first days of ———, ———, ———, ———, and ———, less the sums the jury shall find were actually paid to and realized by the plaintiff in cash paid to her, and money received by her from securities placed in her hands, with interest on the value of the several instalments of gold interest due in each six months as aforesaid, and interest on the principal sum from the ———.[1]

The jury are instructed that, if the jury shall find from the evidence that the plaintiff, on or about ———, deposited for safe-keeping with the defendants ——— United States coupon bonds for $——— each, bearing interest, payable in gold, on the first days of ——— and ——— in each year, that the defendants were then doing business in the city of ———, as bankers and brokers, under the name and firm of ———, and the said deposit was made with them as such bankers and brokers, and was a gratuitous deposit, for the keeping of which they were not to receive any com-

[1] Maury v. Coyle, 34 Md. 235.

pensation, and that such bonds were lost and abstracted from the possession and keeping of the defendants, so that plaintiff did not and could not recover the same, and that said loss and abstraction occurred through the failure of the defendants to use such care in the custody and keeping of such bonds as persons of common prudence in their situation and business usually bestow in the custody and keeping of similar property belonging to themselves, then the plaintiff is entitled to recover, and that the measure of damages is the value of the said bonds at the time of the said demand, and also the value of the gold interest thereon on the first days of ———, ———, ———, and ———, less the sums the jury shall find were actually paid to and realized by the plaintiff, in cash paid and money received from securities placed in her hands, with interest on the value of the several instalments of gold interest due in each six months as aforesaid, and interest on the principal sum from the ———.[2]

[2] Maury v. Coyle, 34 Md. 235.

CHAPTER CVI

DEPOSITIONS

§ 2147. Weight and effect as evidence.
2147(1). Illinois.
2147(2). Mississippi.

§ 2147. Weight and effect as evidence

§ 2147(1). Illinois

The jury are instructed that they should give the same fair consideration to testimony in depositions as they would give to such testimony if it had been sworn to by witnesses in open court.[1]

§ 2147(2). Mississippi

The jury are instructed that, in considering the written testimony of ———, admitted in this trial, by the state, as facts which ——— would testify to if present, the jury must give the same weight to such testimony as they would give to it had ——— been before them on the stand, testifying under oath; and if, from all the testimony in the case, the testimony of ——— included, there is a reasonable doubt of the guilt of the accused as charged in the indictment, the jury must acquit.[2]

[1] Coburn v. Moline E. M. & W. Ry. Co., 90 N. E. 741, 243 Ill. 448, 134 Am. St. Rep. 377.

[2] Lee v. State, 23 So. 628, 75 Miss. 625.

CHAPTER CVII

DETINUE

§ 2148. Assertion of rights under purchase-money mortgage against one other than the purchaser.
2149. Liability on forthcoming bond—Sufficiency of delivery of property to prevent forfeiture.

§ 2148. Assertion of rights under purchase-money mortgage against one other than the purchaser

The jury are instructed that, if the jury are reasonably satisfied from the evidence in this case that plaintiff sold certain parts of the property sued for in this action to B., and the said B. never sold same to ———, or put same into the alleged partnership of the ——— Company, then your verdict must be for plaintiff, for this part of the property.[1]

The jury are instructed that it is not necessary in this case for the plaintiff to recover that she show that there was no such partnership existing at the time plaintiff sold the said property as the ——— Company; it is only necessary that the jury should find from the evidence that the ——— Company never acquired any title to the property sued for in this action.[2]

The jury are instructed that, if the jury believe from the evidence in this case that B. purchased the property sued for in this action, or any part thereof, from plaintiff, in his own name, and not for the alleged partnership of the ——— Company, and never sold said property to said alleged partnership, or put it in said alleged partnership as his part of the assets of said partnership, then plaintiff would be entitled to recover such part of said property as was purchased by said B. from plaintiff, although you may believe from the evidence that there was a partnership existing at the time between A. and B., and known as the ——— Company.[3]

§ 2149. Liability on forthcoming bond—Sufficiency of delivery of property to prevent forfeiture

You are instructed that, where property is bulky or cumbersome to such an extent that the party whose duty it is to deliver it to another party or parties cannot do so without incurring great expense, then in that event the actual taking of the property into his possession, and carrying it to and delivering it to the party to whom it is his duty to deliver it, is not absolutely necessary or es-

[1] Gossett v. Morrow, 65 So. 826, 187 Ala. 387.
[2] Gossett v. Morrow, 65 So. 826, 187 Ala. 387.
[3] Gossett v. Morrow, 65 So. 826, 187 Ala. 387.

sential. Now, in this case, if the property that ——— and the others were called upon to deliver to plaintiff was cumbersome, was bulky, and was at the place where the property was when it was originally levied upon and replevied by defendant in the detinue suit, if it was bulky, cumbersome, and hard to handle and expensive to handle, then, in order to make a delivery of that property within the meaning of the law, it would be sufficient for one or either of the parties interested on that bond to go to plaintiff and notify him of the fact that the property was there, and that they stood ready to turn it over and deliver it to him, and he could take possession of it. That would amount to a delivery of the property, if the property was then situated at the same place where it was at the time of the levy and execution of the replevy bond; but if the property was not of that character, then a different rule would apply. It would then be incumbent upon the defendant within ——— days to take the property to the plaintiff and deliver it to him. Now, what do you say about it, from the facts in this case?[4]

[4] Willoughby v. Jernigan, 60 So. 514, 6 Ala. App. 270.

CHAPTER CVIII

DISORDERLY CONDUCT

§ 2150. Use of opprobrious words.

§ 2150. Use of opprobrious words

The jury are instructed that, if the accused used to the prosecutor the language charged in the indictment, it is for them to determine whether or not he had provocation so to do, and "whether or not the provocation, if there was any, was sufficient to justify the defendant in the use of such language.[1]

[1] Hanson v. State, 39 S. E. 942, 114 Ga. 104.

CHAPTER CIX

DISORDERLY HOUSE

§ 2151. Elements of offense.
2151(1). Missouri.
2151(2). South Dakota.
2151(3). Texas.
2152. Same—Ownership or control.
2153. Same—Necessity of showing that defendant keeper of house.
2154. Criminal liability of lessor of premises.
2154(1). Indiana.
2154(2). West Virginia.
2155. Liability as principal of one aiding and abetting offense.
2156. Burden of proof.
2157. Proof of ownership.
2158. Matters considered in determining character of house.

§ 2151. Elements of offense

§ 2151(1). Missouri

The court instructs the jury that although you may believe that persons of ill fame and bad repute boarded with the defendant, and paid her therefor at the rate of two dollars per week, yet this alone will not justify you in returning a verdict of guilty in this cause; but you must find and believe from the evidence that she knowingly suffered and permitted said boarders to occupy and use the rooms of the said house for the purpose of prostitution and having sexual intercourse, and that she received pay for the use of the rooms for such purposes, and that such sign was displayed for such purpose of prostitution.[1]

The court instructs the jury that a bawdyhouse, or brothel, is a house of ill fame, kept for the resort and commerce of lewd people of both sexes.[2]

The court instructs the jury that the keeper of a bawdyhouse or brothel is a person who acts as master or mistress, or has the care, use, or management of any house or building in which a bawdyhouse or brothel is kept and maintained with his or her knowledge and assistance.[3]

§ 2151(2). South Dakota

You are instructed that you must also find, beyond a reasonable doubt, that the house in question was a house of ill fame at the time in question; that it was resorted to for purposes of prostitution or lewdness, that the defendant was the keeper or one of the keepers thereof, or was concerned or aided or abetted in

[1] State v. McLaughlin, 60 S. W. 1075, 160 Mo. 33.
[2] State v. Horn, 83 Mo. App. 47.
[3] State v. Horn, 83 Mo. App. 47.

the keeping of the said house of ill fame for the purpose of prostitution or lewdness.[4]

§ 2151(3). Texas

You are instructed that, unless you believe from the evidence in this case that the inmates of defendant's house on or about the ——— day of ———, were prostitutes and were residing in said house or resorting to said house for the purpose of plying the vocation of a prostitute, you will find the defendant not guilty.[5]

You are instructed that a disorderly house is one kept for prostitution, or where prostitutes are permitted to resort or reside for the purpose of plying their vocation.[6]

You are instructed that there are three essential ingredients of this offense that must be established by the state by legal and competent evidence beyond a reasonable doubt: (1) That the owner, lessee, or tenant of said house is defendant; (2) that said house is run as a place where prostitutes are permitted to resort and reside for the purpose of plying their vocation; (3) that prostitutes did resort and reside there for the purpose of plying their vocation. And if the state fails to establish any one of these ingredients, by legal and competent evidence, beyond a reasonable doubt, you will acquit the defendant.[7]

You are instructed that, if you believe from the evidence beyond a reasonable doubt that defendant, in the city of ———, and state of ———, at any time within ——— years next before ———, was then and there the owner, lessee, or tenant of a house then and there situated, and that said defendant did then and there unlawfully keep, and was concerned in keeping, said house as a house for the purposes of prostitution, and where prostitutes are permitted to resort and reside for the purpose of plying their vocation, then you will find the defendant guilty, and assess his punishment at a fine of ——— dollars.[8]

§ 2152. Same—Ownership or control

You are charged that if ——— rented or bought the house in question from ——— for herself and in her own name, and that defendant was not a party to such purchase or renting, then defendant was not the owner, tenant, or lessee of such house, and you should acquit him.[9]

The jury are instructed that you must believe beyond a reasonable doubt that defendant was concerned in keeping a disor-

[4] State v. Ballew, 128 N. W. 716, 26 S. D. 494.

[5] Bowman v. State, 164 S. W. 846, 73 Tex. Cr. R. 194.

[6] Bass v. State (Cr. App.) 66 S. W. 558.

[7] Bass v. State (Cr. App.) 66 S. W. 558.

[8] Bass v. State (Cr. App.) 66 S. W. 558.

[9] Sparks v. State (Tex. Cr. App.) 51 S. W. 1120.

derly house, or that he knowingly permitted the keeping of a disorderly house in a house owned or occupied by him. In this connection you are instructed that an owner or lessee or tenant, who is keeping, or is concerned in keeping, or knowingly permitting the keeping, of a disorderly house in any house owned or occupied by him, shall be guilty of keeping, or of being concerned in keeping, or knowingly permitting to be kept, a disorderly house, and that a disorderly house is one kept for prostitution, or where prostitutes are permitted to resort or reside for the purpose of plying their vocation.[10]

§ 2153. Same—Necessity of showing that defendant keeper of house

You are further instructed that, although you should find from the evidence in this case that the defendant was an inmate of the house in question, and although you should find that said house was a house of prostitution, unless you further find from the evidence, beyond a reasonable doubt, that she was the keeper of the same, your verdict should be "Not guilty." [11]

You are instructed that by the term "keeper," as used in this connection, is meant the person in charge and control of the house in question, and having the management of such, as distinguished from the other inmates thereof.[12]

§ 2154. Criminal liability of lessor of premises

§ 2154(1). Indiana

You are instructed that a landlord cannot be convicted of the offense charged, without proof that he had knowledge that the house let was kept as a bawdyhouse, but that it is not necessary to prove that he had witnessed acts of prostitution in the house, or that he had been personally notified of such acts; that knowledge may be proved by circumstantial evidence—by proof of such facts and circumstances as would justify the jury in coming to the conclusion that he had such knowledge.[13]

§ 2154(2). West Virginia

The jury is instructed that, if they believe from the evidence that the defendants and ——— made and entered into the contract of sale introduced in evidence of the property named in the indictment, and further believe that for one year next preceding the

[10] Stratton v. State (Tex. Cr. App.) 44 S. W. 506.

[11] Nelson v. Territory, 49 P. 920, 5 Okl. 512.

[12] Nelson v. Territory, 49 P. 920, 5 Okl. 512.

[13] Graeter v. State, 4 N. E. 461, 105 Ind. 271. This instruction is proper in connection with an instruction that the jury must believe beyond a reasonable doubt that the defendant knowingly permitted the house in question to be kept by the tenant as a house of ill fame resorted to for the purpose of prostitution.

finding of the indictment in this case the said ——— occupied said property under said contract of sale, then the jury must find the defendants not guilty.[14]

§ 2155. Liability as principal of one aiding and abetting offense

The court instructs the jury, as a matter of law, that any one who aids, abets, assists, or encourages in the keeping or superintending of a house or of premises where prostitution, fornication, or concubinage is allowed or practiced is guilty as principal.[15]

§ 2156. Burden of proof

The jury are instructed that, before you will be justified in finding a verdict of guilty against the defendant, you must be satisfied by the evidence in the case, beyond a reasonable doubt, that the defendant was the keeper of a bawdyhouse, in manner and form as charged in the information; and it is incumbent upon the state to establish that fact, by affirmative proof, beyond a reasonable doubt.[16]

§ 2157. Proof of ownership

You are instructed that, if you believe from the evidence, beyond a reasonable doubt, that the defendant was in possession, or had the actual control, care, and management of the house in question, and was not a lessee or tenant of said house, the same would be sufficient to establish ownership, so far as the law of this case is concerned.[17]

§ 2158. Matters considered in determining character of house

You are instructed that, in considering the question as to whether or not the house kept by the defendant, if you find that she did keep it, was a house of ill fame, resorted to by divers persons for the purpose of prostitution and lewdness, you will carefully consider the reputation of the house, the actions of those visiting the house, the time they did so, the reputation of the inmates of the house, as well as the reputation of those who visited the house, and all the facts and circumstances shown in evidence, and from these determine the real character of the house, charged in the indictment to be a house of ill fame.[18]

[14] State v. Emblem, 29 S. E. 1031, 44 W. Va. 521.

[15] Mash v. People, 77 N. E. 92, 220 Ill. 86.

[16] Nelson v. Territory, 49 P. 920, 5 Okl. 512.

[17] Stone v. State, 85 S. W. 808, 47 Tex. Cr. R. 575.

[18] State v. Beebe, 88 N. W. 358, 115 Iowa, 128.

CHAPTER CX

DISTURBANCE OF PUBLIC ASSEMBLY

§ 2159. Elements of offense.

§ 2159. Elements of offense

The court instructs the jury that the mere cursing or swearing or other language uttered is not the gist of the offense, but such cursing or swearing or use of other language must be in a manner reasonably calculated to disturb the people or a part of the people assembled at the public place at which the cursing or swearing or other language is uttered.[1]

[1] Young v. State (Tex. Cr. App.) 44 S. W. 507.

CHAPTER CXI

DISTURBANCE OF RELIGIOUS ASSEMBLY

§ 2160. Elements of offense.
2160(1). Alabama.
2160(2). Texas.
2161. Disturbance of single member of congregation.
2162. When person deemed member of congregation for purpose of protection from disturbance.

§ 2160. Elements of offense

§ 2160(1). Alabama

The court charges the jury that, if only the persons outside the house were disturbed, and if at the time they were not a part of the assemblage met for the purpose of religious worship, then this would not warrant the conviction of the defendant.[1]

The jury are instructed that disturbing a member of that congregation does not mean exciting him, but only directing his attention from the purpose of the assemblage.[2]

§ 2160(2). Texas

You are instructed that, if you shall find from the evidence, beyond a reasonable doubt, that on or about the date alleged, in ——— county, state of ———, and, while a congregation was assembled at ——— for the purpose of religious worship, and conducting themselves in a lawful manner, the defendant did willfully disturb said congregation, or any part thereof, by loud and vociferous talking, or by putting out a light while a prayer was being said, or by saying a mock prayer during said religious services, then you will find defendant guilty, and assess a proper penalty therefor.[3]

§ 2161. Disturbance of single member of congregation

The jury are instructed that, if any one person in an assemblage met for religious worship is disturbed, then the law says the assemblage is disturbed.[4]

§ 2162. When person deemed member of congregation for purpose of protection from disturbance

The jury are instructed that, if a person retires from the meeting for purpose of his own, with the intention of returning, he continues a part of the assemblage.[5]

[1] Adair v. State, 32 So. 326, 134 Ala. 183.
[2] Adair v. State, 32 So. 326, 134 Ala. 183.
[3] Webb v. State, 140 S. W. 95, 63 Tex. Cr. R. 207.
[4] Adair v. State, 32 So. 326, 134 Ala. 183.
[5] Adair v. State, 32 So. 326, 134 Ala. 183.

The jury are instructed that if a person in an assemblage wants a drink of water, and goes to a convenient spring, intending to return, he continues a part of the assemblage, and a disturbance of him while out for such purpose would be a disturbance of the assemblage.[6]

[6] Adair v. State, 32 So. 326, 134 Ala. 183.

CHAPTER CXII

DIVORCE

§ 2163. Cruelty as ground of divorce.
2164. Matters considered on issue of fact of adultery.
2165. Sufficiency of evidence of adultery or cruelty.
2165(1). Illinois.
2165(2). North Carolina.
2166. Testimony of detectives.
2167. Defense to proceedings to enforce alimony—Inability to comply with order.

§ 2163. Cruelty as ground of divorce

The jury are instructed that, if the jurors find that the defendant has been guilty of extreme and repeated cruelty, under the instructions above given, they should return a verdict for the complainant, unless they find that such cruelty was occasioned by the complainant's own misconduct, and that it is not sufficient to show misconduct, in no way proportioned to the cruelty of the defendant, and which could not have caused it.[1]

§ 2164. Matters considered on issue of fact of adultery

The jury are instructed that the fact that there was no issue after the separation of plaintiff and defendant, notwithstanding the alleged adultery of defendant with ———, is a circumstance for the jury to consider on the question whether the alleged adultery took place.[2]

§ 2165. Sufficiency of evidence of adultery or cruelty

§ 2165(1). Illinois

The jury are instructed that it is not necessary to prove the charge of adultery or cruelty beyond a reasonable doubt, but it is sufficient in either case if the jury believe that such charges, respectively, are proved by a preponderance of the evidence.[3]

§ 2165(2). North Carolina

The jury are instructed that evidence to prove adultery may be direct, as where the parties are seen in the act, or it may be indirect or circumstantial, and the charge of adultery may be sufficiently proved by evidence of circumstances leading to an inference of guilt. These facts and circumstances must lead your minds to the conviction of the truth of the charge of adultery;

[1] Von Glahn v. Von Glahn, 46 Ill. 134.

[2] Broom v. Broom, 41 S. E. 673, 130 N. C. 562.

[3] Lenning v. Lenning, 52 N. E. 46, 176 Ill. 180.

that is, the plaintiff must produce such evidence as will lead your minds to the conclusion that adultery was actually committed before you would be warranted in answering the ——— issue, "Yes."[4]

§ 2166. Testimony of detectives

The jury are instructed, with respect to the testimony of detectives, that you are to look at the evidence carefully, scrutinize it, take into consideration the probability of their stories, the appearance of the men upon the stand, and then determine whether or not they are telling the truth. You have a right to believe them. All the law requires, in considering such evidence, is that it be carefully scrutinized, and, after that has been done, if you are convinced they are telling the truth, you must give their testimony its full effect.[5]

§ 2167. Defense to proceedings to enforce alimony—Inability to comply with order

You are instructed that the burden is upon the defendant to show to your satisfaction by a fair preponderance of all the evidence that he has complied with said order, or that, failing to do so, he has made an honest and faithful effort to comply, and in considering whether or not he has made such effort honestly and faithfully you may consider whether or not the defendant has applied to the court to have said order vacated, or modified and reduced, or whether or not he has paid in to the clerk any amount to be applied on said order, and whether or not he has in good faith done everything that a reasonable man could do to comply with said order.[6]

The court instructs you that the fact that the defendant has no property or money at the time of the making of said order would not be sufficient to excuse him from a compliance with same, but that it is incumbent upon him to make every reasonable and honest effort that he could to comply with said order, and in determining whether or not he has made such honest and faithful effort you may take into consideration his age, his intelligence, his physical condition, and his general capabilities to secure employment and earn money.[7]

In this case you are instructed that, if you find, by a fair preponderance of the evidence, after taking into consideration all of the facts and circumstances in the case, that the defendant has made every reasonable effort that he could have made to comply with said order, that is to say, that he has applied to the court to have

[4] Burroughs v. Burroughs, 76 S. E. 478, 160 N. C. 515.

[5] Fries v. Fries, 70 N. Y. S. 295, 34 Misc. Rep. 478.

[6] Fowler v. Fowler, 161 P. 227, 61 Okl. 280, L. R. A. 1917C, 89.

[7] Fowler v. Fowler, 161 P. 227, 61 Okl. 280, L. R. A. 1917C, 89.

said order vacated, or to have the same modified or reduced, or has put forth every effort that was within his power and ability, for one in his condition and circumstances in life, to comply with said order, then it would be your duty to find the defendant not guilty; but if you do not find that he has made an honest effort to comply with said order as above defined to you, then it would be your duty to return a verdict of guilty against the defendant.[8]

The court instructs you that it was the duty of this defendant to promptly and faithfully comply with said order, and before he will be excused for not having done so he must show to your satisfaction that he has done everything within his power to comply with said order, and that, having put forth every effort that he reasonably could put forth, he has been unable to comply with the same.[9]

[8] Fowler v. Fowler, 161 P. 227, 61 Okl. 280, L. R. A. 1917C, 89.

[9] Fowler v. Fowler, 161 P. 227, 61 Okl. 280, L. R. A. 1917C, 89.

CHAPTER CXIII

DOMICILE

§ 2168. Proof of intent—Effect of declarations of party whose status is involved.

§ 2168. Proof of intent—Effect of declarations of party whose status in involved

You are instructed that, in all cases, it is safe to say that the question of residence is a complex one, made up not only of a mental purpose and intent on the part of the person himself to have his home in a particular place, but coupled with certain acts indicating that intent. A man cannot have a residence simply by having an intent to have it in a particular place, if the acts which are disclosed manifest that that intent has not been carried out. It is true everybody is free to come and go as they please, and to choose their home as they please. It is true that the place of their residence is to be determined with a view to their own mental purpose respecting it, as well as the acts that are shown. But it is not enough, to prove what their mental purpose is, to show what they say about it, necessarily. A man may say, "I intend to live in W.;" but if he goes down to W. J., and stays there continuously, and brings about him all the indicia of a home, and votes there, or does any other act signifying an intent to live there, it is very evident his declared intent to live in W. is overrode by his proved intent by living at W. J. In this case the plaintiff insists that he, all the time along during ———, and for years previous, had had a mental purpose to make ——— his home, and that he frequently so declared his purpose. That would be sufficient unless there are facts in the case that prove a contrary intent. In other words, what I mean to say is that proof of a party's declaration of intent to live in one place is not conclusive of what that intent is. The intent may be proved by unequivocal acts that are stronger, in the judgment of the jury, than the declaration by himself. But it is also true, as claimed by the plaintiff, that a man cannot have a home in any place against his own will. He cannot be forced to have a home in a town if his actual mental purpose is not to have a home there.[1]

You are instructed that the act of ——— in registering and voting in ——— and swearing to a residence in the said city for a number of years affords some presumption that the said city was the place of his residence. How strong this presumption is depends upon all the circumstances of the case. It is more or less strong,

[1] Fulham v. Howe, 20 A. 101, 62 Vt. 386.

according as you find how these facts transpired—how he happened to go there to vote. If he went there in ———, and procured himself to be registered as a legal voter, made out that he had lived in that city ——— years, and actually voted in ———, that, under some circumstances, would be a strong presumption in favor of the proposition that ——— was his home. On the other hand, if that was done after this assessment was made in ———, and was done for the purpose of furnishing evidence against the validity of this assessment, then it is very easy to see it affords no presumption whatever in his favor. So that it depends upon how you find the fact to be, as to the force you are to give this act of registration and of voting in the city of ———. If it was an honest act, done in the ordinary course of events, and done because ——— understood that to be his home, and intended to make it his home, then it is of very great force as an act—one of the highest acts of citizenship; an act tending strongly to show that his actual residence was in ———. On the other hand, as I have already said, if it was done under such circumstances as to indicate a purpose to avoid responsibility here in ———, and to make a colorable residence in ———, then, of course, it is good for nothing. A man cannot avoid his duty to pay taxes by any artificial arrangement of facts gotten up for the purpose of avoiding his taxes. The law, in its spirit, requires that all persons who receive the benefits of the law should contribute ratably to the expense incurred by the discharge of those burdens made necessary by the establishment of government. At the same time, it does not require a man to be taxed in the wrong place of taxation. So, in this case, while you may feel impressed with the duty of all men to pay their taxes, you are to remember that no man is bound, legally or morally, to pay them anywhere except in the proper place; and, if this man escaped taxation in ———, it is no reason why he should be held to pay taxes here, unless you find facts in the case to hold him here, under the instructions I have given you.[2]

[2] Fulham v. Howe, 20 A. 101, 62 Vt. 386.

CHAPTER CXIV

DOWER

§ 2169. Requisites.
2170. Effect on inchoate right of dower of formation of partnership by husband and use of land in partnership business.
2171. Damages for detention of dower.

§ 2169. Requisites

The court instructs the jury that the only question for your determination is whether or not the plaintiff is entitled to dower in the land described in the petition. You are therefore instructed that if you shall find and believe from the evidence that the plaintiff was the wife of J., and that, during the time she was his wife, the said J. was the owner of and in possession of the land described in the petition, and that the said J. is now dead, and that the plaintiff has not relinquished or conveyed her dower interest (if any) in the land described in the petition, and that the defendant was, at the time of the commencement of this action, the owner of the land described in the petition, then your verdict should be for the plaintiff.[1]

§ 2170. Effect on inchoate right of dower of formation of partnership by husband and use of land in partnership business

The court instructs the jury that if you find and believe from the evidence that the plaintiff was married to J. in ———, and that while the plaintiff was the wife of said J. the said J. was in possession of the land described in the petition, exercising ownership thereover, under deeds of conveyance thereof from ———, ———, ———, and ———, or was so in possession and exercising ownership over said land under and by virtue of an agreement of dissolution of the copartnership of ———, whereby said land was set off to J., then the right of the plaintiff to dower in said land thereupon attached to said land, and such right is not affected by the fact that, after said J. so entered into possession and began to exercise ownership over said land, he and said ——— entered into a partnership and used said land in their partnership business. You are therefore instructed that if you shall find and believe from the evidence that the plaintiff was married to J. in ———, and that while the plaintiff was the wife of said J., the said J. was in possession of the land described in the petition, exercising ownership thereover, under deeds of conveyance thereof from ——— ———, ———, and ———, or was so in possession and exercising ownership over said land under and by virtue of an agreement of dissolution of the copartnership of ———, whereby said land was set

[1] Murray v. Scully, 167 S. W. 1017, 259 Mo. 57.

off to J., and that the partnership between said J. and ———, if any existed, was not formed until after the said J. entered into possession of said land under such deeds of conveyance or under such agreement of dissolution, and if you shall believe also that J. is now dead, and that the defendant is now the owner of said land, then the plaintiff is entitled to dower in said land, and your verdict should be for the plaintiff.[2]

The jury is instructed that after the several conveyances from ——— to ———, ———, and ———, introduced in evidence, there is no testimony that ———, or the copartnership of ——— and J., as such copartnership, had or held any interest in the land described in the petition.[3]

§ 2171. Damages for detention of dower

The court instructs the jury that it is their duty in this cause to inquire into and ascertain the damages to which the complainant is entitled for the detention and refusal to assign her reasonable dower; that such damages are to be inquired into and determined since the time of filing the petition in this cause; that the complainant is entitled as such damages to one-third of what the jury shall find, from the evidence, to have been the yearly value of the rent of the premises in which she has dower, for the period that has accrued subsequent to the filing of the petition in this cause, deducting therefrom one-third of the annual taxes assessed upon said lands during the same period, and also one-third of the interest upon any incumbrance upon any parcel of said land for the same period, and paid by the defendants, or any of them, and also one-third of all insurance and repairs so paid for any building and improvements in which the said complainant has dower.[4]

The court instructs the jury that it is their duty to ascertain from the evidence in this cause the annual value of the dower of the complainant in the lands in which she has in this suit been adjudged to be entitled to dower, and that by such annual value is meant the sum of money per year which is equal to one-third of the net productive value of said lands, after deducting from such one-third of the annual taxes, repairs, and insurance, and one-third of the interest on all incumbrances, that were on any of the land at the time of the death of ———.[5]

[2] Murray v. Scully, 167 S. W. 1017, 259 Mo. 57.

[3] Murray v. Scully, 167 S. W. 1017, 259 Mo. 57.

[4] Walker v. Walker, 5 Ill. App. 289.

[5] Walker v. Walker, 5 Ill. App. 289.

CHAPTER CXV

DRAINS

§ 2172. Assessment of benefits.
2173. Liability of drain commissioner for damages caused by construction of drain.
2174. Same—Deprivation of water rights.
2175. Liability of commissioner for overflow from drainage system.
2176. Effect of conveyance by plaintiff, pending suit against drain commissioner, of lands involved.

§ 2172. Assessment of benefits

You are instructed that in assessing benefits against said railroad company in this proceeding you have a right to consider only such benefits as will result to the company's right of way in said district for railroad benefits. Benefits to the corporation itself, as a transportation company, growing out of a possible increased productiveness of agricultural land within said district as a result of said improvement, which may lead to an increase of freight and passengers to said company, is not a proper element of the benefit to be considered by the jury in a case of this kind.[1]

§ 2173. Liability of drain commissioner for damages caused by construction of drain

The court instructs the jury that, in the construction of the drain with which we are concerned in this case, since the right of way thereof extends over the west line of the plaintiffs' land and upon his land, it was clearly the duty of the drain commissioner, since the plaintiff did not give a release of the right of way and of any damages which might result to him from the construction of the drain, to have instituted in the probate court of this county statutory proceedings of the character to which your attention has just been called, and thereby afford to plaintiff his day in court, so that it might be determined whether there was a necessity within the terms of the statute for a drain and for taking plaintiff's land or property rights therefor, and, further, for determining what amount of money would be fair compensation therefor, if his property was to be damaged or taken for such purpose.[2]

The undisputed evidence here shows that defendant did not do this, but, on the contrary, without taking or instituting such proceedings in the probate court, he caused the drain to be constructed adjacent to the plaintiff's property, and incident to such construction the dirt excavated from the drain was deposited upon the plaintiff's land and the water of the creek which theretofore had

[1] Cache River Drainage Dist. v. Chicago & E. I. R. Co., 99 N. E. 635, 255 Ill. 398.

[2] Laraway v. Williams, 167 N. W. 960, 201 Mich. 617.

flowed across plaintiff's land was diverted from its natural course and the plaintiff deprived of his right of access thereto and his use thereof. Since the drain commissioner did not comply with the requirements of the general drain law in doing this work or in causing it to be done by the contractor, he is not protected by the fact that he was acting in the official capacity of a drain commissioner, and therefore in the eye of the law he committed a trespass, and he is liable for the damage, if any, that resulted to the plaintiff in consequence thereof, unless the plaintiff has been shown to have done something which constitutes an estoppel or a waiver of his right to recover such damages.[3]

The court instructs the jury, as a matter of law, that the plaintiff has not been shown by the evidence in this case to have estopped himself or to have waived his right to recover for any damage that he may have sustained, unless it was done by his agreeing with the drain commissioner, if he did so agree, that as the dredge which was used in the construction of this drain approached the plaintiff's land, he (the plaintiff) would notify the drain commissioner, who would thereupon attempt to have the course of the ditch slightly varied upon the right of way of the drain, in such a way as to continue the flow of the water either upon or adjacent to the plaintiff's land, and notwithstanding such agreement upon the part of the plaintiff he failed to say anything to the drain commissioner, and in consequence thereof the course of the ditch was not changed and the plaintiff, because of his own fault, was thus deprived of the use of the water course which had theretofore passed over his land. In such an event the plaintiff would not be entitled to recover for any damages resulting from being deprived of his former water rights. But even under these circumstances the defendant would not have had a right to have deposited the dirt excavated from the ditch upon plaintiff's land unless he changed the course of the drain in compliance with the plaintiff's request, and if any damage resulted to the plaintiff therefrom he is entitled to recover to the extent of such damage caused by the dirt being deposited upon his land so far as the damage is shown by the required measure of proof.[4]

§ 2174. Same—Deprivation of water rights

The court instructs the jury that, in passing upon this case, you should bear in mind that there are no other circumstances shown which would justify the defendant in removing the water from the plaintiff's land. The water right was an appurtenance which belonged to the plaintiff's land, and to the extent of its value as such

[3] Laraway v. Williams, 167 N. W. 960, 201 Mich. 617.

[4] Laraway v. Williams, 167 N. W. 960, 201 Mich. 617.

was a property right, and is as fully protected by the law as any other property right, and if wrongfully removed a right of action accrues to recover for any and all damage resulting. In other words, no one has the right to wrongfully remove a water course from the land of another. In this connection I say to you that the plaintiff was under no obligation to take any legal or forcible steps to prevent the drain commissioner from going upon his premises or piling the dirt thereon, or removing the water therefrom, and that the commencement of this suit to recover damages for such action on the part of the drain commissioner is a proper proceeding to test out the question as to whether or not there is a liability for the acts of which the plaintiff complains. And I charge you that the payment under protest by the plaintiff of $———, which was taxed as the amount of benefits against his farm, does not in any way operate against him as a waiver of any damages he may be entitled to by reason of the alleged trespass upon his land, the piling of dirt thereon, destroying his fence, and the removal of his water rights.[5]

§ 2175. Liability of commissioner for overflow from drainage system

The court instructs the jury that if you believe, from the evidence, that the drains and ditches in question were planned and constructed by the commissioners of the said drainage district preceding the defendants, by and with the advice of skilled and experienced engineers, and that such ditches and drains were properly constructed according to such plans, and that such plans and completed drains were such as reasonably prudent men would plan and construct for such district, and that no defects in such system had appeared or come to the knowledge of the defendants or could have been discovered by reasonable diligence on the part of the defendants prior to the injury complained of, then the jury should find the defendants not guilty.[6]

§ 2176. Effect of conveyance by plaintiff, pending suit against drain commissioner, of lands involved

You are instructed that it appears in this case that since the plaintiff started this suit he has sold the land in question and therefore he no longer has any interest in it. But I charge you, as a matter of law, that his having sold the land would not affect his right to recover, if he has otherwise established such right. In other words, for the purposes of this suit, the plaintiff stands exactly in the same position as though he was still the owner of the land.[7]

[5] Laraway v. Williams, 167 N. W. 960, 201 Mich. 617.

[6] Thompson v. Hughes, 121 N. E. 387, 286 Ill. 128.

[7] Laraway v. Williams, 167 N. W. 960, 201 Mich. 617.

CHAPTER CXVI

DRUGGISTS

§ 2177. Degree of care required to avoid mistake in sale of drugs.
2178. Duty with regard to labeling goods sold.
2179. Negligence in the sale of drugs as proximate cause of injuries complained of.
2180. Burden of proof in action for negligence.
2181. Measure of damages for negligence.
2182. Criminal liability for misbranding.

§ 2177. Degree of care required to avoid mistake in sale of drugs

You are instructed that if the jury believe from the evidence that on or about ———, the plaintiff sent his son to the drug store of the defendant to procure arnica, that said son asked the defendant for arnica, and the defendant sold and delivered to him carbolic acid instead of arnica, and if you believe from the evidence that, in so selling the plaintiff carbolic acid, the defendant failed to use ordinary care, as defined in instruction No. ———, then you will find your verdict in favor of the plaintiff, if you find that the plaintiff and his agent exercised ordinary care at the time.[1]

You are instructed that, by the term "ordinary care," as used in the instructions, is meant that degree of care that would be used by a person of ordinary prudence under the same or similar circumstances. A failure to exercise ordinary care, as so defined, is negligence.[2]

§ 2178. Duty with regard to labeling goods sold

The court instructs the jury, on behalf of the plaintiff, that it would constitute negligence, on the part of the defendant, to sell sulphuric acid without labeling the bottle in whch it is contained, and also the outside wrapper or cover, with the words "sulphuric acid" and the word "poison," and that it was wholly immaterial whether ——— called for sulphuric ether or sulphuric acid.[3]

§ 2179. Negligence in the sale of drugs as proximate cause of injuries complained of

You are instructed that, if you find from the evidence that croton oil was by defendant administered to plaintiff in dangerous quantity, as is alleged, then you will consider whether or not it was the proximate cause of plaintiff's sickness and injury, as alleged; and if you find that it was not the proximate cause thereof, or if the

[1] Peterson v. Westmann, 77 S. W. 1015, 103 Mo. App. 672.

[2] Peterson v. Westmann, 77 S. W. 1015, 103 Mo. App. 672.

[3] Fisher v. Golladay, 38 Mo. App. 531. The action was based upon a statute.

plaintiff was sick at the time of administering the croton oil, if any was administered, and the same did not increase the sickness or pain, or the duration thereof, then you should find for the defendant.[4]

§ 2180. Burden of proof in action for negligence

The court instructs the jury that, in considering its verdict, the jury must not be governed by sympathy for plaintiff because he met with an injury, nor have any prejudice or feeling either in favor of or against plaintiff or defendant, but the jury should, in arriving at its verdict, be governed solely by the evidence in the case and the instructions of the court. And the court further instructs the jury that the burden of proof is upon the plaintiff to show by a preponderance of the evidence (that is, by evidence which is, in your opinion, entitled to greater weight than that offered by the defendant) that the defendant was guilty of the negligence alleged.[5]

§ 2181. Measure of damages for negligence

You are instructed that, if the jury finds for the plaintiff, they should assess his damages at such a sum as they may find from the evidence will be a fair compensation to him, first, for any pain of body or mind caused by the loss of the first joint of the middle finger of his right hand, and directly caused by such injury; second, for any loss of earnings resulting directly from said injury; third, for any loss necessarily incurred for medicines and medical attention—not to exceed the sum of $———, the amount sued for.[6]

§ 2182. Criminal liability for misbranding

The jury are instructed that the question for you to determine is whether the several preparations put upon the market in interstate commerce by the defendant in fact contain curative agents for the several ailments set forth upon the labels of these respective preparations. If you find from the evidence that each and every of these preparations do in fact contain such curative agents, your verdict will be not guilty under each and every count of the information. If you find as a fact that one or more of these preparations does not in fact contain such curative agents, then, as to such preparations, it will be necessary to consider the second question in the case which is: Did the defendant in fact believe that the preparation in question would be effective in alleviating the ailments for which its label says it is intended to be used? It is not proper

[4] Rabe v. Sommerbeck, 63 N. W. 458, 94 Iowa, 656.

[5] Peterson v. Westmann, 77 S. W. 1015, 103 Mo. App. 672.

[6] Peterson v. Westmann, 77 S. W. 1015, 103 Mo. App. 672.

in such a case as this to try rival well-established schools of medicine, and, if you find that the defendant has only used in its several preparations homeopathic remedies for the alleviation of ailments, then your verdict should be not guilty, and you will not be called upon to consider any other question in the case.

If you find, however, as a fact, that some or all of the preparations put upon the market by the defendant do not, in fact, contain remedial agents used in any school of medicine for the relief of the ailments for which it is put upon the market, then you will be called upon to consider the second question in the case, and that is: Did the defendant honestly believe that such remedy would have a curative effect upon the ailments for which it is offered to the public? The law requires that the government must prove beyond a reasonable doubt, not only that the statements upon the labels are false, but also that the statements are fraudulent. The statements may be false and not fraudulent. To be considered fraudulent within the meaning of the law requires that the defendant should either know that the remedy which he offers to the public is of no curative value or that he represents to be of curative value recklessly and without caring whether it would cure or whether it did not, for the purpose of defrauding his customers and getting their money for an article which he knew in fact, or ought to have known, was of no value. If you find from the evidence that the defendant honestly believed, and had reasonable ground to believe, that his remedy was of curative value, then your verdict must be not guilty, no matter if in fact the remedies were worthless from a medical point of view.[7]

[7] Kar-Ru Chemical Co. v. United States (C. C. A. Wash.) 264 F. 921.

CHAPTER CXVII

DRUNKARDS

§ 2183. What constitutes drunkenness.
2184. Presumptions and burden of proof.

§ 2183. What constitutes drunkenness

The jury are instructed that when any person, from the use of intoxicating liquors, has affected his reason or his faculties, or has rendered himself incoherent of speech, or has caused himself to lose control, in any manner or to any extent, of the actions or motions of his person or body, such person, in the contemplation of the law, is intoxicated.[1]

§ 2184. Presumptions and burden of proof

The jury are instructed that defendant is charged in the complaint to have been a common drunkard from ——— to ———. Upon this charge he is presumed to be innocent; that is, he is presumed not to be a common drunkard, but the jury are not instructed that, because it is proved that defendant was drunk ——— times in ——— months, with no proof of his condition during the remainder of the ——— months, it is to be presumed that he was sober, and not intoxicated, during all the remainder of the time. The question is whether the facts proved satisfy the jury beyond a reasonable doubt that during the time specified in the complaint he was a common drunkard. One way to state the question is this: Can the facts proved be true, on the supposition that he was not during that time habitually a drunkard.[2]

[1] State v. Huxford, 47 Iowa, 16.

[2] Commonwealth v. McNamee, 112 Mass. 285.

CHAPTER CXVIII

EJECTMENT

§ 2185. Title to support action.
2185(1). Alabama.
2185(2). Delaware.
2185(3). Illinois.
2185(4). Indian Territory.
2185(5). Michigan.
2185(6). South Carolina.
2185(7). Virginia.
2185(8). West Virginia.
2186. Same—Effect of prior peaceful possession by plaintiff or his predecessors.
2187. Same—Lack of title in defendant.
2187(1). Arkansas.
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2193. Sufficiency of evidence.
2193(1). Delaware.
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2194(1). Georgia.
2194(2). Oklahoma.
2195. Recovery of mesne profits of mineral lands.
2196. Right of defeated defendant to compensation for improvements.

§ 2185. Title to support action

Right of grantor of school lot to a reconveyance as basis for ejectment, see § 4744.

§ 2185(1). Alabama

The court charges the jury that if, upon the evidence before them, and the charge of the court, they are unable to say that plaintiff has shown a better title than defendant has shown by his evidence, that the plaintiff is not entitled to recover.[1]

The court charges the jury that if they find from the evidence under the charge of the court that the ——— Iron Company had conveyed away its whole title to the land in controversy before this

[1] Anniston City Land Co. v. Edmondson, 30 So. 61, 127 Ala. 445.

action was brought, plaintiff cannot recover on the alleged demise of such company.[2]

The court charges the jury that the plaintiff in this case must rely upon the strength of his own title, and not upon the weakness of defendant's title, and, if the plaintiff has failed to show a complete right to recover on the strength of his own title, then he cannot recover, even though the defendant has failed to make out a complete title.[3]

§ 2185(2). Delaware

You are instructed that plaintiff in an action of ejectment must recover, if at all, on the strength of his own title, without regard to the strength or weakness of the title of the defendant.[4]

§ 2185(3). Illinois

The court instructs the jury that the deeds and papers introduced in evidence by the plaintiff in this case are sufficient to vest the legal title to the whole of the land described in the declaration in the plaintiff, and to authorize it to take possession of the whole of that tract of land, unless the defendants have shown an adverse possession of the same, or of some part thereof, as explained in these instructions, for a period of ——— years or more before the commencement of this suit, by a preponderance of the evidence.[5]

§ 2185(4). Indian Territory

The court would instruct you that, unless the defendant has some conveyance from somebody who had a better title, he cannot hold possession of this land as against the plaintiff, provided the proof may show you that the plaintiff had a regular chain of title from the original parties who put it in, and as against the plaintiff's title, if the evidence satisfies you that he has a regular chain of title, unless the defendant has shown an equal title, or a better title from some one else, why your verdict should be for the plaintiff. If the evidence has not shown that, then your verdict should be for the defendant.[6]

§ 2185(5). Michigan

You are instructed that, in an ejectment suit the plaintiff must rely upon the sufficiency of her own title, and cannot question defendant's title before making a prima facie case of actionable right in herself, and the plaintiff must recover on the strength of her own title where the defendant is in possession, and in applying this law you are to consider and determine from the evidence in the

[2] Anniston City Land Co. v. Edmondson, 30 So. 61, 127 Ala. 445.

[3] Stiff v. Cobb, 28 So. 402, 126 Ala. 381, 85 Am. St. Rep. 38.

[4] Ableman v. Short, 94 A. 900, 5 Boyce, 491.

[5] Chicago & A. R. Co. v. Keegan, 56 N. E. 1088, 185 Ill. 70.

[6] Reynolds v. Clowdus, 76 S. W. 277, 4 Ind. T. 679.

case whether or not the plaintiff has established her right to recover, and to that end you should consider not only the evidence offered by the plaintiff, but the evidence offered by the defendant as well. If you should find that the only question in dispute was where the west line of the ——— land was located, then you should determine from all the evidence in the case where that line actually is, and if you find as contended for by defendant, then your verdict should be in favor of the defendant, no cause of action.[7]

§ 2185(6). South Carolina

You are instructed that, if you find that the plaintiff has established her complete title, a perfect title from ——— down to herself, and a better title than that of the defendant, then plaintiff is entitled to recover the land. If she has not established a better title than that of the defendant, then she is not entitled to recover.[8]

§ 2185(7). Virginia

The court instructs the jury that if they believe from a preponderance of the evidence in the case that the plaintiff has shown legal title in himself to the land in controversy and the present right of possession at the time of the institution of this suit, then they must find for the plaintiff.[9]

The court instructs the jury that if they believe from a preponderance of the evidence in this case that the land in controversy is in what is known as block No. ——— of the ——— patent and surveys, and that plaintiff has connected himself therewith under his title papers introduced in evidence, that they cover said land and plaintiff had the right of possession at the time of the institution of this suit, then you will find for the plaintiff.[10]

The court instructs the jury that if they believe from all the evidence that the boundaries of grant No. ——— of ——— acres from the commonwealth to ——— are in such doubt and uncertainty that they cannot say whether or not they embrace the land in controversy, then they must find for the defendants.[11]

The court further tells the jury that unless it has been satisfactorily shown by a preponderance of the evidence that the deeds of ——— and ———, from ——— and ———, respectively, to the plaintiff, covers the land in controversy, then they cannot find for the plaintiff more than a one-third interest in the land in controversy. And the court further tells the jury that if they believe

[7] Austin v. Crowell, 159 N. W. 504, 193 Mich. 296.

[8] Mitchell v. Cleveland, 57 S. E. 33, 76 S. C. 432.

[9] Sutherland v. Gent, 93 S. E. 646, 121 Va. 643.

[10] Sutherland v. Gent, 93 S. E. 646, 121 Va. 643.

[11] Sutherland v. Gent, 93 S. E. 646, 121 Va. 643.

from all the evidence that the boundaries of the said deeds are in such doubt and uncertainty that they cannot say they embrace the land in controversy, then they cannot find for the plaintiff more than a one-third undivided interest in the land in controversy.[12]

The jury are instructed that the right of the plaintiff to recover in this case rests on strength of his own title, and he cannot recover by showing defects in the title of the defendant.[13]

The court instructs the jury that the plaintiffs' right to recover depends upon the strength of their title, not upon the weakness of the defendant's title, or the exhibition of defects in the defendant's title, and that the defendant may maintain his defense by the failure of the plaintiffs to show that a better title is in them than is in the defendant, or by the defendant showing the title is not in the plaintiffs, but in some one else.[14]

§ 2185(8). West Virginia

The jury are instructed that in an action of ejectment the general rule is that a plaintiff must recover upon the strength of his own title, and not upon the weakness of the defendant's title, for the reason that the defendant is not required to give up possession until the true owner demands it, and the right to show in defense a substituting outstanding title rests upon the same principle. So, if the title of the plaintiff to the ——— acres of land claimed by him in this suit, or the ——— acres claimed by him, became forfeited to the state of ———, for any ——— consecutive years before bringing this suit, for the nonpayment of taxes thereon, or for the failure of the said plaintiff, or any one under whom he claims, to have said lands entered on the land books of any county in which part thereof is situated, where they are located, for the purpose of taxation, then the said plaintiff cannot recover in this action, and the jury must find for the defendants.[15]

§ 2186. Same—Effect of prior peaceful possession by plaintiff or his predecessors

The court instructs the jury that prior peaceful possession by the plaintiff or those under whom he holds, claiming to be the owner in fee, if proved, is prima facie evidence of ownership and seisin, and is sufficient to authorize a recovery unless the defendant shall show a better title, and in the case at bar, if the jury shall believe from the evidence that D. conveyed to M. the tract of land in the plaintiff's declaration mentioned on the ——— day of ———, and admitted to record ———, and that M. was in posses-

[12] Sutherland v. Gent, 93 S. E. 646, 121 Va. 643.

[13] Buntin v. Danville, 24 S. E. 830, 93 Va. 200.

[14] Atkinson v. Smith, 24 S. E. 901.

[15] Davis v. Living, 40 S. E. 365, 50 W. Va. 431.

sion of said tract of land up to the ——— day of ———, and then conveyed the property to the plaintiff, and that defendant did not receive title to his property until the ——— day of ———, and admitted to record ———, and that there was no record evidence of the conveyance by D. to the defendant, then you must find for the plaintiff.[16]

§ 2187. Same—Lack of title in defendant

§ 2187(1). Arkansas

The court instructs the jury that the plaintiffs must recover, if at all, on the strength of his own title, and not upon the weakness of the defendants. Therefore, if you find from the evidence that plaintiffs, ——— and ———, on the ——— day of ———, conveyed by deed, duly acknowledged and filed for record, the lands in controversy, to ———, and it does not appear that said ——— has conveyed said lands to the plaintiffs or some one through whom they claim title, you will find for the defendants.[17]

§ 2187(2). Virginia

The court instructs the jury that the burden is upon the plaintiff to prove by a preponderance of the evidence in this case that the land in controversy actually lies within grant No. ——— of ——— acres from the commonwealth to ———, and unless you believe that the plaintiff has so proven this as a fact, then you must find for the defendants in this case whether the defendants have any title thereto or not.[18]

§ 2188. Sufficiency of possession of plaintiff prior to ouster

§ 2188(1). United States

You are instructed that it is not necessary that the land in controversy, which has been designated as the ———, should be inclosed with a fence, or that it should be reduced to cultivation, to constitute possession. If you believe from the evidence that there was a house, stockade stable, and corral on said land, erected by the plaintiff in this action, or those from whom they derived possession of the premises; that plaintiff, at diverse times, improved the springs upon said land, and in ——— or ——— made a claim to said land for ——— acres of land, and the water flowing from said springs on the land, as a mill site and water right; that it caused the land to be surveyed, and posts were erected at each corner of the land, indicating the corners and boundaries thereof, and continued in first possession thereof, until ejected by defendants, if they were ejected, so as to subject the land to its

[16] Holladay v. Moore, 78 S. E. 551, 115 Va. 66.

[17] Beardsley v. Hill, 91 S. W. 757, 77 Ark. 244.

[18] Sutherland v. Gent, 93 S. E. 646, 121 Va. 643.

control, and to notify the public that the land was claimed and occupied, this would constitute a possession of the land.[19]

§ 2188(2). Missouri

The jury are instructed that, before plaintiffs can recover upon the ground of a prior possession of the land sued for, or any part of said land, plaintiffs must not only prove the fact of such prior possession, but must also prove to your satisfaction that such prior possession was exclusive and adverse to the possession relied upon by the defendant in this case; and, if you believe that such prior possession relied upon by plaintiffs was not exclusive and adverse to the defendant, and those under whom he claims, then such prior possession of plaintiffs cuts no figure in this case, and you must find for the defendant.[20]

§ 2189. Defense of title in defendant

Upon the question of the title of the defendants, you are instructed that it is sufficient if you find that they were in possession of the same, and as a matter of right were entitled to such possession, with such an interest and right as could be enforced, even though the same may have been defective by reason of the loss of a deed or other defect. If they or their grantors were in fact the owners of the land it is sufficient, even though their chain of title is shown to have been at the time of the alleged sale deficient.[21]

§ 2190. Defense of outstanding title in another

The court instructs the jury that an outstanding title in another to defeat the action of ejectment must be a present, outstanding, operative, and available, legal title on which the owner could recover against either of the contending parties if asserting it by action.[23]

§ 2191. Presumptions and burden of proof

§ 2191(1). Alabama

I charge you that the burden is on the defendant to show that he bought the land from a party in possession of it, or having the legal title to it.[24]

§ 2191(2). Indian Territory

The jury are instructed that this is an action brought by the plaintiffs against the defendants for the recovery of the possession of certain lands and for damages for the use of same while

[19] Valcalda v. Silver Peak Mines (C. C. A. Nev.) 86 F. 90, 29 C. C. A. 591.

[20] Price v. Hallett, 38 S. W. 451, 138 Mo. 561.

[21] Chandler v. Keeler, 46 Iowa, 596.

[23] Reusens v. Lawson, 21 S. E. 347, 91 Va. 226. To same effect, see Holladay v. Moore, 78 S. E. 551, 115 Va. 66.

[24] Carter v. Tennessee Coal, Iron & Ry. Co., 61 So. 65, 180 Ala. 367.

the defendants were in possession or since the institution of this suit. The burden is upon the plaintiff to establish by a fair preponderance of the evidence the case that he sets up in his pleading—the allegations he makes in his complaint.[25]

§ 2191(3). South Carolina

You are instructed that the law presumes that those in possession are rightfully in possession, and he who claims that they are unlawfully in possession has to satisfy the jury by the preponderance of the evidence that he has a good title, and a better title than the defendants. He is to recover by the strength of his own title.[26]

§ 2191(4). Virginia

The court further instructs the jury that in an action of ejectment, the defendant, who is in peaceable possession of land sought to be recovered, is prima facie the owner, and is entitled to hold the same against all the world except the true owner thereof; the true owner must show by a preponderance of the evidence, a complete legal title and right to possession at the time of the institution of this action.[27]

The court instructs the jury that the plaintiff must show a legal title in itself and a present right of possession at the time of the commencement of this action before the defendants are called upon to show anything, and the party in possession is presumed to be the owner till the contrary is proved.[28]

The court instructs the jury that the possession of land by a party claiming it as his own in fee is prima facie evidence of his ownership and seisin of the land, and that it is incumbent upon the plaintiffs in an action of ejectment to prove and show in them a good, perfect, and sufficient title to the land to enable them to recover from the defendant.[29]

§ 2192. Burden of proof on trial of cross-petition alleging that deeds from cross-petitioner to plaintiff are forgeries

You are instructed that the cross-petitioner, ———, claims to be the owner of the land involved in this lawsuit, by virtue of being a citizen of the ——— Nation, under allotment deeds issued to her; that she is entitled to immediate possession thereof; that plaintiff wrongfully withholds from her that possession, for which he is liable to her for a fair rental value during the time he has kept

[25] Reynolds v. Clowdus, 76 S. W. 277, 4 Ind. T. 679.

[26] Sutton v. Clark, 38 S. E. 150, 59 S. C. 440, 82 Am. St. Rep. 848.

[27] Sutherland v. Gent, 93 S. E. 646, 121 Va. 643.

[28] Interstate Coal & Iron Co. v. Clintwood Coal & Timber Co., 54 S. E. 593, 105 Va. 574.

[29] Atkinson v. Smith, 24 S. E. 901.

her out of possession; that the deeds under which he claims, registered copies of which have been offered in evidence by both sides, so far as the same purport to have been executed by her are forgeries; that she never in fact executed the deeds to plaintiff or to any one else. She having assumed the position of plaintiff by virtue of the allegations of her cross-petition, the burden of proof is upon her to show these facts, and, until she does so by a fair preponderance of the evidence, she would not be entitled to prevail.[30]

§ 2193. Sufficiency of evidence

§ 2193(1). Delaware

You are instructed that, in order for the plaintiff to recover in this action, the jury should be satisfied from the preponderance or greater weight of the evidence that the plaintiff has the legal title. It is not necessary, however, that the legal title of the plaintiff be proved beyond a reasonable doubt; it is sufficient if it be proved by the preponderance of evidence.[31]

§ 2193(2). Indian Territory

You are the sole judge of the weight of the testimony and of the credibility of the witnesses. The question of fact is one exclusively for your consideration. The court would instruct you that in an action of ejectment the plaintiff recovers upon the strength of his own title. If you are satisfied from the evidence that the plaintiff is the owner of this land by purchase from the parties who put it in —who formerly owned it—and that they have never parted with their possession by sale or transfer in any way, your verdict should be for the plaintiff for the possession of the land, and for such damages as the proof may show you the plaintiff is entitled to recover. If the evidence shall satisfy you that the defendant has a better title than the plaintiff, why, then, your verdict should be for the defendant.[32]

§ 2194. Damages for withholding possession

§ 2194(1). Georgia

The jury are instructed that, in fixing the rent, it is not to be fixed by the present status of the property as it stands to-day, but it is to be fixed at the rate, under the evidence, that the jury finds to be the rental value of the property as it was prior to the placing upon that property of any improvements by defendant. You are to determine from the facts the condition of that property before defendant had ever placed any improvements upon it himself, and what would be the rental value of that property in that condition,

[30] Davenport v. Mitchell, 155 P. 869, 56 Okl. 175.

[31] Hitchens v. Ellingsworth, 94 A. 903, 5 Boyce, 497.

[32] Reynolds v. Clowdus, 76 S. W. 277, 4 Ind. T. 679.

eliminating and not to include the improvements he had put on it, but the property without these improvements.[33]

§ 2194(2). Oklahoma

You are instructed that, if you find the issues in favor of the plaintiff, that is all you need say. But if, on the other hand, you believe by a fair preponderance of the evidence that the deeds purporting to convey title from defendant and cross-petitioner are in fact forgeries and were never executed by her, then you should find for the cross-petitioner; and, in case you find for the cross-petitioner, then it would be your duty to fix her damages at such sum as you believe is a fair rental value of the property as shown by a fair preponderance of the evidence, during the time the plaintiff has kept her out of possession.[34]

§ 2195. Recovery of mesne profits of mineral lands

The jury are instructed that the value of the ore in place you will ascertain by estimating the cost of mining, cleansing, and putting the ore into market, and then deducting this cost from the value of the ore in the market—the difference will be the value in place.[35]

The jury are instructed that the royalty named in the leases given in evidence in this case is not the absolute measure of the value of the ore in place on the lands of the plaintiffs, but is a measure of such value only in connection with the location of the lands and their natural surroundings.[36]

The plaintiffs are entitled to recover from the defendants in this case, as damages, the value in place of all the ore, timber, etc., taken from the ——— tract by the defendants, or by their lessees, with interest from the time it was taken; and the defendants are entitled to credit, against that value of the ore, only for such improvements put upon plaintiffs' land by defendants or by their lessees, as the jury believe are of a lasting and permanent character, adding a permanent increase of value to the land, and being of lasting or permanent benefit to it. Improvements are of a lasting and permanent character, when they are annexed to and made part of the freehold, and give an increase of value to it. The increase is a permanent increase, if the value of the land has been increased by the permanent improvements made or put upon it; and if such improvements have increased the value of the land, they are a lasting and permanent benefit to it.[37]

[33] Norris v. Richardson, 105 S. E. 493.

[34] Davenport v. Mitchell, 155 P. 869, 56 Okl. 175. This case was tried on the cross-petition of defendant as an action to quiet title and in ejectment.

[35] Ege v. Kille, 84 Pa. 333.

[36] Ege v. Kille, 84 Pa. 333.

[37] Ege v. Kille, 84 Pa. 333.

The jury are instructed that the engines, boilers, washers, planes, drums, pumps, ropes, cars, and all other matters necessary to convert unimproved land into ore banks opened and ready to operate as such, are permanent improvements to the property, whether they will last a limited number of years or not, provided they be necessary parts of the machinery and fixtures erected and put upon the land for that purpose, and provided, also, such machinery and fixtures were annexed to the freehold and made part of it, and give an increased value to the land. And if, therefore, you find these things to be permanent improvements giving increased value to the land, the defendants will be entitled to the difference in value between the property as it was without them and as it was when the plaintiffs were put in possession of it on ——, with them in its distinctive character as ore banks ready to operate, as a defense to the value of the ore in place and before it was taken from the ground, just to the extent, however, that such difference of value was produced by such improvements made and put upon the premises by the defendants and their lessees.[38]

The jury are instructed that, whether fast or loose, all the machinery of an ore bank, which is necessary to constitute it such, and without which it would not be an ore bank, equipped and ready for use as such, are a part of the freehold, and the recovery of the land by the plaintiffs in the action of ejectment gave to them the ore banks on it, with all the machinery, whether fast or loose, and necessary to constitute them such, equipped and ready for use.[39]

The jury are instructed that, if the jury believe that the machinery, buildings, and conveniences for mining ore, put by the lessees of the defendants upon the land of the plaintiffs, were for temporary use only, and not structures of a lasting and permanent character, then they are not such improvements as entitle defendants to credit against the plaintiffs' demand in this action. And we also instruct you that they are structures of a lasting and permanent character, if they are annexed to and made part of the freehold and give an increased value to it.[40]

§ 2196. Right of defeated defendant to compensation for improvements

You are instructed that, while the ejectment case was in controversy, when it commenced, or about that time, a receiver was appointed, and I need not go into the history of it further. A receiver was appointed to take charge of the oil, or the proceeds of the oil, and he did receive all the proceeds of the oil from both the

[38] Ege v. Kille, 84 Pa. 333.
[39] Ege v. Kille, 84 Pa. 333.
[40] Ege v. Kille, 84 Pa. 333.

wells which were on the contested territory—both No. 6 and No. 7. He held and had that money. It was the entire proceeds of the property thereof,—the profits that were obtained from it. He has paid over to ——— all the profits that were obtained from No. 6, and with that you have nothing at all to do. As to well No. 7, the receiver has retained, by order of this court, in his hands, $———, which money is awaiting the determination of this case. Your inquiry now is whether the plaintiffs here are entitled to—shall receive—that money, or a part of it, and, if a part of it, then how much of it, shall be paid over or is due to the defendants here because of the expense put by them upon this territory in putting down well No. 7. The law is—the presumption is—gentlemen, that this money belongs to ——— and ———, the landholders. That has been settled. They had a right, and have a right, to the proceeds of that land, unless there be some reasons shown by the defendants here why they (the defendants) should receive a part of it. That throws the burden of proof upon the defendants to make out their case; and it is really treated here, and has been tried, as though they were, in point of fact, the plaintiffs. Where an individual goes upon the land of another, and makes improvements—even valuable ones, or whether they be valuable or not valuable—he has no right to receive any compensation for the improvements he makes, unless he makes it under an honest belief that he is the owner of it, or unless he makes it with the consent of the owner. There is no pretense to consent here. There is no dispute but that well No. 7 was put down by the defendants ———, and there is no dispute here but that it was a valuable—and is, as the land is now, a valuable—improvement. If the defendants are entitled to receive any of the money that is now in court for that improvement, then they are entitled to receive so much of it as they expended, if it was worth that much; if the property was increased in value to that amount—and about that there is really no dispute that it was—that is, that it produced a considerable amount of oil here, and really was valuable, and is valuable, to the property. So that that, gentlemen, eliminates out of this case every inquiry that you have to make, except one, and that is the good faith—if you please to call it that now—of these defendants in putting down that well. As I have said, if they went there knowing it was the property of another, or having good reason to know that, and shutting their eyes to the facts—arbitrarily went on there, and expended the money, with the idea: "We will get it back, if we can't hold the property. We will hold the property if we can, but, if we cannot, we will then get our money back"—if

that be the condition of things, then they are entitled to nothing. The law will not encourage a man to trespass upon the land of his neighbour in any such a way. Unless the jury are convinced, from the evidence, that he had an honest conviction—and when I say he, I mean the defendants here—that this property was theirs, and had good reason to believe it, then they would not be entitled to anything in this case.[41]

[41] Appeal of Phillips, 18 A. 998, 130 Pa. 572.

CHAPTER CXIX

ELECTIONS

§ 2197. Validity of registration.
2198. Method of arriving at verdict in contested election case.
2199. Criminal liability for false registration.
2200. Prosecution for violating corrupt practices act.
2201. Prosecution for destroying, mutilating, and defacing ballots cast at primary election.

§ 2197. Validity of registration

The jury are instructed that the county registrars have no authority to meet on the day of the election in ——— and register voters, and a certificate issued by them on that day to a person who had not previously registered in the county would not authorize such person or persons to vote in the election held in ——— on ———, the day of issuing the certificate.[1]

§ 2198. Method of arriving at verdict in contested election case

The jury are instructed that, when they are making up their verdict, and are considering who were illegal voters in the election, the jury shall take up the name of each person whose qualifications were in issue, and decide upon his right to vote separately until all were passed upon, and for whom each of those decided to be illegal voted, and when they have thus decided as to the legality of all the voters contested by the relator and the respondent they will take from the total vote counted for the relator all illegal votes found to have been counted for him, and from the total vote counted for the respondent all the illegal votes found to have counted for him, and their verdict shall declare the total number of legal votes found to have been cast for each, the relator and the respondent, and if the total legal vote cast for the relator exceeded the total legal vote found to have been cast for the respondent in said election they shall declare the relator the legally elected mayor of the town of ———, but if the total legal vote found to have been cast for the respondent exceeded the total legal vote found to have been cast for the relator they shall declare the respondent the duly elected mayor of the town of ———.[2]

§ 2199. Criminal liability for false registration

You are instructed that, if you believe and find from all the evidence in this case that on ———, a general registration of electors and voters was held in the city of ——— and state of ———,

[1] Ham v. State ex rel. Buck, 47 So. 126, 156 Ala. 645.

[2] Ham v. State ex rel. Buck, 47 So. 126, 156 Ala. 645.

and in every election precinct of said city, by the duly appointed and acting judges, clerks and officers of election and registration; that the ——— election precinct of the ——— ward of said city of ——— was then and there one of the election precincts of said city of ———; and if you further find from all the evidence that on said ——— day of ———, and while said registration of electors and voters was in progress and being held (if you find that said registration was held as aforesaid), that one E. did appear at the place of registration at No. ——— ——— street in said city in said ——— election precinct of the ——— ward of said city of ——— before the duly appointed and acting judges, clerks and officers of registration of said election precinct, and willfully, knowingly, fraudulently and falsely stated to said judges, clerks and officers of registration for said election precinct that his name was E., and that his residence was No. ——— ——— street in said city of ———, and that he was a resident of said precinct and had a right to register and vote in said precinct, and willfully, knowingly, fraudulently and falsely requested said judges, clerks and officers of registration of said election precinct to register him, the said E., on the books of registration of said election precinct and to enter the residence of him, the said E., as No. ——— ——— street in said election precinct, and as a resident and qualified voter and elector of said election precinct entitled to register and vote in said election precinct as E., and residing at No. ——— ——— street in said election precinct, and if you further find that the said judges, clerks and officers of registration did then and there enter the name of E. upon the official registers and books of registration of said election precinct as residing at No. ——— ——— street in said election precinct as a registered elector and voter of said precinct, and that the said E. then and there willfully, knowingly, fraudulently and falsely signed the said official registers and books of registration by writing therein the name of "E.," and if you further find from the evidence that the said E. was not then and there residing at ——— ——— street in said election precinct, and that the said E. at the time he did the acts set out in this instruction (if you find that he did the acts as set out in this instruction) knew that he did not reside at No. ——— ——— street in said election precinct, and knew that he did not reside in said election precinct, but resided at ——— ——— street in another precinct and ward in said city of ———, then the said E. was guilty of a felony as charged in the indictment, to wit, the felony of fraudulently, unlawfully, intentionally and falsely registering in an election precinct not having a lawful right to register therein, and willfully and knowingly doing an unlawful act to secure registration for himself, and if you further find and believe from all the evidence in this case that the de-

fendant ———, acting alone or with other persons with a common intent and purpose, at the city of ——— and state of ———, on or about the said ——— day of ———, and within ——— years next before the finding of the indictment herein, and before the commission of the said felony by the said E. of fraudulently, unlawfully, intentionally and falsely registering as hereinbefore defined, if said E. did commit such felony, did unlawfully, intentionally and fraudulently procure, aid, counsel, solicit or advise said E. to do and commit the said felony aforesaid of fraudulently, unlawfully, intentionally and falsely registering as defined herein, you will find him, the defendant ———, guilty as charged in the indictment, and assess his punishment at imprisonment in the penitentiary for a period of not less than ——— nor more than ——— years. And unless you so find the facts to be you will acquit the defendant. The terms "knowingly" and "willfully," as used in these instructions, mean intentionally; that is, not accidentally.[3]

§ 2200. Prosecution for violating Corrupt Practices Act

The court instructs the jury that, if the defendant, while a candidate for the office of mayor of the city of ———, at the election to be held ———, for the purpose of influencing or obtaining the political support, aid, or vote of ———, ——— and others, did either directly or indirectly promise the same ——— and ——— that he would use his influence in behalf of and would support and vote for ——— as a candidate for city attorney, a position to be filled by the mayor and commissioners of said city of ———, and in which election or selection of said city attorney the said defendant, if elected, would be entitled to vote, and that said promise was given either directly or indirectly for the purpose hereinabove stated, then you should find the defendant guilty as charged; otherwise, you should acquit him.[4]

The court instructs the jury that, before you can find the defendant guilty, you must find from the evidence beyond a reasonable doubt that the defendant did promise, directly or indirectly, to give ——— an office, or position, or employment, or benefit, or anything of value for the purpose of influencing or obtaining the political support, aid, or vote of ——— and ———, or either of them, at the election for mayor to be held in the city of ———.[5]

[3] State v. Robinson, 139 S. W. 140, 236 Mo. 712.

[4] Wright v. State, 202 S. W. 236, 133 Ark. 76.

[5] Wright v. State, 202 S. W. 236, 133 Ark. 76.

§ 2201. Prosecution for destroying, mutilating, and defacing ballots cast at primary election

You are instructed that if, at the time of the counting of the votes at the close of the polls, the inspector willfully read the name of a candidate other than the one voted for, that constituted a violation of said act by him. And if you find from the evidence that there was such false reading of any of the ballots cast at said primary election, and that tally lists and certificates were made in accordance with such false reading, and that subsequently before the box was delivered to the sheriff, the ballots were changed, it will be for you to determine who it was that made such a change in the ballots so cast. If you find that the defendant, subsequently to the count of the ballots at said primary election, took ballots out of the ballot box, or if you find that he aided, abetted, or procured ballots to be taken out of the box, and that he either himself placed or caused other ballots not voted to be placed therein, or if he willfully and fraudulently did or procured another to do any of the acts complained of, for the purpose of making the ballots in the box correspond with the count as shown by the tally lists and certificates, in order to change the result of the said primary election, it was a gross violation of the law, and it would be your duty to find a verdict of guilty.[6]

[6] State v. Tyre (Del.) 67 A. 199, 6 Pennewill, 343.

CHAPTER CXX

ELECTRICITY

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§ 2202. Duty to avoid injury from electrical plants or appliances

§ 2202(1). United States.

You are instructed that the defendant in this cause was not an insurer of the safety of the persons using its electric current, including the deceased, and if you believe from the evidence that it used the proper degree of care, as given you elsewhere in the charge of the court, then, although you believe from the evidence that the deceased came to his death by reason of the passage through his body of a heavy current of electricity, but that the cause thereof was not attributable to negligence of the defendant, but by reason of causes over which it had no control, or which it had not had sufficient time to discover in the exercise of reasonable diligence, then you will return a verdict in favor of the defendant.[1]

§ 2202(2). Georgia

I charge you, gentlemen, that if you find from the evidence that the defendant, the ——— Telegraph Company, maintained at the place alleged in this declaration wires and poles along which was conducted an electric current, and if you further believe from the evidence that such wires were capable of transmitting a current sufficient to endanger or destroy human life, then I charge you

[1] City Light & Water Co. v. James (C. C. A. Tex.) 261 F. 596.

that a duty existed upon the part of the defendant telegraph company towards the public and towards the deceased.[2]

§ 2203. Degree of care required to protect from injuries by electricity

§ 2203(1). Arkansas

You are instructed that companies supplying electric current are bound to use reasonable care in the construction and maintenance of their lines. This care varies with the dangers that will result from negligence on the part of the company. Reasonable care is such care as a reasonable man would use under ordinary circumstances, and in determining whether such care has been exercised, the jury will take into consideration the location of the lines, whether in thickly or sparsely settled communities, the harmless or dangerous character of the current carried by such lines, and their remoteness or proximity to people who may pass by, and all other circumstances in evidence.[3]

§ 2203(2). California

I instruct you that while the law required of the defendant that it should use ordinary care to see that an unnecessarily dangerous amount of electricity, with respect to causing fires, was not permitted to enter upon the wires in said building of plaintiff, yet this does not make of the defendant an insurer. It only required of the defendant that it should exercise ordinary care; that is, such a degree of care as an ordinarily prudent man under like circumstances would exercise, and if you find from the evidence that the defendant did exercise such ordinary and reasonable care to see that a dangerous and unnecessary amount of electricity, with respect to causing fires, did not enter upon the said wires in the said tankhouse, then, notwithstanding the fact that a fire did result from such electricity, if you should so find, then it will be your duty to find a verdict for defendant.[4]

You are instructed that, if you find that the said fire that destroyed said tankhouse was actually caused by reason of the wires, appliances, and apparatus of defendant being in such condition as to allow a dangerous and unsafe amount or voltage of electricity into the wires in said tankhouse, still the defendant is not liable in damages to plaintiff, and you cannot find a verdict against defendant, unless you also find that the defendant failed to use due and ordinary care to prevent such condition.[5]

[2] Western Union Telegraph Co. v. Harris, 64 S. E. 1123, 6 Ga. App. 260.

[3] Commonwealth Public Service Co. v. Lindsay, 214 S. W. 9, 139 Ark. 283.

[4] Silva v. Northern California Power Co., 162 P. 412, 32 Cal. App. 139.

[5] Silva v. Northern California Power Co., 162 P. 412, 32 Cal. App. 139.

The court instructs the jury that the terms "due care" and "ordinary diligence" as used in the law of negligence are relative terms, and mean a degree of care commensurate with the danger involved. Wires charged with an electric current may be harmless, or they may be in the highest degree dangerous. The difference in this respect may not be apparent to ordinary observation, and the public, therefore, while presumed to know that danger may be present, are not bound to know its degree in any particular case. The company or persons, however, using such a dangerous agent are bound to know the extent of the danger, and to use the highest degree of care practicable to avoid injury to any one who may be lawfully in proximity to its wires, and liable to come accidentally in contact therewith. Where one places or maintains a wire charged with a highly dangerous current, or a wire likely to become charged with a highly dangerous current, over a public street, the law requires that he must use the highest or utmost degree of care in the construction, maintenance, and operation of said wire, and he must use the best materials and most approved methods of construction to prevent injury to any one who may lawfully or accidentally come in contact therewith and also use due care and circumspection over such wire to prevent it from sagging down within reach of pedestrians lawfully using a public street or sidewalk space adjacent thereto. Any failure to observe these requirements renders the person so failing liable for all damages that may thereby be caused to others who, without fault of their own, come in contact with such wire or wires.[6]

§ 2203(3). Colorado

You are instructed that the defendant was bound to exercise the highest skill, most consummate care and caution, and the utmost diligence and foresight in the maintenance and timely inspection of its electrical plant which was attainable consistent with the practical conduct of its business, according to the best-known methods of the said business at and prior to the time of the accident in question, to protect all persons from injury.[7]

§ 2203(4). Florida

You are instructed that such a company, while not an insurer against all possible accidents to those whose right or duty it is to use its electricity, is yet under obligation to do all that human care, vigilance, and foresight can reasonably do, consistent with the practical operation of its plant to protect those who use its electricity.[8]

[6] Tackett v. Henderson Bros. Co., 108 P. 151, 12 Cal. App. 658.

[7] Arkansas Valley Ry., Light & Power Co. v. Ballinger. 178 P. 566, 65 Colo. 548.

[8] Escambia County Electric Light

§ 2203(5). Kansas

As to the care that is necessary to be used by the defendant in the suit, I will say to you that this being a dangerous machine for the purpose of producing and distributing electricity in the city, the law holds the defendant to the highest degree of care known for the purpose of preventing injuries arising from the use of that instrument; the law being that the care that a person must take in the use of an appliance that may be dangerous must increase in proportion to the danger in the use of the appliance, so that, if this is a highly dangerous instrument, then the highest care would be necessary in providing against injuries from its use.[9]

§ 2203(6). Kentucky

You are instructed that, unless the jury believe from the evidence that the defendant failed to exercise the utmost care and skill in the construction and maintenance of said wires, or in properly insulating and supporting said wires, or inspecting or keeping in repair the same, or in permitting said wires to become in unsafe proximity to each other, or to become so defective as to cause them to break and fall upon said street, as defined in instruction No. ———, and unless the said decedent was shocked and killed by reason of such failure on the part of the defendant, then the jury should find for the defendant.[10]

You are instructed that by utmost care and skill, as used in these instructions, is meant the highest degree of care and skill known, which may be used under the same or similar circumstances. By ordinary care, as used in these instructions, is meant such care as an ordinarily prudent person would exercise under like or similar circumstances.[11]

§ 2203(7). Oklahoma

You are instructed that the defendant is not an insurer and is not required to keep its property in such shape that in no event can parties using the public streets be injured; but it is only required to exercise the highest degree of care known to man and to the science, in order to prevent such injury, and, when such care is exercised, it will not be liable for unavoidable accidents or injuries.[12]

§ 2203(8). Utah

You are instructed that the defendant railway company was not an insurer of the safety of said deceased, and that the duty

& Power Co. v. Sutherland, 55 So. 83, 61 Fla. 167.

[9] Leavenworth Coal Co. v. Ratchford, 48 P. 927, 5 Kan. App. 150.

[10] Lexington Utilities Co. v. Parker's Adm'x, 178 S. W. 1173, 166 Ky. 81.

[11] Lexington Utilities Co. v. Parker's Adm'x, 178 S. W. 1173, 166 Ky. 81.

[12] Shawnee Light & Power Co. v. Sears, 95 P. 449, 21 Okl. 13.

of ordinary care devolves upon all persons, and at all times, and by such care is meant such care as an ordinarily prudent and careful man would exercise under like circumstances and conditions.[13]

§ 2204. Care required in construction and maintenance of poles and wires

§ 2204(1). South Carolina

I charge you, as matter of law, that a company of this kind, using a thoroughfare or public highway for the purpose of its business, is charged in law with great care, not only in erection of the wires, but in maintaining and keeping them in repair. They must be so kept and conducted that a citizen pursuing the ordinary vocations of life will not come in contact with them. It is the business of the company to so erect them as not to interfere with the safety of the citizens of the community while pursuing their vocations in the ordinary walks of life. The question for you is, were these wires erected so as to anticipate any ordinary occurrence in the weather? Was it the act of God, or was it the careless or loose manner in which the wires were erected, which caused this wire to break? If it were the act of God—that is, such an act that a business man of ordinary forethought and prudence could not anticipate—then the company would not be liable under those circumstances. But, on the other hand, the company is charged with so placing their wires, and so keeping them in repair, as to withstand the ordinary weather—rain, heat, cold, and wind. It is alleged on the part of the company that that wire was broken in consequence of a severe windstorm. Was it an ordinary windy day, such as is liable to occur at that time of the year, or was it one that could not be anticipated? The law does not require impossibilities. If a cyclone, that could not be anticipated or reasonably foreseen, was the cause of that wire falling, and the company was not negligent in allowing it to remain there for an unreasonable length of time, then, under these circumstances, it would not be liable. But if the accident was due to the wires being improperly erected, or improperly maintained in repair, or, having been properly erected, were broken, and allowed to remain on the streets an unusually long time, then, if the injury to the plaintiff occurred under those circumstances, the company would be liable to compensate him in damages. These are the general observations that I desire to call your attention to before passing upon the points of law that I have been requested to charge you.[14]

[13] Hogge v. Salt Lake & O. Ry. Co., 153 P. 585, 47 Utah, 266.

[14] Mitchell v. Charleston Light & Power Co., 22 S. E. 767, 45 S. C. 146, 31 L. R. A. 577.

§ 2204(2). Texas

You are instructed that it is the duty of an electric light company to exercise ordinary care and diligence in constructing and maintaining its poles and wires, and, if it fails to exercise such care and diligence in constructing and maintaining the same as a person of ordinary prudence would do under the same or similar circumstances, and injury thereby results, the same would be negligence and it would be liable.[15]

§ 2205. Care required in fastening wires to prevent falling

The jury are instructed that, if the jury, from the evidence, believe that the defendant could, by the exercise of due care and caution in and about its business of lighting the streets, stores, and buildings aforesaid, have prevented one of its wires from falling upon the premises and upon the shed or barn of the plaintiff, then it was its duty to do so; and if the same could have been prevented by the exercise of due care and caution, then it was the duty of the defendant to have exercised such care and caution; and if you find that such care and caution was not exercised, and that one of the wires of the defendant, because thereof, did fall into or upon the barn or shed of the plaintiff, then the defendant would in any case be guilty of negligence.[16]

§ 2206. Injuries caused by breaking, and collapse into street, of electric wires

§ 2206(1). Kentucky

The court instructs the jury that it was the duty of the defendant to use and exercise the utmost care and skill in the construction, management, and maintenance of its wires, which carried a current of electricity at the place where the decedent was killed, and it was also the duty of said company to exercise and use the utmost care and skill to properly protect and support said wires, and to inspect and keep the same in repair, and to exercise and use the utmost care and skill not to permit said wires to become or remain in unsafe proximity with each other, or to become so defective as to cause them to break or fall upon the street over which said wires were suspended, or to permit them to remain charged with a current of electricity while fallen upon or near said street or sidewalk; and if the jury believe from the evidence that the defendant failed to observe said duties, or any of them, and that because of such failure on the part of said company, if any, the said wires were broken and fell upon or near the street where the said decedent was, and that because of said failure, if any, the said wires came in contact with and shocked and killed

[15] Temple Electric Light Co. v. Halliburton (Civ. App.) 136 S. W. 584.

[16] Leavenworth Coal Co. v. Ratchford, 48 P. 927, 5 Kan. App. 150.

the decedent while in or upon said street or sidewalk, then the jury shall find for the plaintiff, unless they find for the defendant under instruction No. ———.[17]

§ 2206(2). Missouri

You are instructed that, if the jury believe from the evidence that on the ——— day of ———, the defendant company owned, and was then and there, and for some time prior thereto had been, operating a street railroad over, along and upon ——— street, a public thoroughfare in the city of ———; that the motive power employed by defendant in operating its railroad and conducting its said business was electricity, and that in conducting said business, and as a part of the equipment of said railroad, defendant had erected and strung upon poles along said street a trolley wire charged with electricity; and if you further find from the evidence that on said day, at a point on ——— street near the southwest corner of the public square, the defendant negligently and carelessly permitted the trolley wire mentioned in evidence to become old and worn, to the extent of impairing or weakening the tensile strength thereof, so that said trolley wire was insufficient or inadequate for the use mentioned in evidence; and if the jury further find from the evidence that on the morning of ———, by reason of the worn, weakened, defective and insufficient condition of said trolley wire, if you find it was worn, weakened, defective and insufficient, while plaintiff was standing on ——— street at or near the southwest corner of the public square in said city, for the purpose of taking defendant's street car to his place of business, said trolley wire so charged with electricity, if you find it was charged with electricity, was negligently and carelessly permitted by the defendant to suddenly break in two at a point on ——— street in said city near the southwest corner of the public square where said wire passes under the switch bar, and fall to the street, breaking and carrying with it in its fall the guy wire also charged with electricity, and if you further believe from the evidence that said wires or either of them came in contact with his face with such force and violence as to cut a gash in his upper lip, burning his face, and an electric current was thereby communicated to his head, face or body, and that by reason thereof plaintiff was thrown upon the street and injured; and if you further believe from the evidence that defendant knew, or by the exercise of the utmost care of an ordinarily prudent person engaged in the same or similar business could have known, the worn, defective, dangerous and insufficient condition of the trolley wire,

[17] Lexington Utilities Co. v. Parker's Adm'x, 178 S. W. 1173, 166 Ky. 81.

if it was worn, defective and insufficient, a sufficient length of time before the injuries complained of to have remedied the same and averted the accident and failed to do so; and if you further believe from the evidence that the plaintiff in standing or being upon the street at the time and place in question was exercising ordinary care for his own safety in so doing under the circumstances shown by the evidence—then plaintiff is entitled to recover.[18]

§ 2207. Duty to anticipate and guard against conditions caused by storm

You are instructed that, although the jury may believe from the evidence that the sleet storm mentioned in evidence was severe and unusual, yet if it was such a sleet storm as common experience teaches people in this vicinity to expect, then it was the duty of the defendant company to have expected the same, and to have made and used precaution to guard against its effects.[19]

The court instructs the jury that if they believe and find from the evidence that on the morning of the accident in controversy there had been an extraordinary and unusual sleet storm, and that defendant's wires were covered with a heavy coat of sleet and that the trolley pole, without fault or negligence on the part of the defendant, jumped from the trolley wire and caught defendant's wires, and broke said wires apart so as to cause them to fall and the guy wire to fly around and hit and strike the plaintiff, and that the trolley poles under the best regulation and care will jump from the trolley and cannot be prevented from so doing, and that the cause of the breaking of defendant's wires was a heavy sleet on said wires caused by such extraordinary and unusual sleet storm, and said trolley pole jumping from the trolley wire and catching on said wires, then and in that event, defendant is not liable in this case, and your verdict will be for the defendant.[20]

§ 2208. Duty to repair fallen wires

The court charges the jury that defendant was entitled to a reasonable time after the fall of the wire to repair it, or to remove it out of the way of persons using the street; and, if the jury find that the injury to plaintiffs' intestate occurred before the expiration of such a reasonable time, then the plaintiffs are not entitled to recover anything in this action.[21]

[18] Booker v. Southwest Missouri R. Co., 128 S. W. 1012, 144 Mo. App. 273.

[19] Booker v. Southwest Missouri Co., 128 S. W. 1012, 144 Mo. App. 273.

[20] Booker v. Southwest Missouri R. Co., 128 S. W. 1012, 144 Mo. App. 273.

[21] Birmingham Ry., Light & Power Co. v. Jackson, 63 So. 782, 9 Ala. App. 588.

§ 2209. Degree of care required as to overhead trolley system

You are instructed that it was the duty of the defendant company to exercise the highest degree of care usually exercised by prudent persons engaged in the same or similar business to see that the streets at the point where the accident occurred, and along which the defendant maintained its overhead trolley wires, were at all times maintained in the same condition as to safety from danger of electricity as they were before its overhead use thereof was begun, so that persons passing along said street, in the exercise of a lawful occupation, in a place where they had a right to be, are not injured thereby.[22]

§ 2210. Duty to regulate and keep under control amount of electricity furnished to customers

§ 2210(1). California

You are instructed that, if the jury believe from the evidence that at the time and place claimed by plaintiff and mentioned in the proof, the wires, appliances, and apparatus referred to in this action extended from defendant's power line to the place where said wires entered the tankhouse of plaintiff, and that said wires were used by defendant to supply plaintiff with electricity, and that at said time and place mentioned in the proof they were under the supervision and control of defendant, then it was the duty of the defendant, through and by its employés in charge of and in control of said wires, appliances, and apparatus, to use and exercise ordinary care to operate and control same, and to reasonably control and regulate a reasonably safe amount of electricity to pass through said wires, apparatus, and appliances, and to do so in a reasonably safe manner for the reasonable protection of plaintiff's building and property from fire.[23]

You are instructed that, if defendant used ordinary care, and was not guilty of carelessness or negligence, and did not carelessly or negligently allow the wires, appliances, or apparatus, as the same are described in the amended complaint, to become in such condition as to admit a dangerous amount of voltage of electricity to said wires in said tankhouse, and thereby to render them unsafe or dangerous with respect to causing fire to said tankhouse, you cannot find for plaintiff and against defendant.[24]

§ 2210(2). Kentucky

The court instructs the jury that it was the duty of the defendant to exercise the utmost care and skill to install and construct, keep

[22] Booker v. Southwest Missouri R. Co., 128 S. W. 1012, 144 Mo. App. 273.

[23] Silva v. Northern California Power Co., 162 P. 412, 32 Cal. App. 139.

[24] Silva v. Northern California Power Co., 162 P. 412, 32 Cal. App. 139.

and maintain, inspect and repair, control and operate, its lighting plant, machinery, wires, transformers, and equipment free from danger to those persons, including the decedent, who had the right to use its electrical current for lighting purposes, and to make same free from any unusual, unnecessary, and dangerous current of electricity into the building used by the deceased as a drug store, at the time of his death, and that if the jury believed from the evidence that defendant failed to so construct, maintain, inspect, repair, operate, and control its electrical equipment, wires, transformers, or current of electricity, and by reason of its failure to do any of these things the deceased received into his body an unusual and unnecessary current of electricity, and as a direct and proximate result his death occurred, the jury should find for plaintiff.[25]

§ 2211. Duty to guard against diversion of electric current

You are instructed that if the jury believe from the evidence that on the evening of ———, the defendant caused to be transmitted over an electric arc light circuit owned and operated by it a current of electricity of such character that it was liable to be dangerous to human life, if diverted in whole or in part from the wire of such circuit; and if you further believe that the wire of such circuit at the time such current was so transmitted, if it was so transmitted, was in such condition that such circuit was liable to be diverted in whole or in part from the wire of such circuit; and if you further believe that such current was so liable to be diverted, if so liable, because the wire of such circuit was electrically connected with the ground at that time at two or more places so as to divert a sufficient volume of electricity to kill a man; and if you further believe from the evidence that, at the time the foregoing conditions existed, if they did exist, the defendant knew, or by the exercise of reasonable care and prudence could or should have known, that such condition existed, or that there was a probability of their existence; and if you further believe that it was a want of reasonable care and prudence on the part of the defendant to so transmit such current of electricity under the circumstances aforesaid as claimed by the plaintiff to have existed, and you find that each and every one of such circumstances did exist; and if you further find that by reason of such a diversion of the whole or a part of such a current under such circumstances, if so diverted under such circumstances, the whole or a part of such diverted current passed through and into the body of ——— and killed him, without contributory negligence on his part, and that the diversion of such a current so trans-

[25] Smith's Adm'x v. Middesboro Electric Co., 174 S. W. 773, 164 Ky. 46, Ann. Cas. 1917A, 1164.

mitted was the proximate cause of the death of ———, and that such death was due to the want of such ordinary care and prudence on the part of the defendant or its employés, under all the circumstances found by you to exist; and you further believe that the plaintiff on said day was the wife of said ——— and suffered pecuniary loss from his death, your verdict should be for the plaintiff.[26]

§ 2212. Duty to insulate or protect wires

§ 2212(1). Kentucky

The jury are instructed that it was the duty of the defendant to use the highest degree of care and skill known, which may be used under the same or similar circumstances, to so insulate or protect its wires as to make them free from danger to those who may be brought in contact with them; and if they believe from the evidence that the said company failed to so insulate or protect the wire with which the plaintiff's decedent came in contact, and that his injuries were caused as the direct result of such failure, then the law is for the plaintiff, and the jury should find for the plaintiff such a sum in damages as will be a fair and reasonable compensation for the mental and physical suffering of said decedent, if any, caused by said injury, not to exceed $———, unless they further believe from the evidence that in receiving his injury plaintiff was himself negligent, and that but for his own contributory negligence, if any, he would not have been injured.[27]

The court instructs the jury that it is the duty of the defendant to so insulate or protect its wires as to make them free from danger to those who may be brought in contact with them; and if they shall believe from the evidence that the said company failed to so insulate or protect the wire with which ——— came in contact, and that his injuries were caused by the reason of such failure, then the law is for the plaintiff, and they shall so find, unless they shall further believe from the evidence that the said ———, by his own negligence, contributed to cause his injuries, and that he would not have been injured but for his contributory negligence, if any there was.[28]

You are instructed that, if you believe from the evidence that plaintiff was injured by the wire of the defendant at a point where he had a right to go for work, business, or pleasure, then the injury to the plaintiff is conclusive proof of the defective insulation of the said wire, and of negligence of the defendant.[29]

[26] Harrison v. Kansas City Electric Light Co., 93 S. W. 951, 195 Mo. 606, 7 L. R. A. (N. S.) 293.

[27] Bowling Green Gaslight Co. v. Dean's Ex'x, 134 S. W. 1115, 142 Ky. 678.

[28] McLaughlin v. Louisville Electric Light Co., 37 S. W. 851, 100 Ky. 173, 18 Ky. Law Rep. 693, 34 L. R. A. 812.

[29] McLaughlin v. Louisville Electric Light Co., 37 S. W. 851, 100 Ky. 173, 18 Ky. Law Rep. 693, 34 L. R. A. 812.

§ 2212(2). Maryland

The court instructs the jury that, if they find from the evidence that the defendant company owned and maintained a certain insulated wire carrying electrical current of high voltage, which said wire was fastened to, and supported, by, a cross-arm of a certain pole located in the bed of ——— avenue, north of ——— street, in the city of ———; and if the jury further find that the said pole was jointly used by the defendant and by the ——— Telegraph Company; and if the jury further find that ———, the husband of the equitable plaintiff, was employed by the said ——— Telegraph Company as a telegraph lineman, and that in the course of his duties in such employment it became necessary for him to ascend the said telegraph pole, and to come into close proximity or contact with the said wire owned by the defendant; and if the jury further find that the insulation on the said wire, at the time of the happening of the events which are the subject of this suit, was defective, so as to make this said wire a source of danger to persons coming into close proximity or contact with the same, and that the defendant knew, or by the exercise of due care ought to have known, of such defect; and if the jury further find that, while the said ——— was so engaged in his duties, and exercising such reasonable care as might be expected of a reasonably prudent man under the circumstances, he came into contact with said wire, and received the injuries from which he died—then the verdict of the jury should be for the plaintiff.[30]

The court instructs the jury that, if they find from the evidence that the defendant company owned and maintained a certain insulated wire carrying electrical current of high voltage, which said wire was fastened to, and supported by, a cross-arm of a certain pole located in the bed of ——— avenue, north of ——— street, in the city of ———; and if the jury further find that the said pole was jointly used by the defendant and by the ——— Telegraph Company; and if the jury further find that ———, the husband of the equitable plaintiff, was employed by the said ——— Telegraph Company as a telegraph lineman, and that in the course of his duties in such employment it became necessary for him to ascend the said telegraph pole and come into close proximity or contact with the said wire owned by the defendant; and if the jury further find that the said defendant had, prior to the time of the happening of the events which are the subject of this suit, caused certain cuts to be made in the insulation of said wire at or near the point where the same was fastened to said cross-arm of said pole for the purpose of making tests, or for some other purpose, and

[30] Consolidated Gas, Electric Light & Power Co. v. State, to Use of Smith, 72 A. 651, 109 Md. 186.

that said defendant had negligently allowed the said cut places in said insulation to remain bare and uncovered, so as to make the said wire a source of danger to persons coming into close proximity or contact with said bare and uncovered portions thereof; and if the jury further find that, while the said ——— was so engaged in his duties, and exercising such reasonable care as might be expected of a reasonably prudent man under the circumstances, he came into contact with said bare and uncovered portions of said wire, and received the injuries from which he died—then the verdict of the jury should be for the plaintiff.[31]

The court instructs the jury that, if they find from the evidence that the defendant company owned and maintained a certain insulated wire carrying electrical current of high voltage, which said wire was fastened to and supported by a cross-arm of a certain pole located in the bed of ——— avenue, north of ——— street, in the city of ———; and if the jury further find that the said pole was jointly used by the defendant and by the ——— Telegraph Company; and if the jury further find that ———, the husband of the equitable plaintiff, was employed by the said ——— Telegraph Company as a telegraph lineman, and that in the course of his duties in such employment it became necessary for him to ascend the said telegraph pole, and to come into close proximity or contact with the said wire owned by the defendant; and if the jury further find that the insulation on said wire, at the time of the happening of the events which are the subject of this suit, was defective because of the negligence of the defendant, so as to make the said wire a source of danger to persons coming into close proximity or contact with the same; and if the jury further find that, while the said ——— was so engaged in his duties, and exercising such reasonable care as might be expected of a reasonably prudent man under the circumstances, he came into contact with said wire, and received the injuries from which he died—then the verdict of the jury should be for the plaintiff.[32]

§ 2212(3). West Virginia

The court instructs the jury that it was the duty of the defendant to not only protect any portion or portions of its wires in close proximity to the north end of the balcony, mentioned in evidence, that may be exposed, by proper insulation, so that persons coming in contact therewith in the performance of their work would not be injured, but it was also the duty of the defendant, by proper in-

[31] Consolidated Gas, Electric Light & Power Co. v. State, to Use of Smith, 72 A. 651, 109 Md. 186.

[32] Consolidated Gas, Electric Light & Power Co. v. State, to Use of Smith, 72 A. 651, 109 Md. 186.

spection from time to time, to see that said insulation was kept in a proper condition.[33]

The court instructs the jury that if they believe from the evidence that one of the wires of the defendant, in close proximity to the north end of the balcony mentioned in evidence, was not properly insulated, and that ——— was attempting to release the banner on the north end of said balcony, and leaned over said balcony, and, without negligence on his part, was thereby brought in contact with said wire where it was improperly insulated, and by reason of such contact received a shock of electricity from said wire which caused his death, then the jury should find a verdict for the plaintiff.[34]

The court instructs the jury that if they believe from the evidence that ——— was attempting to release the banner on the north side of the balcony mentioned in evidence, and leaned over the balcony in such a way that he was brought in close proximity to the wire of the defendant, and that by some accident his hand came in contact with said wire, and that said wire at the point of contact was improperly insulated, and that he thereby received from said wire the shock of electricity which caused his death, and further believe that he received such shock of electricity by reason of the failure of the defendant to properly insulate its wires at the point where ——— came in contact therewith, then the jury should find a verdict for the plaintiff.[35]

§ 2213. Liability of electric light company to employees of telephone company

You are instructed, gentlemen of the jury, that an electric light company, which maintains its wires so near the wires used by a telephone company that the employés of the telephone company in the performance of their ordinary duties are liable to come in contact with such wires of the electric company, owes the employés of such telephone company the duty of so constructing or insulating its wires as to render them harmless to the touch and to use reasonable and ordinary care to so construct and insulate its wires as to prevent injury to such employés of the telephone company while engaged in the performance of their duties, and without negligence upon the part of such telephone company's employés.[36]

You are instructed, gentlemen of the jury, if you believe from the evidence in this case that the electric light company's wires were maintained so near the wires of the telephone company that em-

[33] Thomas v. Wheeling Electrical Co., 46 S. E. 217, 54 W. Va. 395.

[34] Thomas v. Wheeling Electrical Co., 46 S. E. 217, 54 W. Va. 395.

[35] Thomas v. Wheeling Electrical Co., 46 S. E. 217, 54 W. Va. 395.

[36] Duncan Electric & Ice Co. v. Chrisman, 157 P. 1031, 59 Okl. 67.

ployés of such telephone company in the performance of their ordinary duties, with reasonable and ordinary care and caution, were liable to come in contact with said wires of said electric light company, either by direct contact or by reason of connecting wires. and if you further find from the evidence in this case that the defendant light company failed to use ordinary care and caution in protecting and insulating its wires, and that by reason of such negligence on the part of the defendant company the deceased. while in the performance of his usual and ordinary duties, and without negligence or want of ordinary care and caution upon his part, was injured and killed, and if you further believe from the evidence in this case that the failure of the defendant electric company to insulate its wires or to use reasonable and ordinary care in the construction of its wires was the proximate cause of such injury and death of said deceased, then your verdict should be for the plaintiff in such sum as you may find from the evidence and from the instructions hereinafter given you.[37]

§ 2214. Precautions to be taken where necessary to maintain wire uninsulated

You are instructed that, if you find from all the evidence that the defendant ——— Railway Company knew, or in the exercise of reasonable care and diligence should have known, that it might become necessary for workmen to go upon the roof of said substation in the performance of said work, or that workmen would be apt to be called upon or go upon the roof of said substation in the performance of said work, and thereby come in such close proximity to the said high-tension wires that they would be apt to receive a dangerous current of electricity therefrom, and if you further find from all the evidence in this case that the deceased was directed by said ——— and ——— to go upon the said roof to do said work, and that the deceased did not know of the dangers in coming in contact with or in close proximity to said high-tension wires located upon the roof of said substation, and if you should further find from all of the evidence that the defendant ——— Railway Company maintained said high-tension wires uninsulated and unguarded while said work was being performed, and gave no warning to said deceased of the dangers that might arise to said deceased by coming in contact with or in close proximity to the said high-tension wires, and that the said deceased in the prosecution of said work or while going to or from his said work. while not knowing that it was dangerous to come in contact with or close proximity to the said high-tension wires, came in contact

[37] Duncan Electric & Ice Co. v. Chrisman, 157 P. 1031, 59 Okl. 67.

with, or in close proximity to, the said high-tension wires and thereby received an electric shock from the said high-tension wires, from which he died, your verdict should be for the plaintiff, unless you should further find that the said deceased knew, or by the exercise of ordinary care should have known, of the danger which might arise from coming in contact with or in close proximity to said high-tension wires, or unless you should further find that the said deceased was guilty of contributory negligence.[38]

§ 2215. Duty to guard against wires becoming charged by contact with other electrical systems

The court instructs the jury that if they believe from the evidence that the defendant company, or its agents or employés in charge, knew, or by the exercise of care commensurate with the danger might have known, that one of its wires strung over and along ——— street, between ——— and ——— streets, had become broken and detached from its proper position on its telephone poles, and had come in contact with, or attached to, one of the heavily charged electric wires of the street car company, in such manner as to be liable to be or become charged with a dangerous current of electricity, and in such position as to be liable, by a change of position or otherwise, to injure a child passing along or being in said ——— street, then it was the duty of the said defendant company and its agents or employés in charge to remove said wire, and a failure to discharge that duty would be negligence.[39]

The court instructs the jury that if they believe from the evidence that the defendant had erected, and on the ——— day of ———, maintained, on E. street, between M. and T. streets, in the city of ———, a telephone system operated for pay, consisting in part of telephone poles planted in and along said E. street, between said M. and T. streets, and had attached to said poles certain telephone wires, forming part of its telephone system, and that said E. street, at said point, was a public highway over which the public was accustomed to travel, and that the ——— company, at the same time, on said E. street, between M. and T. streets, maintained an electric trolley street car system, one or more of the wires of which were charged with a dangerous current of electricity, it was then the duty of the said defendant to use care commensurate with the danger and consistent with the practical conduct of its business to inspect and maintain its said wires, in order to prevent its said wires from coming in contact with the said

[38] Hogge v. Salt Lake & O. Ry. Co., 153 P. 585, 47 Utah, 266. An objection to this instruction, that it made the defendant an insurer, was not good, in view of other instructions.

[39] Lynchburg Telephone Co. v. Bokker, 50 S. E. 148, 103 Va. 594.

heavily charged wires of such company in such manner as to become charged with a dangerous current of electricity, and, while so charged, to prevent injury to every one who may be lawfully in proximity to such wires or liable to come accidentally or otherwise in contact with them, and any failure upon the part of said defendant company to discharge said duty would be negligence.[40]

The court instructs the jury that although they may believe from the evidence that the defendant had constructed and put up its poles and telephone wires along E. street, between M. and T. streets, before the ——— company erected and constructed its electric trolley street car system along said E. street, between the streets aforesaid, and that thereafter such company erected and constructed its said electric trolley street car system, with its trolley wires and feed wires, charged with a heavy and dangerous current of electricity, under or lower than the wires of the said defendant, this fact does not absolve the said defendant from the duty to exercise the degree of care and diligence in inspecting and maintaining its own wires, as set forth in instruction No ———; it being immaterial which system was first constructed in said street.[41]

§ 2216. Duty to guard against injuries from lightning

The court further instructs the jury that, while the defendant company was not required to guarantee the safety of the wire attached to the house of intestate's father under all possible conditions and circumstances, it was required to exercise that due and ordinary care which the present state of scientific knowledge, as well as common observation of the nature of electricity and the enormous power of lightning would suggest as reasonably necessary for the protection of life along its line and wires. And if the jury shall believe from the evidence that the death of the intestate was caused by lightning conducted over a wire which defendant company had attached to the house for her father where she was at the time of her death, and that her death was due to the failure of the defendant company to exercise such due and ordinary care as aforesaid, and without negligence on her part, they shall find for the plaintiff.[42]

§ 2217. Duty with respect to service wires after discontinuance of service

You are instructed that the defendant was not bound to anticipate that a third party might so move the lunch wagon as to make the service wires leading to it dangerous to the public, nor was it

[40] Lynchburg Telephone Co. v. Bokker, 50 S. E. 148, 103 Va. 594.

[41] Lynchburg Telephone Co. v. Bokker, 50 S. E. 148, 103 Va. 594.

[42] Norfolk & P. Traction Co. v. Daily's Adm'r, 69 S. E. 963, 111 Va. 665.

bound to anticipate that the lunch wagon might be moved without notice to it. What the defendant was required to do in this case was, after the removal of the meter, to exercise a reasonable inspection with reference to the condition of the wires. If the current is left upon them, they must exercise a certain care—reasonable care in the inspection of their property to see that by the action of the elements or otherwise those wires are not broken or removed from the building and so become a danger to the public in general. The question for your determination, gentlemen of the jury, is whether these wires, which had been removed by the contractor and wound in loops around the bracket, had come down to the ground and remained upon the ground such a length of time that the defendant company, considering the dangerous character of such wires, ought by a reasonable degree of care to have known of its condition and remedied it. If anybody is furnishing electricity as furnished by the defendant company in this case, a very high degree of care is enjoined, and I may say, gentlemen of the jury, it is perhaps the highest degree of care which is reasonably practicable under the circumstances of the case.[43]

§ 2218. Injuries caused by sagging of wires permitting primary and secondary wires to come into contact

The court instructs the jury that if you believe and find from the evidence that on or about the ——— day of ———, the plaintiff was the wife of ———, the deceased, and that at and prior to said date the defendant owned and operated the electric light wires in the alley between ——— and ——— streets in ———; and if you further believe and find from the evidence that the defendant had carelessly and negligently permitted the primary and secondary electric wires upon certain poles in said alley, near the ——— laundry plant, to become so out of repair, if they did so, that the same were not stretched tight upon the poles carrying the same, but were allowed to sag in such manner as to permit them to touch one another; and if the jury further believe and find from the evidence that because of such condition of said wires at said place, if you believe and find from the evidence it existed, a deadly and dangerous current of electricity passed from said primary wire to said secondary wire and into the laundry building in question, and into and along the drop cord in evidence; and if the jury further believe and find from the evidence that by reason thereof and on account of the negligence of the defendant in the manner hereinbefore set out, if you believe and find from the evidence the defendant was so negligent, the wires, light cords, or lines, and extension

[43] Swaczyk v. Detroit Edison Co., 174 N. W. 197, 207 Mich. 494.

cords in the building where plaintiff's husband worked, were made dangerous and not reasonably safe; and if the jury further believe and find from the evidence that at such time, to wit, on or about ———, the defendant knew, or by the exercise of ordinary care might have known, that said wires were out of repair and not reasonably safe by reason of the sagged condition thereof heretofore referred to, if you believe and find from the evidence said sagged condition existed, for persons working in the laundry in question; and if the jury further believe and find from the evidence that on said ———, plaintiff's said husband, in the performance of his work in and about said laundry, took hold of a drop cord in said building, and that in said cord was then and there, through the negligence of the defendant, as above set forth, if you believe and find from the evidence the defendant was so negligent, a deadly and dangerous current of electricity, if you believe and find from the evidence there was in said cord at said time a dangerous and deadly current of electricity; and if you further believe and find from the evidence that directly, because of the carelessness and negligence of the defendant in the particulars hereinbefore set out, if you believe and find from the evidence said defendant was so negligent, and by reason of the deadly and dangerous current of electricity in said cord, if you believe and find from the evidence there was a deadly and dangerous current of electricity in said cord, and by reason of plaintiff's said husband coming in contact with said cord, if you believe and find from the evidence he did so come in contact with said cord, plaintiff's said husband was killed by an electric shock or current, while exercising reasonable care for his own safety, if you believe and find from the evidence he was, at said time and place, exercising reasonable care for his own safety—then your verdict will be for the plaintiff.[44]

§ 2219. Liability as to trespassers or licensees—Willfulness or wantonness of conduct of defendant

The court charges the jury that before a party can be said to be guilty of willful or wanton conduct it must be shown that the person charged therewith was conscious of his conduct, and conscious, from his knowledge of the existing conditions, that injury would likely or probably result from his conduct, and that, with reckless indifference to consequences, he consciously and intentionally did some wrongful act, or omitted some known duty which produced the injury.[45]

[44] Vessels v. Kansas City Light & Power Co. (Mo.) 219 S. W. 80.

[45] Birmingham Ry., Light & Power Co. v. Jackson, 63 So. 782, 9 Ala. App. 588.

§ 2220. Liability of electric street railroad to employees of independent contractor erecting coal chute on premises of railroad

The court instructs the jury that a different rule of law applies as between the plaintiff and his employer, and as between him and the railway company, touching the risks assumed by and the degree of care to be exercised towards the plaintiff in respect to the charges of negligence made by the plaintiff against these defendants, respectively, and you are instructed that, as between the plaintiff and the employing defendant the ——— Company, the plaintiff assumed the risks of injury from contact with the wires in question so far as such risks were obvious, or as discernible to him as they were to such defendant, the ——— Company, and its foreman, by the exercise of ordinary care, to the extent that their respective opportunities for inspection of such wires and knowledge of such risks were equal.[46]

§ 2221. Duty as to children—Attractive nuisance

The jury are instructed that, if they shall believe from the evidence that the abandoned gas container or pit, upon the premises, described in the evidence, was unusually attractive to children, and that before the accident to the plaintiff, mentioned in the evidence, children were attracted by it, and did, and were accustomed to go upon said lot and about the pit and play, and that the defendant knew thereof; and that the defendant maintained upon said lot near the pit electric wires and transformers, and that said wires were dangerous by reason of the high current of electricity carried upon them, or that the insulation upon one of the electric wires was defective, and rendered contact with the wire dangerous, and that, at the time of the accident, or before, the defendant knew, or, by the exercise of the highest degree of care and skill which may be used under similar circumstances, could have known, thereof; and if the jury shall further believe from the evidence that at the time of the accident to the plaintiff one of the boards, constituting a part of the board fence inclosing the electric wires and transformers upon said lot was broken, and that an opening in said fence was thereby left at such height and of such character as rendered the electric wires and transformers, inclosed by the fence, so accessible to children playing upon the lot and about the pit, that danger to them coming in contact with the electric wires and transformers would reasonably be anticipated, and that such danger reasonably to be anticipated, if such there was, from said condition was, or by

[46] Clark v. St. Louis & S. Ry. Co., 137 S. W. 583, 234 Mo. 396. The street railroad company objected to this instruction on the ground that it exacted from the company more than ordinary care, and that it permitted a recovery against it, although the danger of the wires was obvious.

the exercise of the highest degree of care which may be used under the circumstances could have been, known to the defendant; and if the jury shall believe from the evidence that the defective insulation, if such there was, and the opening in the fence of the character hereinbefore required, if it was of that character, amounted to and was a failure on the part of the defendant to exercise the highest degree of care and skill which may be used under the circumstances to protect its electric wires and transformers from contact with children playing upon the lot, and that by reason of such failure the plaintiff, while playing upon said lot, and in pursuit of a frog which had entered the inclosure, thrust himself into or through said opening in the fence and came in contact with the defendant's electric wire and was thereby injured—the jury will find for the plaintiff, unless the jury shall further believe as in the third instruction, in which event the jury will find for the defendant.[47]

§ 2222. Proximate cause

§ 2222(1). Maryland

The court instructs the jury that they cannot find for the plaintiffs in this case unless they find: (1) That the deceased, at the time of his accident, was using due and ordinary care such as an ordinarily careful and prudent lineman would use under similar circumstances; and (2) that the defendant was guilty of some act of negligence on its part, which directly contributed to the happening of the accident resulting in his death.[48]

§ 2222(2). Michigan

You are instructed that, if you find that this wire was allowed to remain there hanging in the highway as the plaintiff claims, and that the defendant knew, or by ordinary diligence would have known; that fact; that is, that it was out of place and dangling in the highway, the defendant would be negligent, but he would not necessarily be liable; and, if you further find that a reasonably prudent person, under the circumstances, might have expected or anticipated that the wire would come in contact with the third rail of the interurban company, and cause such an injury, you would then be justified in finding that the defendant's negligence was the proximate cause of the injury, or one of the proximate causes. By proximate cause I mean the immediate producing cause of the injury. To make it the proximate cause, the result or injury must be the natural and probable consequence of the negligent act. Now, the defendant says that the death of the boy in the manner shown by the evidence was not a natural and prob-

[47] Union Light, Heat & Power Co. v. Lunsford, 225 S. W. 741, 189 Ky. 785.

[48] Consolidated Gas, Electric Light & Power Co. v. State, to Use of Smith, 72 A. 651, 109 Md. 186.

able consequence of the negligent act, that is, of allowing the wire to remain dangling in the highway near the third rail, but that an intervening human agency in the person of three ——— boys produced this injury. The defendant was not bound—it is true the defendant was not bound to anticipate that unauthorized persons would interfere wrongfully with its wire. But if, under the circumstances, considering the manner in which the highway was used and the proximity of the dangerous third rail, and the fact that children frequently passed at this point in the highway—I say, considering these and all the other circumstances, if under these circumstances the ——— Telephone Company reasonably should have expected or anticipated that children, acting from boyish instincts and impulses, would interfere by meddling with or playing with the wire, the act of the defendant would be the proximate cause of the injury, notwithstanding the other intervening cause or the intervening cause. If you find that, acting as an ordinarily prudent person, the defendant might have expected that boys would do whatever you find these boys did, then the defendant would not be relieved of liability by the intervention of the three ——— boys, if you find that they did intervene in the manner claimed by the defendant.[49]

§ 2222(3). North Carolina

The jury are instructed that there is no evidence of any other cause of death of plaintiff's intestate, except from the electricity coming from the wire of the defendant. Therefore, if the jury find from the evidence that the death of the intestate of plaintiff was caused by the current of electricity passing into his body from the charged wire of the defendant, the jury will find the third issue "Yes." [50]

§ 2222(4). Virginia

The court instructs the jury that even though they may believe from the evidence that the defendant company negligently allowed one of its wires to become detached from its poles and come in contact with a wire of the traction company charged with a dangerous current of electricity, and that the plaintiff's injury was caused by his coming in contact with such wire, nevertheless, if they further believe from the evidence that this condition had remained for such length of time as would have enabled the said traction company to discover and remedy it by the exercise of reasonable care in the inspection of its wires, and that the said negli-

[49] Kruis v. Grand Rapids, G. H. & M. Ry. Co., 155 N. W. 742, 190 Mich. 105.

[50] Mitchell v. Raleigh Electric Co., 39 S. E. 801, 129 N. C. 166, 55 L. R. A. 398, 85 Am. St. Rep. 735.

gence of the traction company was the independent or proximate cause of the plaintiff's injury, they must find for the defendant.[51]

§ 2223. Liability for acts of third persons

You are instructed that, if you believe from the evidence that the wire with which plaintiff claims to have come in contact was hung over an electric light wire of defendant, by some person or persons over whom the defendant had no control, on the day on which plaintiff claims to have been injured, and that defendant did not have knowledge or notice of the presence of such wire at the time plaintiff claims to have been injured, and that its failure to have such knowledge or notice was not the result of negligence on its part, then your verdict must be for the defendant.[52]

§ 2224. Negligence of third person concurring with negligence of defendant

§ 2224(1). Arkansas

You are instructed that if you find that the injury was the result of the concurring negligence of two parties, and would not have occurred in the absence of either, you are charged that the negligence of both parties was the proximate cause of the injury, and defendant is not excused because of the other concurring act of negligence.[53]

§ 2224(2). Virginia

The court instructs the jury that although they may believe from the evidence that the ——— company was negligent in the construction, maintenance, and inspection of its trolley wires, feed wires, or other wires, passing along and over E. street, between M. and T. streets, or along and over any other portion of said E. street, yet if the jury further believe from the evidence that the defendant was also guilty of negligence in constructing, inspecting, or maintaining its own wires, and that the negligence of both companies concurred in producing the injury of the plaintiff, then the defendant company will not be excused from liability for its own negligence by reason of the negligence of the ——— company. In other words, where the evidence proves each of two parties to have been guilty of negligent acts of commission or omission, which acts concurred in causing the injury of another, neither of the said parties can escape liability for his own negligence by showing the negligence of the other.[54]

[51] Lynchburg Telephone Co. v. Bokker, 50 S. E. 148, 103 Va. 594.

[52] Brubaker v. Kansas City Electric Light Co., 110 S. W. 12, 130 Mo. App. 439.

[53] Southwestern Telegraph & Telephone Co. v. Bruce, 117 S. W. 564, 89 Ark. 581.

[54] Lynchburg Telephone Co. v. Bokker, 50 S. E. 148, 103 Va. 594.

§ 2225. Contributory negligence of person injured

§ 2225(1). Kentucky

You are instructed that, if the jury shall believe from the evidence that ——— came in contact with said wire while in the act of climbing out of said window, and that the said wire was not so insulated or protected as to be free from danger to him, and that his injuries were caused thereby, you ought not to find him guilty of contributory negligence, unless in so doing, he failed to exercise that degree of care which ordinarily careful and prudent persons usually exercise under the same or similar circumstances.[55]

The jury are instructed, if they believe from the evidence that the said wire had all the appearances of having been properly insulated at the time the plaintiff received his injuries, that this was then an invitation or inducement to plaintiff to risk the consequences of contact with same, in the performance of his work in painting the house to which said wire was attached.[56]

§ 2225(2). Maryland

The court instructs the jury that, if they find from the evidence that the deceased, by any failure to use due and ordinary care on his own part, directly contributed to the happening of the accident which caused his death, then their verdict must be for the defendant, notwithstanding that they may find that the defendant was equally, or even to a greater extent, guilty of a failure to use due and ordinary care, and no matter how gross or culpable such failure on the part of the defendant may have been.[57]

§ 2225(3). Oregon

The court instructs the jury that, to entitle the plaintiff to recover in this action, the jury must find from the evidence that the accident and injury to ——— complained of was caused altogether and entirely by the negligence and want of due care by the defendant or its servants and employés, and that the said ——— did not directly contribute to the said accident by negligence or want of prudence and ordinary care on his part.[58]

The court instructs you that if you find from the evidence in this case that the accident complained of was in any degree owing to the want of due care and caution on the part of the plaintiff's intestate, ———, directly contributing to said accident, then your verdict must be for the defendant.[59]

[55] McLaughlin v. Louisville Electric Light Co., 37 S. W. 851, 100 Ky. 173, 18 Ky. Law Rep. 693, 34 L. R. A. 812.

[56] McLaughlin v. Louisville Electric Light Co., 37 S. W. 851, 100 Ky. 173, 18 Ky. Law Rep. 693, 34 L. R. A. 812.

[57] Consolidated Gas, Electric Light & Power Co. v. State, to Use of Smith, 72 A. 651, 109 Md. 186.

[58] Carroll v. Grande Ronde Electric Co., 97 P. 552, 52 Or. 370.

[59] Carroll v. Grande Ronde Electric Co., 97 P. 552, 52 Or. 370.

§ 2225(4). Utah

You are instructed that if the deceased failed to exercise such degree of care as an ordinarily prudent man would have exercised under like circumstances and conditions, and in doing the work required to be done, or failed to exercise such care in going to and from said work, then the said deceased was guilty of contributory negligence, and would not be entitled to recover in this action.[60]

You are instructed that if the deceased knew, or by the exercise of such reasonable care, as herein defined, should have known, that said wires were carrying such heavy current of electricity and were dangerous, and that notwithstanding such knowledge, and without any reason therefor, he carelessly or negligently approached and touched the same or went into close proximity thereto, and the injury resulted, then the plaintiff is not entitled to recover.[61]

§ 2225(5). West Virginia

The court instructs the jury that even if they believe from the evidence that ——— knew of the presence of the wire of the defendant company near the balcony mentioned in evidence, and further believe that when in the act of releasing or attempting to release the banner on the north end of said balcony he was brought in such close proximity to such wire that he took hold of the same to support himself, this fact will not excuse the defendant from liability if the jury believe from the evidence that ——— did not know that it was dangerous to touch said wire, and that he, in taking hold of said wire, received such a shock of electricity by coming in contact therewith that his death was caused thereby, and provided further that the jury believe such shock was caused by defective or improper insulation of said wire at the point where ——— came in contact with it.[62]

§ 2226. Same—Picking up live wire

§ 2226(1). Arkansas

You are instructed that the defense of contributory negligence is contingent upon the object of the plaintiff in handling said wire, and also upon his knowledge or ignorance of all the elements of danger connected therewith. The plaintiff cannot be charged with contributory negligence unless he voluntarily exposed himself to a known danger. If you find from the testimony that a live wire belonging to the defendant company and controlled by the defendant was lying near the walk, as alleged, and that said wire showed no signs of being charged with electricity, and that plaintiff was ignorant of the character of said wire, and that he took hold of

[60] Hogge v. Salt Lake & O. Ry. Co., 153 P. 585, 47 Utah, 266.

[61] Hogge v. Salt Lake & O. Ry. Co., 153 P. 585, 47 Utah, 266.

[62] Thomas v. Wheeling Electrical Co., 46 S. E. 217, 54 W. Va. 395.

said wire merely for the purpose of casting it aside, and was injured thereby, then your verdict will be for the plaintiff upon this issue.[63]

§ 2226(2). California

You are instructed that if you find that ———, when going to or coming from his work found a wire in his way, and that he did not believe said wire was carrying a current of electricity and that an ordinarily prudent man in his situation at the time would not have believed or suspected, and would have had no reason to believe or suspect, that said wire was carrying a current of electricity, then if you find that he placed his hands on said wire, in an endeavor to get it out of his way, he was not guilty of negligence.[64]

§ 2227. Same—Duty to avoid contact with fallen wires

§ 2227(1). Kentucky

You are instructed that it was the duty of the decedent to exercise ordinary care for his own safety, and if the jury believe from the evidence that upon the occasion referred to in the evidence said decedent knew, or had reasonable grounds to believe that the wire that killed him was charged with a dangerous current of electricity, and if they further believe that he failed to exercise ordinary care in approaching or passing the said wire, and that by reason of such failure to exercise such care, if he did so fail, he came in contact with said wire and was killed, the jury should find for the defendant, even if they believe there was a failure on the part of the defendant, as defined in instruction No. ———.[65]

§ 2227(2). Oregon

The court instructs the jury that, if you find from the evidence in this case that the plaintiff's intestate knew that this wire was broken, and was hanging upon the fence, and, his business not calling him to the vicinity of this broken wire, he went out to the vicinity of the same out of idle curiosity to see if the wire was alive, and while in the vicinity he carelessly or thoughtlessly came dangerously near or in contact with said broken wire, and was killed by an electric shock therefrom, then it will be your duty to return a verdict for the defendant.[66]

The court instructs the jury that if you find, from the evidence in this case, that upon the deceased and ——— coming in from their work at noon on the day of this accident, the said ———

[63] Commonwealth Public Service Co. v. Lindsay, 214 S. W. 9, 139 Ark. 283.

[64] Foley v. Northern California Power Co., 112 P. 467, 14 Cal. App. 401.

[65] Lexington Utilities Co. v. Parker's Adm'x, 178 S. W. 1173, 166 Ky. 81.

[66] Carroll v. Grande Ronde Electric Co., 97 P. 552, 52 Or. 370.

proposed to go out to where this broken wire was hanging on the fence and test the same to see if it was alive, and the deceased went along with the said ——— to see him make such test, and while in the vicinity of this broken wire the said deceased, either by design or accident came dangerously near to or in contact with said broken wire, and was then and there killed by an electric shock therefrom, then it will be your duty to return a verdict for the defendant.[67]

§ 2228. Same—Going into vicinity of broken wire in disregard of warnings

The court instructs the jury that if you find from the evidence in this case that the plaintiff's intestate, ———, knew that this wire was broken and hanging on the fence, and that he was warned by his employer to stay away from the same, and to not go about the same, and, if he did so, he was liable to get killed, and, disregarding this warning, he went out to the vicinity of this broken wire and placed his hand upon the fence in near proximity to this broken wire, and received an electric shock therefrom by which he was killed, then I instruct you that you should find for the defendant.[68]

The court instructs the jury that if you find from the evidence in this case that plaintiff's intestate, ———, had been informed by his employer that this wire had been broken and was hanging on this fence, and that it was dangerous, and to stay away from the same, or he was liable to get killed, and, disregarding this warning, the plaintiff's intestate, ———, went out to the vicinity of this broken wire and took hold of the fence near this broken wire, and pointed his finger toward the same with the purpose of testing the same to see if it was alive, or for any other purpose, and in so doing he received from this wire an electric shock which killed him, then it will be your duty to return a verdict for the defendant.[69]

§ 2229. Care required from child

The court instructs the jury that ——— was required to use such care for his own personal safety as a child of his age, intelligence, and experience would ordinarily use under the same circumstances. If you believe from the evidence that a person of his age, intelligence, and experience would know the danger of touching or coming in contact with said guy wire in the condition it was in, and that said ——— voluntarily touched said wire or permitted his person to come in contact therewith, and that, under all the facts

[67] Carroll v. Grande Ronde Electric Co., 97 P. 552, 52 Or. 370.

[68] Carroll v. Grande Ronde Electric Co., 97 P. 552, 52 Or. 370.

[69] Carroll v. Grande Ronde Electric Co., 97 P. 552, 52 Or. 370.

and circumstances in evidence, you believe that such touching the wire or coming in contact therewith was a failure on the part of said ——— to use that degree of care that a person of his age, intelligence, and experience would ordinarily use under the same circumstances, then you will answer question No. ———, relating to contributory negligence, in the affirmative.[70]

§ 2230. Presumptions and burden of proof

§ 2230(1). Arkansas

The court instructs the jury that if you find that the wire in question was under the control and management of the defendant, and that the accident would not have happened in the ordinary course of events and if defendant had used due care, then, since the defendant owed a duty to the plaintiff to use care in the management of its lines to avoid injuring him, the burden of proof is on the defendant to prove that the alleged injury was not caused by defendant's negligence.[71]

You are instructed that if you find that plaintiff was injured by the wire in question, and that said wire was hanging down on said lot, and that said wire was erected, maintained, and owned by the defendant, and was under its management and control, and that by contact with said wire the plaintiff, having a right to be on said property, was injured, a prima facie case of negligence is made out, and the burden was cast upon the defendant to show that this wire was hanging down through no fault of its servants and agents.[72]

§ 2230(2). California

You are instructed that the fact that a wire belonging to the defendant, highly charged with a dangerous current of electricity, was down across the public highway at the point where the accident occurred, and that the plaintiffs' intestate, while traveling along said public highway, came in contact with that wire and was killed, raises a presumption of negligence on the part of the defendant company in maintaining the wire, and casts upon the defendant the burden of meeting such presumption. Such presumption need not be overcome by the defendant by a preponderance of the evidence. If the defendant company produces sufficient evidence to balance such presumption, the presumption is overcome.[73]

§ 2230(3). Oklahoma

You are instructed, to entitle the plaintiff to recover, the burden is upon her to prove by a fair preponderance of the evidence,

[70] Dowlen v. Texas Power & Light Co. (Tex. Civ. App.) 174 S. W. 674.

[71] Commonwealth Public Service Co. v. Lindsay, 214 S. W. 9, 139 Ark. 283.

[72] Southwestern Telegraph & Telephone Co. v. Bruce, 117 S. W. 564, 89 Ark. 581.

[73] Diller v. Northern California Power Co., 123 P. 359, 162 Cal. 531, Ann. Cas. 1913D, 908.

not only that she was injured, but also that the defendant had charged the wire with which the plaintiff came in contact with a current of electricity; and in this connection you are instructed that, if you find from the evidence that the wire with which the plaintiff came in contact was the property of the defendant, and then being used as a part of its electric light system, and that the same was then charged with a deadly current of electricity, the presumption would be that the same was charged by the defendant.[74]

§ 2230(4). Oregon

The jury are instructed that, if you believe from the evidence that the accident was caused by the breaking or sagging of the wire, which was the property of the defendant, then there is raised a presumption of negligence on its part, and unless it appears that there was contributory negligence on the part of the plaintiff sufficient to make her acts the proximate cause thereof, the burden of proof is shifted to defendant to establish, by a preponderance of the evidence, that it was not at fault, and that the accident happened without any negligence or want of care on its part.[75]

§ 2230(5). Texas

You are instructed that the defendant was presumed in law to have that knowledge of the condition of its wires which it could have had by the exercise of that degree of care, prudence, and diligence that an ordinarily prudent person would have used under the same or similar circumstances.[76]

§ 2230(6). Virginia

The court instructs the jury that if they believe from the evidence that on the ——— day of ———, one of the wires of the defendant company was detached from its proper position on its pole on E. street, between M. and T. streets, and came in contact with a wire of the ——— Company, which was charged with a heavy and dangerous current of electricity, and thereby itself became charged with a dangerous current of electricity, and hung down in a lot abutting on E. street so close to the ground, and so near to E. street, as to be easily and readily grasped by a child while passing along or being in said E. street, and that the defendant knew, or by the exercise of care commensurate with the danger could have known, the condition of said wire, and that the plaintiff, while in said E. street, took hold of and was burned and injured by the said wire and the said dangerous current of electricity then being thereon, the law presumes, prima facie, that the injury

[74] Shawnee Light & Power Co. v. Sears, 95 P. 449, 21 Okl. 13.

[75] Crosby v. Portland Ry. Co., 100 P. 300, 53 Or. 496.

[76] Citizens' Telephone Co. of Texas v. Thomas, 99 S. W. 879, 45 Tex. Civ. App. 20.

to the said plaintiff was caused by the negligence of the defendant company, and the burden is then on the defendant company to establish that it was not guilty of the negligence which caused the said injury.[77]

§ 2231. Burden of proof to show lack of intelligence of child to understand dangers

The court instructs the jury that, on the issue of the plaintiff's age, experience, and ability to understand the dangers incident to coming in contact with such guy wire, and of the plaintiff's ability to understand the warning given him not to touch such wire, the burden of proof is on plaintiff to show, by a preponderance of the evidence, both that said plaintiff did not have sufficient intelligence and experience to understand the dangers of touching or coming in contact with such wire, and that he did not have sufficient intelligence and experience to understand the warning given him not to touch such wire; and, unless you believe that a preponderance of the evidence establishes such facts you will answer question ——— of the main charge in the affirmative.[78]

§ 2232. Sufficiency of evidence

The court instructs the jury that the burden rests upon the plaintiff to show by a preponderance of evidence every fact necessary to hold the defendant liable for the injury complained of. Such evidence must show more than the probability of a negligent act. A verdict cannot be found on mere conjecture, but there must be affirmative and preponderating proof that the negligence of the defendant was the proximate cause of the injury of which the plaintiff complains, or that its negligence concurred with that of the traction company, in producing the injury. But negligence may be established by the evidence of the defendant, as well as the plaintiff.[79]

The court instructs the jury that, in order to entitle the plaintiff to recover, it must appear by preponderating and affirmative evidence that the negligence of the defendant was the proximate cause of the injury complained of, or that said injury was caused by the concurring negligence of the defendant and the traction and light company.[80]

[77] Lynchburg Telephone Co. v. Bokker, 50 S. E. 148, 103 Va. 594.

[78] Dowlen v. Texas Power & Light Co. (Tex. Civ. App.) 174 S. W. 674.

[79] Lynchburg Telephone Co. v. Bokker, 50 S. E. 148, 103 Va. 594.

[80] Lynchburg Telephone Co. v. Bokker, 50 S. E. 148, 103 Va. 594.

CHAPTER CXXI

EMBEZZLEMENT

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See, also, Larceny.

§ 2233. Elements of offense

§ 2233(1). California

You are instructed that embezzlement is when the possession of the property has been acquired lawfully and bona fide, and afterwards fraudulently appropriated. The gist of the offense of embezzlement is the breach of trust reposed in the agent, employé, or bailee by his principal, employer, or bailor. The crime may be in general terms defined to be the fraudulent conversion of another's personal property by one to whom it has been intrusted. When a bailee of property obtains possession of it from the owner with the intention of stealing it, and carries out that intent, he is guilty of larceny; but, where the intent to steal did not exist at the time of taking possession of the property by the bailee, but was conceived afterwards, it is embezzlement.[1]

I instruct you that one who acts as the agent of another, and in such capacity is intrusted with and receives into his care any money for the use of another person and fraudulently appropriates the same to his own use or to any use or purpose not in the due and lawful execution of his trust, is guilty of embezzlement; and in this case, if you find from the evidence to a moral certainty and beyond a reasonable doubt that defendant did unlawfully, fraudulently, and feloniously convert, embezzle, and appropriate the money mentioned in the information, or any part thereof, to his own use and contrary to his trust as such agent, then your verdict must be guilty.[2]

The court instructs you that if any person assumes to act as the agent or bailee of another, and in such assumed capacity he is intrusted with and receives into his care and custody, the property of another, for the use of such other person, and thereafter fraudulently and feloniously appropriates and converts such property or any part of the same to his own use, or to any use or purpose not in the due and lawful execution of his trust, he is guilty of embezzlement.[3]

[1] People v. Dye, 154 P. 875, 29 Cal. App. 169.

[2] People v. Blair, 127 P. 657, 19 Cal. App. 688.

[3] People v. McLean, 67 P. 770, 135 Cal. 306.

§ 2233(2). Delaware

You are instructed that the offense charged is purely statutory and is distinguished from the crime of larceny. It consists in the unlawful, fraudulent conversion or misapplication by one person of another's property, in his lawful possession, to his own use and benefit, thereby depriving the true owner thereof without the latter's consent. So if the property of a person is intrusted to the care or custody of another, and the person to whom the same is intrusted fraudulently appropriates it instead of applying it to the purpose for which he accepted it, the misapplication constitutes the offense of embezzlement. If the prosecuting witness engaged the accused as her agent or servant to obtain cash on the check, in evidence before you, and then to return the proceeds thereof to her, and he failed to discharge the trust reposed in him by converting the same to his own use, without her consent, he would be guilty of embezzlement; and no subsequent arrangement between the parties would in anywise affect the right of the state to prosecute for the offense. So that if the accused accepted the check for the purpose of having it cashed and return the proceeds thereof to the prosecuting witness, but instead of doing so he applied it to his own use or any part thereof, without her consent, the offense charged in this indictment has been established.[4]

You are instructed that, if you find that the prisoner thus lawfully came into possession of the cow and calf belonging to ——— and thereby became the bailee of them, it then remains for you to determine whether the prisoner is guilty of embezzlement, by converting them or either of them to his own use contrary to an express or implied contract of bailment to return them to the owner after the purpose for which they had been delivered to him had been fulfilled. To do this you must first determine whether the cow or calf were the property of ———; second, whether the prisoner misappropriated them and converted them or either of them to his own use; and, third, whether he did it with an intent to defraud ——— of his property.[5]

You are instructed that, if you find that the prisoner was intrusted by ——— with the possession of a cow that belonged to ———, to be kept and used by the prisoner for a particular purpose and that afterward he became possessed of a calf upon its birth from the cow and that the prisoner thereafter converted the cow and calf or either of them to his own use, contrary to the purposes for which it was delivered to him, and with an intent to defraud ——— of his property, the crime of embezzlement as bailee will have been established, and your verdict should be guilty.[6]

[4] State v. Acetoa, 96 A. 206, 5 Boyce, 597.

[5] State v. Lyons, 80 A. 976, 3 Boyce, 72.

[6] State v. Lyons, 80 A. 976, 3 Boyce, 72.

§ 2233(3). Florida

The court charges you that this is an information filed by the county solicitor against ——— charging him with the crime of embezzlement of $———, the money and property of the ——— Company, a corporation. Now, if you believe from the evidence, and beyond a reasonable doubt, that the defendant, ———, within the county of ——— and state of ———, being the agent and servant of the ——— Company, a corporation, and by reason of his employment as such agent or servant of said company, received and took into his possession the sum of $——— (or any other amount of money) belonging to the said ——— Company, as alleged and set forth in the information, and afterwards, in the month of ———, fraudulently converted or appropriated the same to his own use, without the consent of the said ——— Company, you will find the defendant guilty as charged. If you have a reasonable doubt as to his having been proved guilty, you will find him not guilty.[7]

§ 2233(4). Idaho

You are instructed that the mere secreting by the defendant of the checks described in the information would not constitute an embezzlement thereof, unless you find present the other necessary elements set forth in the information.[8]

§ 2233(5). Missouri

The court instructs the jury that, if they believe and find from the evidence, beyond a reasonable doubt, that the ——— Association was, prior to ———, an incorporated association doing business in the state of ———, and that the defendant was its secretary, that there came into his possession or under his care and control, by virtue of his office as such secretary, money belonging to the said association, and that at any time within ——— years prior to ———, in the county of ———, state of ———, the said defendant, while over the age of ——— years, did then and there, by virtue of his office as said secretary of said association, have, receive, and take into his possession or under his care and control, money belonging to the said ——— Association, and that the defendant, or another with his knowledge and consent, did then and there fraudulently convert to his own or such other person's use $——— or more, of the said money belonging to the said ——— Association, which came into his care and under his control by virtue of his being the secretary of said ——— Association, with the fraudulent intention then and there on the part of the defend-

[7] Eatman v. State, 37 So. 576, 48 Fla. 21.

[8] State v. Sage, 126 P. 403, 22 Idaho, 489, Ann. Cas. 1914B, 251.

ant to convert the said money to his own or such other person's use without the assent of the said ——— Association, you should find the defendant guilty of embezzlement, as he stands charged in the information, and assess his punishment at imprisonment in the penitentiary for a term of not less than ——— or more than ——— years.[9]

You are instructed that if you believe and find, from the evidence and under these instructions, that on or about the ——— day of ———, or at any time within ——— years next before the filing of the information herein, the defendant was the agent, collector, and servant of the ——— Company, and was then over the age of ——— years, and that then and there, while he was such agent, collector, and servant, and by virtue of his employment as such agent, collector, and servant, he received and took into possession $——— lawful money of the United States, of the value of $——— or more, belonging to the said ——— Company, and that the said ——— Company was at that time a corporation duly organized under the laws of ———, and that the said defendant unlawfully, feloniously, and fraudulently did embezzle and convert to his own use the said $———, or any part thereof of an amount and value of $——— or more, and so unlawfully, feloniously, and fraudulently did embezzle and convert the same to his own use, without the consent of the said ——— Company, and with intent at the time unlawfully, feloniously, and fraudulently to convert the same to his own use, and to permanently deprive the said ——— Company thereof without its consent, you will find the defendant guilty of embezzlement, and assess his punishment at imprisonment in the penitentiary for a term of not less than ——— years nor more than ——— years, and, unless you find the fact so to be, you will acquit him. "Feloniously," as used in these instructions, means wickedly and against the admonition of the law.[10]

The court instructs the jury that if they believe and find from the evidence in this cause that at any time within ——— years prior to the filing of the information in this cause the defendant was the agent and attorney of a certain private person, to wit, ———, and that the defendant during the time of his employment as such agent and attorney of said ——— was not a person under the age of ——— years, and that, during such employment as such agent, he did, by virtue of his employment, take or receive into his possession, as the money of said ———, the sum of $———, or any portion thereof of the value of $——— or more, and that after receiving said money the defendant did, at the county of ——— and

[9] State v. Shour, 95 S. W. 405, 196 Mo. 202.

[10] State v. Wissing, 85 S. W. 557, 187 Mo. 96.

state of ———, and within ——— years prior to the filing of the information in this cause, feloniously, unlawfully, and intentionally embezzle and fraudulently convert said money, or any portion of the same, to the amount of $——— or more, to his (the defendant's) own use, without the assent of his employer, ———, and that he (the defendant) did so convert the same with the felonious intent to deprive the said ——— of the said money, and that said money so embezzled and converted by the defendant then and there belonged to, and was the property of, said ———, then you should find the defendant guilty of embezzlement, as charged, and assess his punishment at imprisonment in the penitentiary for a period of not less than ——— nor more than ——— years.[11]

The court instructs the jury that if you find, from the evidence in this cause, that during the months of ———, ———, ———, 19—, at the county of ——— and state of ———, the defendant was a member of ——— Lodge No. ——— A. O. U. W., and that said lodge was then and there a benevolent organization of ———, in said county of ———, and that the objects and purposes of said organization were to render and secure to its members and their families financial aid and assistance in cases of sickness and death, and that the said lodge was then and there a branch or subordinate lodge of the A. O. U. W., and that said A. O. U. W. was then and there an incorporated benevolent organization, and the defendant was then and there an officer to wit, the receiver, of ——— Lodge No. ———, duly elected and acting as such officer, and that by virtue of such membership, office and official position in said ——— Lodge No. ——— he, the said defendant, did then and there receive and have in his possession, care, custody, and control the moneys of the said ——— Lodge No. ——— of the amount of $———, as alleged in the indictment, or any portion thereof to the amount of $——— or more, and that said defendant was then and there, by virtue of his said membership, office, and official position in said ——— Lodge No. ———, intrusted with the safekeeping and disbursement of said money, and that said money was then and there the property of and belonged to said ——— Lodge No. ———, according to the laws, rules, and regulations of said ——— Lodge No. ——— and of said A. O. U. W., and that being so intrusted, and having the care, custody, and control as aforesaid of said money, or any part thereof to the amount of $——— or more, the defendant did then and there, at the county of ——— and state of ———, feloniously, unlawfully, and intentionally embezzle, make way with, and fraudulently convert said

[11] State v. Lentz, 83 S. W. 970, 184 Mo. 223.

money, or any portion thereof to the amount of $——— or more, to his own use, without the assent of the said ——— Lodge No. ———, and that said money so embezzled, made way with, and converted to his own use by the defendant then and there belonged to said ——— Lodge No. ———; and if the jury further find, from the evidence, that the defendant afterwards, in the month of ———, did flee from justice by then and there fleeing from his usual place of residence in ——— county, and concealed himself and remained away from his usual place of residence in said county, and remained concealed for the purpose of avoiding arrest and prosecution on the charge of embezzlement contained in the indictment in this cause; and if you further find that he continued to flee from justice and so conceal himself until the month of ———, at which time he was arrested in the state of ———, and brought back to ——— county,—then you will find the defendant guilty of embezzlement and assess his punishment at imprisonment in the penitentiary for a term of not less than ——— nor more than ——— years.[12]

The court instructs the jury that if they shall believe and find from the evidence that the defendant, at any time within ——— years next before the ——— day of ———, at the county of ———, and state of ———, was a clerk in the employment of the copartnership firm of ———, and that defendant at the time of his employment as such clerk was not a person under the age of ——— years, and that during such employment as such clerk of the said ———, and within ——— years next before the ——— day of ———, defendant, while acting in the capacity of such clerk, and by virtue of his employment as aforesaid, did take or receive into his possession or care the money of the said firm of the amount of $———, as alleged in the indictment, or any portion thereof, to the amount of $——— or more, and that, after taking and receiving said money, the defendant did, at the county of ——— and state of ———, and within ——— years next before the ——— day of ———, feloniously, unlawfully, and intentionally embezzle and fraudulently convert said money, or any portion thereof of the amount of $——— or more, to his own use, without the assent of the said ———, and that the said money so embezzled and converted by the defendant then and there belonged to and was the property of the said ———, then the jury should find the defendant guilty of embezzlement, as charged in the ——— count of the indictment, and assess his punishment at imprisonment in the penitentiary for a term not less than ——— nor more than ——— years.[13]

[12] State v. Knowles, 83 S. W. 1083, 185 Mo. 141.

[13] State v. Lipscomb, 60 S. W. 1081, 160 Mo. 125.

§ 2233(6). Oklahoma

You are instructed that the defendant stands indicted by a grand jury of ——— county, state of ———, which said indictment was duly presented in the district court of ——— county, and which charges the defendant with the offense of embezzlement, in this: That he did, on the ——— day of ———, in said county of ——— and state of ———, being at the time a person over the age of ——— years, and not being an apprentice to ——— Company, a corporation, and being then and there the bookkeeper and cashier of said ——— Company, and in control and care, by virtue of his employment as such bookkeeper and cashier, of $——— in money, of the value of $———, the personal property of the said ——— Company, then and there unlawfully, willfully, feloniously, and fraudulently, appropriate the said $——— to his, the said ———'s, own use, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state. You will take with you in your retirement the indictment in this case, to which you are referred for a more specific description of the offense alleged in the indictment.[14]

You are instructed that, under the law, the offense for which the defendant stands indicted is as follows: "Embezzlement is the fraudulent appropriation of property by a person to whom it has been intrusted." And it is further provided by the law as follows: "If any clerk or servant of any private person or copartnership, or corporation, except apprentices and persons within the age of eighteen years, fraudulently appropriates to his own use, or secretes with the fraudulent intent to appropriate to his own use, any property of another person which has come into his control or care by virtue of his employment as such clerk or servant, he is guilty of embezzlement." [15]

You are instructed by the court that if you believe from the evidence submitted by the court for your consideration, beyond a reasonable doubt, that the defendant, on or about ———, in the county of ——— and state of ———, was then and there a person over the age of ——— years, and was not an apprentice of the said ——— Company, and if you believe that he was then and there a bookkeeper and cashier of the said ———, a corporation, and was then and there, by virtue of his employment as such bookkeeper and cashier, in the control and care of $——— in money, of the value of $———, or of a sum of money less than $———, but exceeding $——— in money, the same being the personal property of the said ——— Company, and that the said ——— did then and there, in said county of ——— and state

[14] Carter v. State, 118 P. 264, 6 Okl. Cr. 232.

[15] Carter v. State, 118 P. 264, 6 Okl. Cr. 232.

of ———, on or about the ———, unlawfully, willfully, feloniously, and fraudulently appropriate the said $——— in money, or any portion of said sum of $——— exceeding $——— thereof, to his own use, then it is your duty to convict him as charged in the indictment, and so say by your verdict.[16]

§ 2233(7). Texas

You are instructed that, if you find and believe from the evidence beyond a reasonable doubt that prior to the time of the filing of the indictment herein, and about the time alleged therein, the defendant was then and there in possession of a certain cow belonging to D. under and by virtue of an agreement of borrowing said cow with or from the said D., and that he did then and there fraudulently convert said animal to his own use, without the consent of D., the owner thereof, and that such conversion by the defendant was with the intent to deprive the said D., the owner thereof, of the value of the same, then you will find the defendant guilty and assess his punishment at confinement in the penitentiary for any term of years you may see fit, not less than ——— nor more than ———.[17]

You are instructed that four things are essentially requisite to constitute the offense of embezzlement: (1) The defendant's agency whereby he was charged with the duty of receiving the property; (2) the receipt of the property; (3) its receipt by virtue of his agency; (4) the fraudulent conversion or misapplication of the property by him. If either of these requisites is wanting in a prosecution for embezzlement, then the prosecution has failed to establish that crime, and the defendant would be entitled to an acquittal. If you have a reasonable doubt as to whether either of these elements is present, or if you believe that the property described in the indictment came into the possession of defendant by virtue of a sale on credit, then you will acquit the defendant. If you believe or have a reasonable doubt that ———, for ———, agreed to sell goods on credit to defendant in consideration of his agreeing to pay the debt formerly owed ——— by ———, and that the property described in this indictment was sold to defendant under this agreement, you will acquit the defendant.[18]

You are instructed that if you believe from the evidence beyond a reasonable doubt that the defendant, ———, alias ———, alias ———, in the county of ——— and state of ———, on or about the ——— day of ——— was in possession of a horse, the prop-

[16] Carter v. State, 118 P. 264, 6 Okl. Cr. 232.

[17] Barrow v. State, 160 S. W. 458, 71 Tex. Cr. R. 549.

[18] Pope v. State, 158 S. W. 527, 71 Tex. Cr. R. 261.

erty of ——— by virtue of a contract of hiring with the said ———, and that the defendant did then and there unlawfully and without the consent of the said ———, the owner thereof, if he was the owner, fraudulently convert said horse to the said ———'s (alias ———, alias ———) own use, and with the intent to deprive the said ——— of the value of the same, you will find the defendant guilty as charged, etc.[19]

§ 2233(8). Virginia

The court instructs the jury that if they believe from the evidence that ——— wrongfully and fraudulently used, disposed of, concealed, or embezzled any money, bill, note, check, order, bond, draft, or any other property of the ——— Company, as charged in the indictment, that came into his possession or was intrusted to him by virtue of his office as president of the said company, then they will find him guilty.[20]

§ 2234. Distinction between larceny and embezzlement

§ 2234(1). California

You are instructed that the distinction between larceny and embezzlement is that in larceny the guilty party does not have the lawful possession of the property and in embezzlement the guilty party has the lawful possession of the property.[21]

You are instructed that there is a crime known to the law as larceny. It is a crime very similar to embezzlement, yet it is entirely distinct and different from embezzlement. Larceny is the felonious stealing, taking, carrying, leading, or driving away the personal property of another. Embezzlement is the fraudulent appropriation of property by a person to whom it has been intrusted. The difference between the crime of larceny and the crime of embezzlement is this: In larceny the person taking and driving away the property of another must have, at the time he takes and drives away such property, the intent then and there to steal such property. In embezzlement there must be no intent to steal at the time the person takes and drives away the property, but the person must have come into lawful possession of such property and thereafter formed the intent to fraudulently convert it to his own use. When a person intends from the beginning to steal, and does steal, the crime is larceny, and not embezzlement. Therefore I instruct you that if, in this case, the defendant had, at the very time he took and drove away the property described in the information, an intent to steal and did steal it, he is not guilty of embezzlement, and your

[19] Lewallen v. State, 87 S. W. 1159, 48 Tex. Cr. App. 283.

[20] Wadley v. Commonwealth, 35 S. E. 452, 98 Va. 803.

[21] People v. Bojorquez, 169 P. 922, 35 Cal. App. 350.

verdict in that event, and if you should find the fact so to be, should be not guilty.[22]

The jury are instructed that in the case of grand larceny the taking must be with a felonious intent, as heretofore stated, but in embezzlement the original taking is lawful, and the crime consists in the fraudulent appropriation of property by a person to whom it has been intrusted.[23]

§ 2234(2). Delaware

The court instructs the jury that embezzlement is a fraudulent appropriation of another's property by a person to whom it is intrusted or into whose hands it has lawfully come. It differs from larceny in that the original taking of the property was lawful, or with the consent of the owner. In larceny the felonious intent must have existed at the time of the taking.[24]

§ 2235. Conviction as dependent on the capacity in which defendant came into possession of moneys alleged to have been embezzled

Was it competent for the board of convict inspectors to authorize defendant to go to the bank and collect these checks for the purpose, as there is evidence tending to show, avowedly at least, of paying the cash over to the state? I think it was within the power of the board of convict inspectors; that they could require that under the statute which says that the clerk may perform such other duties as may be required by the board. I think it would be a narrow and unreasonable construction of the law to hold that the president of the convict board would have to go in person and collect every claim due the state. It would perhaps be impossible, and, if he is allowed to use any agent for that purpose, surely it would be allowable for him to use his chief clerk of the board, and I think it was within the right of the board to require that duty of defendant. Now, did they require it? Is the evidence sufficient to show that by the usage of the office they required it? Is the evidence sufficient to show that defendant acted in that capacity and held himself out as acting in an official capacity in that direction in such a way as he would be precluded from denying his authority and his official capacity as an officer of the state? These are questions dependent upon the sufficiency of the evidence. I have given you the rules of law as I understand them with regard to official capacity as averred in such counts. If you should find that defendant did act in his official capacity in getting into the possession of this $———, and that he knowingly converted it to his own use,

[22] People v. Bojorquez, 169 P. 922, 35 Cal. App. 350.

[23] People v. Dye, 154 P. 875, 29 Cal. App. 169.

[24] State v. Curtin, 95 A. 232, 5 Boyce, 518.

after having received it in his official capacity, then he would be guilty of embezzlement under the ——— count.[25]

You are instructed that if, from the evidence, you are not satisfied that defendant was acting within his official capacity as an officer of the state, but that he was acting in some capacity which made him liable to the state for a proper use of those funds as an agent of some sort of the state, why then you might consider some of the other counts in the indictment in that respect. The ——— count charged him in the relation of agent of the ——— Savings Bank, thus, for instance, if you should find from the evidence that the ——— Savings Bank either expressly or impliedly delivered on the check of ———, president of the board of convict inspectors, a large sum of money—$———, I believe it is charged here—to the defendant, and if you believe from the evidence that that was delivered to him on an implied agency or implied contract that he would deliver the money paid on this check to ———, president of the board of convict inspectors, bona fide and in good faith, if you believe that the evidence justifies that view, then you must find from the evidence that defendant was acting as the agent of the ——— Savings Bank for that purpose. He might have been an agent of the convict department to collect the money on the check, and when the money was delivered to him, if you find that it was delivered to him by the ——— Savings Bank on that check, and on an implied or express agreement that he should deliver it to the convict department or to the treasurer of the state, it would be within your power to find that he was acting also as the agent of said bank, and if while so acting, and thus coming into possession of the funds, he fraudulently, at a subsequent time, however short, converted them to his own use, that would be embezzlement in that capacity.[26]

§ 2236. Necessity that possession of defendant should have been acquired lawfully

See, also, ante, § 2234.

The court instructs the jury that there can be no embezzlement if the property alleged to have been embezzled came into the possession of the prisoner unlawfully. If the original taking or possession of the property was unlawful the offense might be larceny but could not be embezzlement. The prisoner, therefore, cannot be convicted unless you are satisfied that the securities came to her lawfully. If, at the time of executing the power of attorney in pursuance of which the prisoner went to the ——— in ——— and ob-

[25] Lacy v. State, 68 So. 706, 13 Ala. App. 212.

[26] Lacy v. State, 68 So. 706, 13 Ala. App. 212.

tained the bonds and stock certificates, ——— had sufficient mind to know what he was doing, and was not so under the influence and control of the prisoner as to be unable to exercise his own will, the prisoner obtained possession of the property lawfully and might be guilty of embezzlement. And she might be guilty if she obtained possession of the property by persuasion or entreaty provided the owner had sufficient mind to appreciate the nature of the business and to know what he was doing, for in such case she would have acquired the property lawfully. But if ——— at the time he executed the power of attorney had not sufficient mind to enable him to know what he was doing, and because of that fact the prisoner knowingly, improperly and wrongfully influenced him to execute the said power of attorney in order to get possession of the securities, then her possession of them was unlawful and she cannot be convicted of embezzlement. And so we say that, if you believe from the testimony in this case beyond a reasonable doubt that the prisoner obtained possession of the securities lawfully and afterwards converted the same or any of them in this county as charged in the indictment, your verdict should be guilty. But if you do not so believe, or if you believe that she obtained possession of them unlawfully, no matter whether she converted them or not, your verdict should be not guilty.[27]

§ 2237. When moneys deemed entrusted to defendant

You are instructed that the placing of money in a bank, to be drawn upon by another, is not, in legal effect, the intrusting of money to that person; but, if one has placed money in a bank, to be drawn by the other, the money so drawn by the other is money, in legal effect, intrusted to him or given to him.[28]

§ 2238. What constitutes conversion

The court instructs the jury that if the prisoner, after acquiring possession of the bonds, had sold or disposed of the same, or had even attempted to do so without the consent of the owner, that act would undoubtedly have been a conversion in law. If she had in this county refused to deliver them to the owner after being requested by him to do so, and retained them in her possession against the consent of the owner, that likewise would be a conversion. But the mere fact that she kept the bonds in her possession after bringing them from ——— to the owner here would not constitute a conversion of them in law, even though the owner did not ask her to keep them, and did not expressly consent to her keeping them. If you believe the owner was willing not only that the prisoner

[27] State v. Curtin (Del.) 95 A. 232, 5 Boyce, 518.

[28] De Leon v. Territory, 80 P. 348, 9 Ariz. 161.

should go to the ——— in ——— and get the securities and bring them to him, but also keep them in her possession after bringing them here, and that she did nothing more than that, she would not be guilty of embezzlement because there was no conversion.[29]

§ 2239. Same—Necessity of demand for surrender of property

The jury are instructed that, where an attorney receives money by collecting it for a client, he cannot be held for embezzlement, or convicted thereof, unless a demand has first been made upon him for the same by the person authorized to receive it. But where money or drafts or certificates of deposit are placed in the hands of an attorney or agent, to be by him forwarded or paid to another party, and he receives the drafts, money, or certificates for such purpose, and feloniously and unlawfully secretes, appropriates, purloins, and converts the same to his own use, then, in that event, he would be guilty of embezzlement, whether any demand was first made or not.[30]

§ 2240, Necessity of showing appropriation to use of defendant with fraudulent intent to deprive owner of property

§ 2240(1). Arkansas

You are instructed that, to embezzle the property, the defendant would have to convert it to his own use, which means that he would have to sell or dispose of the property, or do some act which amounted to a holding in active dispute of the owner's right; and such acts on his part must have been with the fraudulent intent of permanently depriving him of his property.[31]

You are instructed that the mere failure to pay over to the ——— Company the money in his hands, by defendant, at the proper time, would not, of itself, constitute the offense of embezzlement; but, to constitute embezzlement, it must appear that the defendant did retain money of the ——— Company, that came to his hands by reason of his agency, by attempting to, in some manner, conceal from the company the fact that he was in possession of same, or by falsely and fraudulently keeping his accounts so as to prevent the company from knowing the defendant had it in his possession; and, the taking and receiving the same being lawful, the appropriation thereof must appear to have been felonious.[32]

[29] State v. Curtin (Del.) 95 A. 232, 5 Boyce, 518.

[30] Dean v. State, 46 N. E. 528, 147 Ind. 215.

[31] Conley v. State, 64 S. W. 218, 69 Ark. 454.

[32] Fleener v. State, 23 S. W. 1, 58 Ark. 98. This instruction should be accompanied by proper explanations of the offense charged and the character of the evidence admissible to prove the intent or want of intent with which the unlawful appropriation was made.

§ 2240(2). Delaware

You are instructed that the intent to defraud the owner of his property is the element of the offense that makes the misappropriation criminal, and must be shown before conviction is warranted. Such an intent to defraud may be shown either by direct evidence or by evidence of facts and circumstances from which a fraudulent intent may reasonably or naturally be inferred.[33]

§ 2240(3). Michigan.

You are instructed that, if you are satisfied beyond a reasonable doubt that the defendant was in the employ of the ——— Company as servant, clerk, or agent,—that is to say, as bookkeeper or assistant cashier,—during the period covered by the information in this case, viz. during the time intervening between ——— and ———, and that, by reason of such employment, certain moneys came into his hands during that period, and that he feloniously appropriated such moneys or any part thereof, which may have come into his hands by virtue of such employment, to his own use, with the intention of depriving the owners of the same, he is guilty of the crime of embezzlement and you must so find. The evidence shows that the defendant entered the employ of the said company in ———, and remained there until some time in ———, when he was arrested and charged with the crime for which he is now being tried; that he was first engaged as bookkeeper, and that, some time in ———, he was made assistant cashier, in which capacity he received all the checks and moneys which came into the hands of the company at ———; and that it was the duty of the defendant to deposit these funds in the bank to the company's credit. The testimony shows, and the defendant admits, that from ———, up to and including the month of ———, while he was in the employ of the said company, he did take certain moneys belonging to that company. It appears from the evidence that the defendant was in the habit of taking checks which came to the ——— office of the company from the various branch offices in different parts of the state of ———, and that he placed these checks in the money drawer or till, and took cash equal in amount to the checks which he had placed therein, and that he converted this money to his own use. This course of appropriating the company's money was continuous, and the method of doing it was the same throughout the entire period, and the defendant says that, during all this time, he had the same intent with regard to taking and appropriating the money. It is for you to say what that intent was.[34]

[33] State v. Lyons, 80 A. 976, 3 Boyce, 72.

[34] People v. Hawkins, 64 N. W. 736, 106 Mich. 479.

§ 2240(4). Missouri

You are further instructed that the mere conversion of money to the agent and collector's use after receiving the same in such capacity and by virtue of his agency and collectorship, and the failure to pay it over to his employer, do not constitute the offense of embezzlement charged in the information, but there must have been in the mind of the agent and collector at the time of such conversion an unlawful, felonious, and fraudulent intent to appropriate such money to the agent and collector's use, and to deprive the owner of such use thereof absolutely. But you are further instructed that it is not necessary that the state should prove by direct and positive evidence that the conversion of the moneys mentioned in the information and in instruction "first" herein, if you believe and find from the evidence there was a conversion of the moneys as defined in the last-mentioned instruction, was without the consent of the ——— Company; it is sufficient if from all the evidence the jury are satisfied beyond a reasonable doubt that it was without such consent; and it is not necessary that the intent with which the defendant may have acted should be proved by direct and positive evidence, but you may infer his intent from all the facts and circumstances attending and surrounding the acts.[35]

The court further instructs you that if you believe and find from the evidence that the moneys collected and received by the defendant for the ——— Company, and not paid over to said company by him, were all used and consumed by him in paying rebates to customers to whom he was selling goods, or in making good the accidental loss or theft of such moneys from him, or in expenditures for the direct and sole purpose of promoting the business of said company, and not for his own uses and purposes, or jointly in paying such rebates, in making good such loss or theft, and in making such expenditures for the direct and sole purpose of promoting the business of said company, then such failure to pay over to the said company the moneys so disposed of does not constitute embezzlement.[36]

The court instructs the jury that although the jury may believe from the evidence that the defendant, at the county of ——— and state of ———, within ——— years prior to ———, received the funds described in the information, or any part thereof, to the value of $——— or more, under and by virtue of an order of the probate court, and in his official capacity as public administrator and ex officio public guardian, and that he subsequently, and before ———, converted same, or some part thereof, to the

[35] State v. Wissing, 85 S. W. 557, 187 Mo. 96.

[36] State v. Wissing, 85 S. W. 557, 187 Mo. 96.

value of $——— or more, to his own use, yet the jury cannot find him guilty unless they further believe and find from the evidence that at the time the defendant converted same he did so with the felonious and fraudulent intent of depriving his said ward, ———, thereof; and, unless the jury so find, they will acquit the defendant.[37]

§ 2240(5). Texas

The jury are instructed that, if you shall find that defendant and M. were partners, or if you have a reasonable doubt thereof, then you will acquit the defendant, although you may find he misapplied and converted the money to his own use and benefit. If you shall find that defendant lost the money, or that he was robbed of same, or if you have a reasonable doubt thereof, you must acquit, although you may find that he was the agent of M. The defendant in a criminal case is presumed to be innocent until his guilt is established by legal evidence, beyond a reasonable doubt; and in case you have a reasonable doubt as to the defendant's guilt you will acquit him, and say by your verdict, Not guilty.[38]

§ 2240(6). Virginia

You are instructed that, before you can convict the prisoner under any count of the indictment against him, you must believe beyond a reasonable doubt that he feloniously took, appropriated, disposed of, or converted to his own use the property, or some part thereof, therein mentioned; that is, that he did so with a criminal intent, and not under an honest belief that he had a bona fide claim of right to do so.[39]

§ 2240(7). Washington

The jury are instructed that an essential element in the crime charged in this case is a felonious intent, and, before you can convict the defendant, you must find from the evidence that he intended to convert to his own use the money in question, and to cheat, wrong, and defraud the county of ——— out of the same. If you find from the evidence that the failure of the defendant to pay over this money was due to neglect and carelessness, and that he had no intention of cheating and defrauding the county out of the same, your verdict must be not guilty.[40]

§ 2241. Intent at time of conversion to deprive owner of property

The jury are instructed that, in order to constitute the offense of embezzlement, it must distinctly appear that defendant acted with felonious intent and made an intentional wrong disposal of

[37] State v. Laughlin, 79 S. W. 401, 180 Mo. 342.

[38] O'Marrow v. State, 147 S. W. 252, 66 Tex. Cr. R. 416.

[39] Wadley v. Commonwealth, 35 S. E. 452, 98 Va. 803.

[40] State v. Leonard, 105 P. 163, 56 Wash. 83, 21 Ann. Cas. 69.

the money that he collected for ——— while in ———'s employ. An intent to convert funds to one's own use is a necessary element in embezzlement, and as such is a question of fact for you to find from all the evidence, with all the circumstances attending or surrounding the case. I charge you that the mere failure to pay over money by an agent to his principal after the agent has collected or received it for and on account of his principal does not of itself constitute the crime of embezzlement, nor does the conversion of it by the agent to the agent's own use after reception or collection by the agent and failure to pay it over to his principal constitute the crime of embezzlement under the law of the state. There must be a felonious intent, as I said in the opening of my charge. There must be a felonious intent upon the part of the defendant at the time of the conversion to appropriate it to his own use to deprive the owner of it.[41]

§ 2242. Sale of chattel and appropriation of proceeds as embezzlement of chattel—Intent at time of sale

The jury are instructed that, if you believe from the evidence, beyond a reasonable doubt, that H. owned and had the actual possession of a horse, and that on or about the ——— day of ———, in ——— county, state of ———, he delivered the same to the defendant, and that the defendant received the actual possession of said horse from the said H. on or about the ——— day of ———, in said county, and that said horse was delivered by said H. to defendant, as his agent, and was received by defendant from said H., as his agent, under and by virtue of an agreement to the effect that defendant would sell said horse and pay $——— to said H. and keep for himself as his property the excess over said $——— that he may sell said horse for, or that he was to sell said horse and pay H. $——— and keep for himself any excess for which he might sell said horse, or that he was to sell or dispose of said horse to the best advantage and account to H. for the proceeds of such sale; and if you further believe from the evidence, beyond a reasonable doubt, that after defendant received possession of said horse as such agent, if you so find, that he sold the same or pledged him for money, and that at the time of such sale or pledge the defendant had the fraudulent intent to appropriate the proceeds of said sale or pledge to his own use, and that in pursuance of said intent the defendant afterwards appropriated the proceeds of said sale or pledge to his own use and benefit, without the consent of said H.—then the defendant would be guilty of embezzlement of a horse, as charged, and you will so find and assess his punishment at confinement in the penitentiary

[41] People v. Wolff, 121 N. W. 754, 157 Mich. 242.

for not less than ——— nor more than ——— years. But if you believe from the evidence, or have a reasonable doubt, that it was the intention of the defendant, at the time he sold or pledged said horse, to act in good faith towards said H., and carry out his alleged agreement, and that he, after said sale or pledge, conceived for the first time the intention to appropriate the proceeds of the sale or pledge, then he would not be guilty of embezzlement of the horse, and you will find him not guilty.[42]

You are instructed that, if you believe from the evidence that the defendant received from the said C. the organ in question, under an agreement that the defendant should act as the agent of the said C. in the sale of said organ, and that defendant should sell said organ, and pay over to and deliver to said C. a certain sum in money or notes that defendant should secure from the sale of said organ, and you further believe that defendant sold said organ as his own property, and not as agent for said C., and that at the time of said sale the defendant had the fraudulent intent to appropriate the proceeds of said sale to his own use, and that in pursuance of said intent the defendant afterwards appropriated the proceeds of said sale to his own use and benefit, without the consent of said C., the defendant would, under such circumstances, be guilty of embezzling the organ; but if you believe it was the intention of the defendant to act in good faith towards said C., and carry out his alleged agreement, and that he, after said sale, conceived for the first time the intention to appropriate the proceeds of the sale, he would not be guilty of embezzling the organ.[43]

§ 2243. Bona fide claim of title to property alleged to have been embezzled

§ 2243(1). Connecticut

The jury are instructed that, to constitute embezzlement under the statute, the appropriation of another's money must be with intent to defraud. This means, as applied to this case, that the party accused must have intended to permanently deprive the persons named in each count of the moneys therein named, and if the jury believe from the evidence that the money shown to have been retained by the accused was so retained by him under a belief honestly entertained by him that he had the right to so retain the same, he would not be guilty of embezzlement of such moneys as to which such belief obtained, even although he had in fact no right to retain such moneys, for in such case the fraudulent intent necessarily would be absent.[44]

[42] Henderson v. State, 117 S. W. 825, 55 Tex. Cr. R. 640.

[43] Epperson v. State, 3 S. W. 789, 22 Tex. App. 694.

[44] State v. Lanyon, 76 A. 1095, 83 Conn. 449.

§ 2243(2). Utah

You are instructed that, upon an indictment for embezzlement, it is a sufficient defense that the property was appropriated openly, avowedly and under claim of title preferred in good faith, even though such claim is untenable.[45]

§ 2243(3). Washington

You are instructed that under the laws of the state of ——— if a person in converting property to his own use does so under a bona fide claim of title thereto, he is not guilty of the crime of larceny, although his claim of title was not good, and in this case you are instructed that if the defendant after negotiating with ——— for a trade believed that this note in question was his, and so believing used the proceeds as his own, you cannot find the defendant guilty.[46]

You are instructed that, if the defendant in good faith claimed a lien upon the moneys of ——— in his hands for a general balance due him or the firm of which he was a member as attorney's fees for services performed by the said defendant, or the firm of which he was a member, for the said ———, the mere fact that the defendant retained the whole of said money in his possession, and failed or refused to turn the same over to the said ——— until the amount of said claim for attorney's fees should be adjusted and paid, would not of itself constitute an offense under the law: but you must further find from the testimony that the defendant fraudulently converted to his own use moneys belonging to the prosecuting witness, which he did not in good faith claim as attorney's fees.[47]

§ 2244. Place of conversion

§ 2244(1). Delaware

The court instructs the jury that there are certain things which it is necessary for the state to prove in order to convict the prisoner. You must be satisfied that the prisoner at the time of the alleged embezzlement in this county was the agent of ———, or acting in that capacity. You must also be satisfied from the evidence that the prisoner converted in this county the property mentioned in the indictment or some part of it. It is not necessary to show that she converted all of the securities she is charged with embezzling for if you are convinced beyond a reasonable doubt that she converted in this county even one of them she would be guilty. Counsel for the prisoner insist that there has been no con-

[45] State v. Coyle, 126 P. 305, 41 Utah, 320.

[46] State v. Ward, 165 P. 794, 96 Wash. 550.

[47] State v. Lewis, 71 P. 778, 31 Wash. 75.

version of the securities by the prisoner in this state. We instruct you that it must be shown that the securities or a part of them have been converted in this county as charged in the indictment before the prisoner can be found guilty.[48]

§ 2244(2). South Dakota

Now, in regard to the county, I might say to you that where property is taken in one county by embezzlement and carried into or through another county, the defendant may be tried in either county. And where property is intrusted to a person in one county and he is to return it in that same county, and he afterwards embezzles it, he may be tried in that county, notwithstanding he may have taken it into or through other counties. So this rule is applicable to this case. If the defendant was intrusted with the property in this county and he was under obligations and it was the understanding it should be returned in this county, and he afterwards embezzles it, he may be prosecuted in this county, although the property may have been taken into other counties or into other states. If you believe, then, from all the evidence, beyond a reasonable doubt, that, within the county and the time I have mentioned, any of the property mentioned in the information was intrusted to this defendant as a bailee, individually or jointly with others, and that the defendant fraudulently converted or appropriated it, or was concerned in or implicated in the fraudulent conversion or appropriation of it, you should find the defendant guilty of embezzlement as charged in the information. If you have a reasonable doubt as to any one of these facts being proved you should find the defendant not guilty.[49]

§ 2245. Embezzlement of moneys wrongfully obtained by prosecuting witness

You are instructed that it is no defense to the charge of embezzlement that the person from whom the money was embezzled may himself have obtained it wrongfully or unlawfully.[50]

§ 2246. Value of property embezzled

The court instructs the jury that it is not necessary in this case, in order to find the defendant guilty of embezzlement of $——— or more, for the state to prove that the amount of $——— was taken at the same time or on the same day. Therefore, if the jury believe from the evidence that the defendant formed the design to embezzle and convert money of the said ——— Association, and that, in the pursuance of such formed design, he did, within ——— years

[48] State v. Curtin, 95 A. 232, 5 Boyce, 518.

[49] State v. Allen, 110 N. W. 92, 21 S. D. 121.

[50] State v. Hoshor, 67 P. 386, 26 Wash. 643.

next before the filing of the information, fraudulently embezzle and convert to his own use money belonging to the said ———. Association, to the amount of $——— or more, then that is sufficient.[51]

The court instructs the jury, if they shall believe from the evidence that defendant is guilty of embezzlement as defined in instruction number ———, and if the jury believe from the evidence that the money so converted was of a less amount than $———, and that the same was taken, received, and embezzled by defendant, as defined in these instructions, within ——— year next before the ——— day of ———, then the jury will find the defendant guilty as charged in the ——— count of the indictment, and assess his punishment at imprisonment in the county jail for a period not exceeding ——— year, or by fine not exceeding $———, or by both such fine and imprisonment.[52]

§ 2247. Embezzlement by agents—Who are agents

§ 2247(1). Delaware

You are instructed that, in order to constitute the relation of agent or servant within the meaning of the statute, it is not necessary that there should be more than one act authorized, or more than the undertaking of a single transaction for, or in the name, or on the account of the principal, or employer.[53]

You are instructed that it is contended that the accused in the transaction complained of was a partner with the prosecuting witness, and not an agent within the meaning of the statute. If you find from the evidence that the check was not delivered to and received by the accused for a special purpose, but was to be used in paying part only of the printing and the balance to be used in promoting the sale of the book, then the offense charged has not been established, and the accused should be acquitted. If, however, independent of any other relations subsisting between the parties at the time the check was made and delivered to the accused, he accepted it for a special purpose, namely for the purpose of paying the printing company in full of the contract price for printing the book and certain half-tones, and instead of so applying it, he only applied a part thereof, and misapplied the balance, the offense charged has been established; for in order to constitute the relation of agent within the meaning of the statute it is not necessary that there should be more than one act authorized, or more than the undertaking of a single transaction, for, or in the name, or on account of the employer.[54]

[51] State v. Shour, 95 S. W. 405, 196 Mo. 202.

[52] State v. Lipscomb, 60 S. W. 1081, 160 Mo. 125.

[53] State v. Acetoa, 96 A. 206, 5 Boyce, 597.

[54] State v. Dougherty, 86 A. 736, 4 Boyce, 163.

§ 2247(2). Illinois

The jury are instructed that, if they believe from the evidence that defendant was, at the time of the alleged embezzlement, a collector for the company, with the right to retain her commissions—that is, that she was not required to pay over to the company the gross sum or sums of money collected by her, but might first deduct her commissions, and then pay over the balance or net amount due the company—she was not such an agent or servant as is contemplated in the statute defining embezzlement, and the verdict should be "Not guilty."[55]

§ 2248. Embezzlement by bailees—Who are bailees

§ 2248(1). California

I instruct you that in the state of ——— embezzlement is the fraudulent appropriation of property by a person to whom it has been intrusted; also every person intrusted with property as a bailee who fraudulently converts the same or the proceeds thereof to his own use is guilty of embezzlement. I instruct you that if you find from all the evidence that the defendant hired the personal property described in the information from ———, that he thereupon became a bailee of the property thus hired.[56]

§ 2248(2). Delaware

You are instructed that the particular offense of which the prisoner stands indicted is known to the law as embezzlement as bailee, with reference to which the statutes of this state provide "that if any person, being a bailee of money or other property the subject of larceny, shall embezzle or fraudulently convert the same to his own use, he shall be deemed guilty of a misdemeanor, and upon conviction, shall be punished." A bailment consists in the delivery of some personal property, the subject of larceny, by one person to another, to be by him held, used or handled according to the purpose or object for which it is delivered, upon an understanding, express or implied, that after the purpose for which it is delivered has been fulfilled, it shall be returned to him who first delivered it or be otherwise dealt with according to his direction. A bailee is one to whom property is so delivered.[57]

You are instructed that, as the prisoner in this case is charged with embezzlement in his capacity of bailee, the state must first prove to you that the prisoner was in fact the bailee of the property which he is charged to have embezzled, and second, that as such bailee he embezzled or fraudulently converted the same to his own use. If you find that ———, being the landlord of the prisoner,

[55] McElroy v. People, 66 N. E. 1058, 202 Ill. 473.

[56] People v. Bojorquez, 169 P. 922, 35 Cal. App. 350.

[57] State v. Lyons, 80 A. 976, 3 Boyce, 72.

was the owner of the cow in question and delivered the cow to the prisoner to be by him kept upon the farm for the purpose of producing manure, the delivery of the cow constituted a bailment and the prisoner, upon receiving the cow, became a bailee. If you find that after so receiving the cow she gave birth to a calf, then the prisoner became the bailee of the calf as well as of the cow.[58]

You are instructed that if you find that, when the cow was purchased by ———, it was purchased by him for the prisoner in the sense that the cow thereafter was to belong to the prisoner, and that when the cow was received by the prisoner it was received by him and treated as his own property, for which he was to reimburse ——— when he made sufficient money out of the farm, as he contends by his testimony, then the cow and its offspring, though not paid for, became the property of the prisoner, his possession of them was that of owner and not as bailee, and his subsequent disposition of the calf and retention of the cow would not constitute the crime of embezzlement as charged against him by the indictment, and your verdict should be not guilty.[59]

§ 2248(3). Oregon

You are instructed that, when property is delivered by one person to another with the understanding that the identical property or its equivalent is to be returned to him, the person who delivered the property is called the bailor, and the one to whom it is delivered is called the bailee; and so in this case if the defendant received the money as alleged in this indictment, he would be the bailee.[60]

§ 2248(4). Texas

You are instructed that if you find and believe from the evidence in this case that, on or about the date alleged in the indictment and at the same time of the transaction between the defendant and the witness G., the same being the transaction alleged in the indictment, the defendant had a conversation with A., in which conversation and at which time the said A. agreed to extend, and did extend, to the defendant credit to the amount of $———, and that as a result of said conversation and in pursuance of said agreement, if any, ———, acting through its agent, the witness G., sold to the defendant the goods described in the indictment on credit, and if you believe that the disposition of said goods to the defendant at said time and place was a "sale," as that term is hereinafter defined, and was not a "bailment," as that term has been hereinbefore defined, or if you have a reasonable doubt thereof, you will

[58] State v. Lyons, 80 A. 976, 3 Boyce, 72.

[59] State v. Lyons, 80 A. 973, 3 Boyce, 72.

[60] State v. Stiles, 160 P. 126, 81 Or. 497.

acquit the defendant. By the term "sale" is meant the agreed transfer of the title to property from one person to another at an agreed price for a valuable consideration either paid at the time or agreed to be paid in the future.[61]

§ 2249. Appropriation by defendant of moneys held by him as bailee to secure him against liability on bond

You are instructed that, if you should find that the understanding and agreement between the defendant and the complaining witness was that the defendant should receive the said sum of $——— and hold it to be redelivered to the complaining witness ———, upon the release of the defendant from said bonds, and that there was no agreement or understanding between the said defendant and the said ——— that the defendant should have the use of said money, then it would be the duty of the defendant to redeliver said money to the said complaining witness within a reasonable time after being informed that the defendant was released from said bonds, if you do find that he was so released, and failure so to do, if you should find against the defendant upon the other issues in the case, would constitute the offense of larceny.[62]

§ 2250. Embezzlement by public officers

§ 2250(1). Kentucky

You are instructed that, if the jury believe and find from the evidence beyond a reasonable doubt that the defendant, in ——— county, before the finding of the indictment, did unlawfully, fraudulently, and feloniously, without the consent of ———, then sheriff of ——— county, or the owner thereof, or either, convert to his own use good and lawful money of the United States, exceeding $———, the same being the public moneys and taxes collected for said ———, sheriff as aforesaid, by said defendant, as deputy sheriff for said ———, which said money had then and there been intrusted to said defendant, or to his care, custody, and keeping as said deputy sheriff, they will find him guilty as charged in the indictment and say so and no more. If, however, the defendant in fact lost the money mentioned in the evidence, either accidentally or negligently, or it was in fact stolen from him, and he did not in any way use the money or keep it, the jury should find him not guilty.[63]

§ 2250(2). Virginia

You are instructed that the law requires that a justice of the peace, within ——— days after the receipt of any fine imposed by

[61] Lee v. State, 193 S. W. 313, 81 Tex. Cr. R. 117.

[62] State v. Jakubowski, 137 P. 448, 77 Wash. 78.

[63] Cline v. Commonwealth, 171 S. W. 412, 161 Ky. 678.

him, do pay such fine, with the cost, to the clerk of the circuit court of his county; and if the jury shall believe from the evidence that defendant, while a justice of the peace for this county, received a fine of $——— of ———, imposed by him as such justice, and instead of paying the same within ——— days after such receipt by defendant to ———, clerk, knowingly misused or misappropriated the same, or knowingly disposed thereof otherwise than in accordance with the law, it is the duty of the jury to find him guilty, and to fix his confinement in the penitentiary at not less than ——— nor more than ——— years.[64]

§ 2251. Same—For what funds required to account

You are instructed that if you find, from the evidence, that defendant, as treasurer of ——— county, received a check from his predecessor for $——— on the ——— Bank of ———, and that defendant deposited the same in said bank, and it was afterwards credited to ——— county on open account under the depository law as herein mentioned, and the county of ——— accepted a credit on its open account for such amount against said bank, this made the bank ——— county's debtor for such sum, and should be charged the same as if the sum had been received by the treasurer in money, instead of a check, and then deposited upon such account in said bank.[65]

§ 2252. Embezzlement by public administrator of funds of ward

You are instructed that if the jury believe from the evidence, beyond a reasonable doubt, that the defendant did, at the county of ——— and state of ———, within ——— years prior to ———, receive into his possession the money mentioned in the information, or any portion thereof, to the value of $——— or more, and that the defendant received the same into his possession as public administrator and ex officio public guardian of said county, under and by virtue of an order of the probate court of said county authorizing and directing him, as such public administrator and ex officio public guardian, to take charge of the estate of ———, a minor, and that he did, within ——— years prior to ———, at said county of ——— and state of ———, feloniously and fraudulently convert the same to his own use, with the intent fraudulently to deprive his said ward thereof, you will find the defendant guilty of embezzlement, as charged in the information, and assess his punishment at imprisonment in the penitentiary for a term of not less than ——— years, nor more than ——— years.[66]

[64] Robinson v. Commonwealth, 52 S. E. 690, 104 Va. 888.

[65] Whitney v. State, 73 N. W. 696, 53 Neb. 287.

[66] State v. Laughlin, 79 S. W. 401, 180 Mo. 342. These instructions were favorable to the defendant.

You are instructed that, if the jury believe from the evidence that the defendant was public administrator and ex officio public guardian at the time the order of the probate court read in evidence, authorizing and directing him to take charge of the estate of ———, a minor, was made, and that he received the funds described in the information, to wit, $———, by virtue of and pursuant to such order, then he received the same in his capacity of public administrator and ex officio public guardian.[67]

§ 2253. Embezzlement by officer of bank

You are instructed, first, that the person accused must have been an officer of a national bank at the time the offense, if any, was committed by him; second, he must, as such officer, have been intrusted by said bank with the care and custody of its money; third, he must have fraudulently appropriated to his own use some of the money so intrusted to him; fourth, such fraudulent appropriation thereof must have been with the intent to injure or defraud the bank.[68]

§ 2254. Pleading and proof—Proof of allegations as to subject of embezzlement

The jury are instructed that, although the jury may believe from the evidence that defendant received a cow from witness R., and that they valued the same at $———, and defendant did agree to credit the value of said cow upon R.'s notes, and then converted said cow to his own use, and failed to account to ——— for the value or proceeds of said cow, yet the jury are instructed that this will not constitute embezzlement of the $——— fixed as the value of said cow, and will not authorize the jury to find defendant guilty under the ——— count of the indictment.[69]

§ 2255. Sufficiency of evidence of conversion

You are instructed that the conversion or misappropriation by a bailee of property intrusted to him may be proved by direct evidence of the fact, or by proof of facts from which the conversion may be inferred. Any use to which the prisoner put the cow or calf of which he may have been bailee that was inconsistent with the rights of the owner and with the nature and purpose of the bailment, is evidence of a conversion; but in order that it shall amount to a fraudulent conversion to the bailee's own use, it must be effected with the intent to defraud the owner.[70]

[67] State v. Laughlin, 79 S. W. 401, 180 Mo. 342.

[68] McKnight v. United States (C. C. A. Ky.) 115 F. 972, 54 C. C. A. 358.

[69] State v. Schilb, 60 S. W. 82, 159 Mo. 130. The charge was for embezzling money and could not be sustained by proof of embezzlement of a cow and calf.

[70] State v. Lyons, 80 A. 976, 3 Boyce, 72.

§ 2256. Sufficiency of evidence of intent

The court instructs the jury that the law presumes that every man intends the natural and probable consequences of his own acts, and if you find from the evidence that the defendant feloniously and fraudulently converted the property alleged in the information to have been embezzled, to his own use, you will be authorized to infer therefrom the criminal intent, and that he did at the time intend to embezzle and convert the same to his own use, and to deprive ——— of it. The court further instructs the jury that "feloniously" means a wrongful act willfully done.[71]

§ 2257. Effect of restitution

§ 2257(1). Texas

The jury are instructed that, if the defendant, upon agreement with ———, on or about the ——— day of ———, executed to her his note for money received by him from her, then you cannot find the defendant guilty, unless you believe from the evidence beyond a reasonable doubt that before that time the defendant had fraudulently embezzled, misapplied, and converted to his own use said money, or a portion thereof, under the rules hereinbefore given you. But if you believe from the evidence beyond a reasonable doubt that prior to that time the defendant had fraudulently embezzled, misapplied, and converted to his own use said money, or any portion of the same, amounting to the value of $——— or over, then the execution of said note would be no defense.[72]

§ 2257(2). Virginia

The court instructs the jury that a payment made to the clerk ——— days after the receipt by a justice of public funds does not excuse a crime, if any, committed because of the failure of an earlier payment.[73]

[71] State v. Lentz, 83 S. W. 970, 184 Mo. 223.

[72] Jackson v. State, 70 S. W. 760, 44 Tex. Cr. R. 259.

[73] Robinson v. Commonwealth, 52 S. E. 690, 104 Va. 888.

CHAPTER CXXII

EMINENT DOMAIN

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2321. Land taken for sewer purposes.

A. THE POWER

§ 2258. Taking by municipality

You are instructed that the city has the right to take the land described in the petition for the purpose mentioned therein, namely, the building of a street or an approach to a wharf or dock, to be built in front of the harbor area in front of the said tract.[1]

§ 2259. Who to determine question of necessity of taking

§ 2259(1). Illinois

The jury are instructed that the only question in the case is the amount of compensation that should be awarded to the defendant railroad company for the extension of ——— street, as prayed in the petition of the city, and that whether or not such extension of said street is a wise or a necessary improvement is not for your consideration.[2]

§ 2259(2). Michigan

The jury are instructed that the determination of the mayor and council that the laying and operation of the line of defendant on this street was a proper and public convenience was conclusive on all parties.[3]

§ 2260. Property subject to appropriation

The jury are instructed that, as a matter of law, a railroad company takes its right of way subject to the right of the public to extend the public highways and streets across such right of way, without reference to whether the railroad company owns the right of way in fee or merely has an easement therein.[4]

The jury are instructed that, although the jury may believe from the evidence that part of the land and right of way described in the petition is used by the defendant railroad company for storing cars, yet such fact does not deprive the city of the right to extend ——— street over and across the same, and that such extension of the street will not amount to the exclusion of the prior use of the property by the railroad company.[5]

[1] In re City of Bremerton, 132 P. 240, 73 Wash. 565.
[2] Chicago & A. R. Co. v. City of Pontiac, 48 N. E. 485, 169 Ill. 155.
[3] Taylor v. Bay City St. Ry. Co., 59 N. W. 447, 101 Mich. 140.
[4] Chicago & A. R. Co. v. City of Pontiac, 48 N. E. 485, 169 Ill. 155.
[5] Chicago & A. R. Co. v. City of Pontiac, 48 N. E. 485, 169 Ill. 155.

B. Right to Compensation and Injuries for Which Compensation Must be Made

§ 2261. Effect of award in former proceedings

The court instructs you that by the payment of the award of $——— in the condemnation suit against plaintiffs, evidence of which has been introduced at the trial, the defendant fully compensated plaintiffs for all lands taken by it for its use as a right of way and described in the petition in condemnation, as well as for all damages done to the remainder of said tract of land by reason of said taking and by reason of the occupation, improvement, and use thereof for railroad purposes; that said damages so assessed, awarded, and paid plaintiffs included full compensation to plaintiffs for all damages resulting to their remaining land along and through which said right of way extends by reason of the construction of the cut in question, the sloping of its sides, and the establishing of its grades so far and to such an extent as the same was done in the usual and customary way, and with reasonable and ordinary care and skill, and, if you find that said cut was so constructed, your verdict must be for the defendant, even though you believe from the evidence that the slipping or caving of plaintiffs' lands referred to in the evidence was caused by the construction of said cut.[6]

§ 2262. What are injuries for which compensation must be made

Damages from opening street, see post, § 3893.

The court instructs the jury that, unless you find by a preponderance of evidence that the owners of the land sought to be condemned in this proceeding will be disturbed in their enjoyment of some right which they are entitled to make use of in connection with their land, you cannot find that they were damaged within the sense of the Constitution of the state of ———, which provides that they shall receive full compensation for the taking or damage of the land in a proceeding of this character. You are instructed that the market value of the land sought to be condemned in this action is not to be determined by its value for any particular use, but by a consideration of all the uses for which it is adapted and to which it may be applied, and that it is only when the market value of the land is diminished by a public use that it can be said to have sustained such damage as will entitle the owner to receive compensation.[7]

[6] Chapman v. St. Louis Belt & Terminal Ry. Co., 144 S. W. 469, 240 Mo. 592.

[7] Colusa & H. R. Co. v. Leonard, 167 P. 878, 176 Cal. 109.

§ 2263. Injuries to adjacent property from operation of railroad

You are instructed that, if you believe from a preponderance of the evidence that the laying and construction of the said tracks by or near the property of plaintiff, and the operation of trains thereon, taking into consideration, not only the uses then immediately made, but also such as will, in reasonable contemplation, likely be made thereof in future, had the effect to reduce the value of her property, so that it was worth less immediately after such construction and operation than it was immediately before, to the extent that it was so reduced, you will find your verdict in favor of the plaintiff.[8]

§ 2264. Discomfort and annoyance from operation of railroad water tanks

You are instructed that, if you believe from the evidence that the supplying of water to defendant's engines from the water tanks alleged in plaintiff's petition, with the exercise of ordinary care, necessarily produces smoke and noise to such an extent as to cause personal discomfort and annoyance to any persons who should occupy plaintiff's property alleged in his petition to be his home, and that by reason thereof the market value of said property has been depreciated, then you will find for plaintiff damages for such depreciation the measure of which would be the difference, if any, between the reasonable market value of said property immediately before and after the erection and beginning of the use of said tanks for said purposes; and in estimating the market value of said property before the erection of said tanks you will take into consideration any depreciation of said value by the operation of trains and locomotives on the ——— Railway and the ——— Railway, if you believe that the same did depreciate its value.[9]

§ 2265. Injuries to rights of riparian owner

The jury is instructed that it has the right to take into consideration, under the evidence introduced in this proceeding, that the defendant had certain rights to the river frontage of its property, of which it could not be legally deprived without just compensation, whether the river shipments paid or did not pay it, or were or not profitable, or whether it shipped by river, at all; and that if the plaintiff railroad company, in any way, by the construction of its road through and over the land of the said defendant, contracted, hampered, endangered or injuriously affected said rights to the river front of its property, so enjoyed by the said defendant, immediately prior to the ——— day of ———, then the result of

[8] Houston Belt & Terminal Ry. Co. v. Wilson (Tex. Civ. App.) 165 S. W. 560.

[9] Texas & Pac. Ry. Co. v. Edrington, 101 S. W. 441, 100 Tex. 496, 9 L. R. A. (N. S.) 988.

the said construction of the said railroad company's railroad become proper matters to be considered by the jury, in arriving at the damages to residue, if any, over and above peculiar benefits, if any accrued to said defendant, by the taking of the land taken and by the construction of said railroad, assuming said railroad company to have fully done and performed all the things it agreed and was required to perform and do under the agreed order of ———.[10]

§ 2266. Right to compensation for change of grade

See, also, post, § 3894.

Measure of damages for change of grade of street, see post, § 3895.

The court instructs the jury that, if they believe from the evidence that the defendant changed or caused to be changed the grade of the streets or roadways in front and on the side of the plaintiff's property or either of them, leaving the lot of the plaintiffs and the building thereon (which had been built with reference to grade theretofore existing, or a grade given the plaintiffs by the engineer in charge of said work) up on a bank above the said streets or roads, and so damaged the property of the plaintiffs, they must find for each plaintiff such sum as they may be of opinion from the evidence such plaintiff is entitled to, not exceeding the sum of $——— to each of them.[11]

C. Measure and Elements of Damage

1. *In General*

§ 2267. Duty of appropriator to make just compensation

§ 2267(1). California

The jury are instructed that, as the power of eminent domain is necessary for the public good, it would be unjust to the public that the plaintiff should be required to pay the owner more than a fair indemnity for the loss he sustains by the appropriation of his property for the general good, On the other hand, the owner being compelled to part with his property, whether he desires to sell or not, the law allows him just compensation therefor.[12]

§ 2267(2). Illinois

The jury are instructed that "just compensation" means the payment of such sum of money as will make the defendant whole, so that, on receipt by the defendant of the compensation and damages awarded, he will not be poorer by reason of his property being taken or damaged.[13]

[10] Buckhannon & N. R. Co. v. Great Scott Coal & Coke Co., 83 S. E. 1031, 75 W. Va. 423.

[11] Nelson County v. Loving, 101 S. E. 406, 126 Va. 283.

[12] Vallejo & N. R. Co. v. Reed Orchard Co., 147 P. 238, 169 Cal. 545.

[13] Phillips v. Town of Scales Mound, 63 N. E. 180, 195 Ill. 358.

§ 2267(3). Pennsylvania

You are instructed that, under the act of assembly and under the laws of the commonwealth and the constitution of the commonwealth, it is the duty of the railroad company to make just restitution to ——— for the land taken or injured by reason of the occupation of this land by the railroad company. They are to make just compensation. ——— is to be kept in statu quo. He is not to profit by reason of the fact that for a public purpose and as a public necessity (and that is the language of the law) this railroad company entered upon this land. He is not to profit by that, but he is entitled to just compensation for any injury sustained by him by reason of such entry. He is not to lose financially by reason of their entry upon these premises, but he is entitled to recover such an amount as will compensate him for the injury sustained by him, and preserve him financially in the same position after the entry and construction of the road as before.[14]

§ 2268. Market value of lands taken as measure of compensation

§ 2268(1). Illinois

The jury are instructed that, in considering the compensation to be paid to the defendant for the land about to be taken, they are to fix the actual cash market value of the land taken. And they are further instructed that they are not to consider the price at which the property would sell for under special or extraordinary circumstances, but its fair cash market value, if sold in the market under ordinary circumstances for cash, and not on time, and assuming that the owners are willing to sell, and the purchaser is willing to buy.[15]

§ 2268(2). Missouri

You are instructed that the just compensation, or in other words, the damages to which the defendant is entitled, is the fair market value of the defendant's property at the time of the appropriation by the plaintiff.[16]

§ 2269. Same—Matters entering into market value

§ 2269(1). California

The court instructs the jury that you are not to consider what the land was worth to the defendant, the owner, for speculation, or merely possible uses, nor what she claims it was worth to her, nor what it may be worth to plaintiff for railroad or other purposes, nor what the land would bring at a forced sale. You are not to consider the price the land would sell for under special

[14] Reiber v. Butler & P. R. Co., 50 A. 311, 201 Pa. 49.

[15] Brown v. Calumet River Ry. Co., 18 N. E. 283, 125 Ill. 600.

[16] Metropolitan St. Ry. Co. v. Walsh, 94 S. W. 860, 197 Mo. 392.

or extraordinary circumstances, but its fair market value, if offered in the market under ordinary circumstances for cash, a reasonable time being given to make the sale. Market value is the amount the strip would sell for if put upon the open market, and sold in the manner in which property is ordinarily sold for cash in the community where it is situated, with a reasonable time being given to find a purchaser and make the sale.[17]

The court instructs the jury that, in ascertaining the market value, you may consider the purposes for which the land is adapted, and the price for cash it would bring for any purpose, allowing a reasonable time in which to find a purchaser on ———.[18]

The court instructs the jury that you must take into consideration the purposes for which the property was adapted, and determine the market value from what a person would then have paid for the property, in cash, not buying, however, for any particular purpose, but having regard to the market value of the property, as it then stood for all purposes.[19]

§ 2269(2). Georgia

So, gentlemen, you look to the evidence upon that proposition. and you determine from the evidence what was the fair market value of this property before the erection and construction of the viaduct, and without reference to its construction or erection. And market value, gentlemen, is the price that property will bring when it is offered for sale by one who desires but is not obliged to sell, and is bought by one who is under no necessity of having it. So, under this rule, gentlemen, you look to the evidence and determine what was the fair market value of this property at the time the viaduct was erected, and what was its fair market value without reference to the construction or erection of the viaduct. It is your duty to look to the evidence and consider, if the evidence shows, what the capabilities of the property were—its capabilities and all the uses to which it may be applied, or to which it is adapted, both before and after the construction and erection of the viaduct. Determine it in the light of the evidence. Look at this property as a whole, land and buildings; take it as a unit, as one piece of property; and you determine from the evidence what was its fair market value at the time and just prior to the erection of the viaduct along ——— street in front of it. Consider all the evidence that enters into this question of its value, and determine what its fair market value was then; and then look to the evidence and determine how much, if any, the construction and

[17] Sacramento Southern R. Co. v. Heilbron, 104 P. 979, 156 Cal. 408.

[18] Sacramento Southern R. Co. v. Heilbron, 104 P. 979, 156 Cal. 408.

[19] Sacramento Southern R. Co. v. Heilbron, 104 P. 979, 156 Cal. 408.

maintenance of the viaduct in the front of this property has depreciated that market value. The jury may consider the adaptability to business or other advantageous uses of that portion of the street made possible by the erection of the viaduct. Consider all the elements, gentlemen, that would be advantageous to the property by the construction of the viaduct, if the evidence shows any; consider all the evidence, all that the evidence discloses, gentlemen, that would detract from its market value, and thereupon determine whether or not the construction, erection, and maintenance of the viaduct had depreciated or not the fair market value of the plaintiffs' property. Whatever that may be, gentlemen, if you find any depreciation by your verdict, that would measure the amount the plaintiffs would be entitled to recover—they would be entitled to recover whatever damage, whatever depreciation in the fair market value, whatever that would be; that is the amount they would be entitled to recover in this case. If there has been no depreciation, gentlemen, in the fair market value of their property, why then there would be no recovery for the plaintiffs, and the verdict should be for the defendant.[20]

§ 2269(3). Kentucky

The court tells the jury that they will find for the defendants a fair equivalent for the entire piece of property, which finding should be its market value at present in money, and its market value is that price it would bring when it was offered for sale by one who desires, but is not obliged, to sell it, and is bought by one who is under no necessity of buying it; in other words, a fair market value means the fair value between one who wants to purchase and one who wants to sell.[21]

§ 2269(4). Missouri

You are instructed that the market value of the property means its actual value independent of the purposes for which it is to be used by the railroad company; that is, the fair value of the property as between one who wants to purchase, and one who wants to sell it. Not what could be obtained for it in peculiar circumstances when greater than its fair price could be obtained; nor its speculative value; nor the value obtained through the necessities of another; nor, on the other hand, is it to be limited to that price which the property would bring when forced off at auction under the hammer. The question is: If the defendant wanted to sell his property, what could be obtained for it upon the market from the parties who wanted to buy and would give its full value? The market value is not to be determined by the value

[20] City of Newnan v. Davis, 89 S. E. 336, 145 Ga. 380.

[21] Sandy Valley & E. Ry. Co. v. Bentley, 171 S. W. 178, 161 Ky. 555.

of the property to the railroad company or the railroad's necessity for acquiring it. This consideration must, in no way, be allowed to affect the determination by the jury of the value of the property sought to be appropriated by the railroad company.[22]

§ 2269(5). North Dakota

You are instructed that such damage or detriment is made up of elements to be considered under two heads; the first head being the reasonable present cash market value of the land actually occupied by plaintiff for the use and purpose proposed, exceeding in no instance the present market value of the entire ——— foot strip, taking into consideration that such strip is within the limits of a public highway and subject to a public use for highway purposes.[23]

§ 2269(6). Oklahoma

You are instructed that in determining what is the value of the property in controversy, however, the law does not permit you to fix speculative or fancy values upon it, but the law requires you to determine the reasonable market value of the property if the owner was offering to sell on the usual terms and the purchaser desiring to buy. The phrase "market value" does not mean what you may ask for it, but said phrase means the fair selling value of the property in the market, either in its present condition or any condition to which it is susceptible of being changed.[24]

§ 2270. Same—Cash price obtainable under ordinary circumstances

The jury are further instructed that they are not to consider the price which the property would sell for under special or extraordinary circumstances, but its fair cash market value if sold in the market, under ordinary circumstances, for cash, and not on time, and assuming that the owners are willing to sell, and the purchaser is willing to buy.[25]

§ 2271. Measure of damages where part of tract taken

§ 2271(1). Illinois

The jury are instructed that, if the land not taken will be depreciated in actual market value by reason of the building of the road through it, the jury should fix the damages at a sum equal to such depreciation.[26]

The jury are instructed that, in assessing the value of the land

[22] Metropolitan St. Ry. Co. v. Walsh, 94 S. W. 860, 197 Mo. 392.

[23] Tri-State Tel., etc., Co. v. Cosgriff, 124 N. W. 75, 19 N. D. 771, 26 L. R. A. (N. S.) 1171.

[24] Oil Fields & S. F. Ry. Co. v. Treese Cotton Co., 187 P. 201, 78 Okl. 25.

[25] Phillips v. Town of Scales Mound, 63 N. E. 180, 195 Ill. 353.

[26] Galesburg & G. E. R. Co. v. Milroy, 54 N. E. 939, 181 Ill. 243.

actually taken, and the damages to the land not taken, you should not assess the same on the basis of what the owner would take for the same, or any part thereof, or what you would take, and let the railroad go across the lands, if you were the owner of them. These are improper to be taken into consideration, either in fixing the value of the land taken, or in assessing the damages to the land not taken; but you should at all times keep in mind that the actual, fair cash market value of the lands taken, and the decrease, if any, in the actual, fair cash market value of the lands and property not taken, by reason of the construction and operation of the railroad, are the proper measure of damages and compensation which you are to ascertain in this case.[27]

You are instructed that, if the jury find from the evidence that the part of the lot proposed to be taken in this case is of greater value when considered as a part of the entire lot than it would be as a separate and distinct piece of property, entirely disconnected from the residue of the lot, then the jury, in order to make the owner of the lot just compensation for the part of the lot taken, may allow to him the fair cash or market value of the part of the lot taken, when considered in its relations to and as a part of the entire lot, and not simply what may appear to be its value as a separate and distinct piece of property, entirely disconnected from the residue of the lot.[28]

§ 2271(2). Kentucky

The court further instructs the jury that, if they find for plaintiffs as indicated in instruction No. ——— or ———, then they must find for plaintiffs the value of the land taken by the defendant for its road, and, in valuing the same, they must take into consideration its relative position to the entire farm of which it is a part, and its value when considered in its relation to the entire tract, which includes the actual injury to the remainder of the farm and its improvements, and every direct damage tending to diminish in value the plaintiffs' farm by reason of the use and appropriation of the strip actually taken and used by defendant in constructing and operating its road permanently thereon, not exceeding in all the sum sued for, $———, and being governed in such assessment of damages by all the evidence in the case.[29]

§ 2271(3). Maryland

You are instructed that, if the jury find that ——— and ——— are the owners of the ground binding on the southernmost side of ——— street as proposed to be opened in the proceedings now

[27] Kiernan v. Chicago, S. F. & C. R. Co., 14 N. E. 18, 123 Ill. 188.

[28] Chicago & E. R. Co. v. Blake, 4 N. E. 488, 116 Ill. 163.

[29] Maysville & B. S. R. Co. v. Holton, 39 S. W. 27, 100 Ky. 665.

pending for that purpose, and bounded northwardly by ——— street and southwardly by ——— avenue and the dividing line between the land known as the ——— property and the land known as the ——— property, and if the jury further find that the opening of ——— street as proposed in this proceeding will be injurious to the petitioners, ——— and ———, in an amount greater than the present market value of the ground contained in lot No. ———, shown on the plat marked ——— in evidence, then the jury, in ascertaining the damages to be paid to said petitioners, are not confined to the market value of the ground contained in said lot No. ———, but they may and should award to the said petitioners as damages such sum of money as will fully compensate for all the injury which the jury shall so find will so be done to them by the opening of said ——— street as proposed in the present proceedings.[30]

The court instructs the jury that, in making up their verdict as to the amount of damages to be allowed the property owner for the condemnation and taking by the mayor and city council of ——— of that portion of the lot so condemned and taken, they should take as the measure of damages the difference between the present market value of the entire lot before taking and the present market value of the remaining portion fronting on ——— after taking, but in ascertaining the present market value of said remaining lot they are not to consider any value that may accrue thereto by reason of the opening of ——— street from ——— street to ———.[31]

§ 2271(4). Missouri

You are instructed that, in estimating the damages in this case, the jury should take into consideration the actual value of the strip of land sought to be condemned by plaintiff, and benefits, if any, and the disadvantages, if any, resulting to the remainder of the lands of defendant not taken by plaintiff, from the appropriation by plaintiff of the strip of land in question for the purpose of its said railroad. The benefits to be considered and allowed by the jury are the direct and peculiar benefits, if any, which result to the remainder of the lands of defendant not appropriated by plaintiff, not the general benefits which defendant derives, in common with other landowners in the vicinity, from the building of the road. Neither should the jury, in estimating the damages in this case, take into consideration such inconveniences and disadvantages to the defendant as are consequences of the lawful and

[30] Patterson v. Mayor and City Council of Baltimore, 91 A. 966, 124 Md. 153.

[31] Mayor and City Council of Baltimore v. Megary, 89 A. 331, 122 Md. 20.

proper use of the railroad, in so far as the same are common to the other landowners in the neighborhood, portions of whose land are not taken.[32]

§ 2271(5). Oklahoma

You are instructed that the issue for you to determine in this case is the amount of damages the landowner had sustained by reason of the appropriation of the said strip of land ——— feet wide and extending along the south portion of said strip of land, and the injury that the landowner has sustained to the remaining portion of the land not condemned for right of way purposes, together with such damages as the owner actually sustained as to the real or personal property by such appropriation of its land.[33]

You are instructed that the real measure of damages is the difference, if any, in the value of the land as a whole, without the railway over it, and the value that remains untaken, burdened with the operation and the damages and inconvenience incident to the operation of the railway over the land; and that the jury, in arriving at the damages of defendant, should take into consideration only the value of the land actually taken, together with the depreciation in the value of the land not taken.[34]

§ 2271(6). Wisconsin

The court instructs the jury that in estimating and determining the fair market value of the strip or parcel of land taken by the railroad company, you will consider the fact that said strip of land was part and parcel of and used in connection with the tract and premises of the plaintiffs, described in the evidence, and you will not view the parcel taken as an isolated or separate parcel of land. You will further consider any and all evidence relating to the situation of said strip, its general location with reference to the remainder of said plaintiff's premises, its surroundings, the use to which it was, in whole or in part, devoted, its availability and adaptability for valuable uses, its natural advantages, if any, rising out of its location and situation, the uses to which it was or was intended by the owners in the immediate future to be applied, and all the other evidence, facts and circumstances introduced and appearing upon the trial which will aid you in arriving at a just determination of said value.[35]

[32] Cape Girardeau & C. R. Co. v. Bleechle, 137 S. W. 974, 234 Mo. 471, Ann. Cas. 1912D, 246.

[33] Oil Fields & S. F. Ry. Co. v. Treese Cotton Co., 187 P. 201, 78 Okl. 25.

[34] Wichita Falls & N. W. Ry. Co. v. Munsell, 132 P. 906, 38 Okl. 253.

[35] Jeffery v. Osborne, 129 N. W. 931, 145 Wis. 351.

§ 2272. Same—Recovery of damages to part not taken

§ 2272(1). California

The court instructs the jury that after you have determined the value of the strip of land sought to be condemned for the right of way, you must then ascertain and assess the amount of damages, if any, which accrue to the portion not sought to be condemned by the plaintiff. This damage, if any, will be determined by ascertaining, in the same manner as heretofore stated, the market value of those portions of said tract not taken as it was on ———, and by deducting therefrom the market value of said property after the severance and proposed railroad is constructed. The difference between these values, if there shall be any, will be the amount of damage done by the opening of said railroad to the part of said land not taken. The law fixes this method of ascertaining the damages, and it is your duty to follow it. You must exclude in this estimate, however, any estimate of benefits derived from building the road to the property not taken.[36]

§ 2272(2). Illinois

The jury are instructed that, in estimating the damages to the balance of the farm, you should consider this railroad as running only through this farm, and should not consider any general benefit which the road might be in making a better market or affording conveniences for travel.[37]

§ 2272(3). Maryland

You are instructed that, in estimating the damages to be paid for condemnation of property, the jury must include in their award of damages not merely the market value of the land actually to be taken, but also a due allowance of damages for injury to the remaining land owned by ——— and ———, if the jury shall find that any such injury will be caused.[38]

§ 2272(4). North Dakota

You are instructed that the second element of damage is that which will be suffered by the parts not taken of the tract of land owned by the defendant by reason of the taking and appropriation of the strip in question for telephone and telegraph purposes, and that "in determining the value to the balance of the several tracts not included in the ——— foot strip, you should determine from the evidence how much said land will be depreciated in value by reason of the taking for the particular use of the ——— foot strip or the portion thereof necessary to be taken. What is the differ-

[36] Sacramento Southern R. Co. v. Heilbron, 104 P. 979, 156 Cal. 408.

[37] St. Louis, etc., R. Co. v. Kirby, 104 Ill. 345.

[38] Patterson v. Mayor and City Council of Baltimore, 91 A. 966, 124 Md. 153.

ence, if any, between the cash market value of the entire tract of land excepting the ——— foot strip before the erection of the said telephone and telegraph lines thereon and its present cash market value after said line has been erected. Such difference will be the damage occasioned to the defendant arising under the second element of damage.[39]

§ 2272(5). Pennsylvania

You are instructed that, in determining the amount of damages sustained, you take into consideration the whole tract of land, the advantages as well as the disadvantages that accrue to the property of the plaintiff by reason of the entry of the railroad company upon the premises. The entry and construction of a railroad upon some tracts of land might be of such advantage to the balance of the tract that the owner of the land would be entitled to no damages at all. On the other hand, the entry of a railroad company upon a certain piece of property might damage it greatly in excess of the value of the land taken. In determining if ——— has sustained damages largely in excess of the value of the land taken—that is, per acre, the value of the land taken—you compare the land acre per acre with the entire tract before and after the entry upon the premises. You should take into consideration the manner in which this road traverses through his land, the cuts and fills, and the extent, if any, to which any part not so occupied is injured by the erection or location of the road.[40]

§ 2273. Same—Method of determining depreciation in market market value of part not taken

The court instructs the jury that, after you have determined the market value of the strip of land sought to be condemned for the right of way, you must then ascertain and assess the amount of depreciation of the market value, if any, which may accrue to the portion of the land not taken by reason of the construction of the railroad in the manner proposed. This damage, if any, will be determined by ascertaining, in the same manner as heretofore stated, the market value for cash of those portions of said tract not taken, as it was on the ——— day of ———, and by deducting therefrom the market value for cash of said property after the severance and the proposed railroad is constructed. The difference between these values, if there shall be any, will be the amount of the depreciation of the market value of the land not taken. The law fixes this method of ascertaining the damages, and it is your duty to follow it.[41]

[39] Tri-State Telephone & Telegraph Co. v. Cosgriff, 124 N. W. 75, 19 N. D. 771, 26 L. R. A. (N. S.) 1171.

[40] Reiber v. Butler & P. R. Co., 50 A. 311, 201 Pa. 49.

[41] Colusa & H. R. Co. v. Leonard, 167 P. 878, 176 Cal. 109.

§ 2274. Same—Difference in market values of tract, considered as an entirety, before and after entry by appropriator

§ 2274(1). Iowa

You are instructed that the market value of land is the actual price at which it may ordinarily be sold on the market to one who desires to purchase The price which an owner may put upon his land is not the market value, unless it may be sold at such price. You should therefore, in determining the amount of damages which you award the plaintiffs, find the actual market value of the plaintiffs' farm, as an entirety, on or about the ——— day of ———, and just prior to the condemnation of the piece of land in question, and the actual market value of such farm immediately after the tract of land in question was condemned and taken from the farm, and the difference between such values is the damage sustained by the plaintiffs.[42]

You are instructed that the measure of the damage sustained by ——— and ———, by reason of the taking of the tract of land in question, is the difference in the market value of the farm from which such tract is taken before such tract was condemned and taken therefrom, and its market value after the taking of such tract of land by the township trustees.[43]

The jury are instructed that the interruption of plaintiff in the use and cultivation of his land, or any inconvenience he may have been put to in its cultivation and use as a live stock farm, or otherwise, according to his peculiar taste in farming, since the appropriation of the right of way, if any, cannot be considered by the jury as forming an element of damages in his favor, and your inquiry must be confined to the marketable value of plaintiff's land before and after the right of way was appropriated, taking into the account, in this connection, the number of acres taken for right of way, the manner of its location, the way his land is cut by the railroad, and the like, so as to be able to estimate the true market value of his land affected by the location of the railroad before and after such location. The difference in the market value of the land affected by the appropriation of the strip for right of way before, and then again after, the right of way is asserted, will form or constitute his true measure of damages.[44]

§ 2274(2). Kentucky

You are instructed that the plaintiffs are further entitled to recover damages, under instruction No. ———, if any, resulting to plaintiff's land from the construction of the railroad through their

[42] Watters v. Platt, 168 N. W. 808, 184 Iowa, 203.

[43] Watters v. Platt, 168 N. W. 808, 184 Iowa, 203.

[44] Hartshorn v. Burlington, C. R. & N. R. Co., 3 N. W. 648, 52 Iowa, 613.

farm; and the jury are directed, in estimating said damages, to find the value of the land as now cut and occupied by the road, and then find what it would be worth if not cut and occupied by said road, and the difference, if any, is the damages they are entitled to recover on that account.[45]

§ 2274(3). Pennsylvania

You are instructed that the jury are not to consider that one part of the tract of land has been injured and the other part not affected by the railroad in arriving at the damages, but must determine the damages from the difference between the market value of the whole tract before and after the building of the railroad.[46]

You are instructed that the proper measure of damages for the land taken in this case for railroad purposes is the difference between the general market or selling value of the entire tract as a whole immediately before, and as unaffected by the railroad, and the general market or selling value of the whole immediately after the appropriation of the right of way, and as affected by the railroad.[47]

The jury are instructed that, whatever damages plaintiff is entitled to, he is entitled to as of the date of the entry of the railroad company upon the premises, which, it appears, was in ———. The amount which he is entitled to recover is the difference between the market value of that land immediately prior to the entry of the railroad company and its market value immediately after the entry of the railroad company; that is, the value of the land prior to the entry of the railroad company and the value of the land after the entry and construction of this railroad upon the land. That is the measure of damages. There is no question as to the law in that respect. Counsel appear to differ somewhat in reference, or appear to differ in reference, to the manner in which you shall arrive at the value of this land at these particular times; but the difference between the values at the times indicated is the measure of damages which the plaintiff is entitled to recover.[48]

The jury are instructed that, in estimating the damages in this case they are to consider the matter just as if they were called on to value the injury at the moment when the railroad company condemned the land, which is admitted to have been ———. They are to value the injury to the property without reference to the person of the owner, or the actual state of his business; and in doing that the only safe rule is to inquire what would the property, unaffected by the railroad, have sold for at the time it was

[45] Louisville, St. L. & T. Ry. Co. v. Neafus, 18 S. W. 1030, 93 Ky. 53.

[46] Reiber v. Butler & P. R. Co., 50 A. 311, 201 Pa. 49.

[47] Reiber v. Butler & P. R. Co., 50 A. 311, 201 Pa. 49.

[48] Reiber v. Butler & P. R. Co., 50 A. 311, 201 Pa. 49.

taken by the railroad company? What would it have sold for as affected by the taking of the railroad company? The difference is the true measure of compensation.[49]

§ 2275. Same—Elements of loss in market value of tract through taking part

§ 2275(1). Illinois

The jury are instructed that the owner of the land is entitled to the use and enjoyment of the same for the highest and best use to which it is adapted, and if you find, from all the evidence, that a large portion of the ——— farm is by the proposed railroad cut off from the water supply, and the several parts rendered inconvenient of access, so that the whole farm is depreciated in market value and damaged for all time, then you should take such facts into consideration in estimating the damages.[50]

§ 2275(2). Iowa

The jury are instructed that, if you find, from the evidence, that plaintiff's farm consisted of near ——— acres of improved lands, and the right of way of defendant cut the same in such a manner as to injure the value of the same by throwing it open and dividing it into pieces, you are at liberty to consider all the circumstances and effects upon the lands and lots, if any, by reason of the location upon the lands of the railroad, and all the inconveniences directly caused by the railway, in determining the effect the same would have upon the market value of the lands; and it is the depreciation in market value of the premises which is the true measure of damages, and which you are to allow for, and not the matters which would cause such depreciation.[51]

§ 2275(3). Missouri

You are instructed that the market value of the property is not to be determined by the value of the strip in question to the plaintiff, or plaintiff's necessity of acquiring it, nor its peculiar value to defendant. These considerations must in no way be allowed to affect the determination by the jury of the value of the whole property, or of the strip sought to be appropriated by plaintiff in this proceeding.[52]

§ 2275(4). Pennsylvania

The jury are instructed that the market value of land is not necessarily the price it would command in a forced sale by public auction. It is estimated upon a fair consideration of the location of the

[49] Reiber v. Butler & P. R. Co., 50 A. 311, 201 Pa. 49.

[50] Galesburg & G. E. R. Co. v. Milroy, 54 N. E. 939, 181 Ill. 243.

[51] Hartshorn v. Burlington, C. R. & N. R. Co., 3 N. W. 648, 52 Iowa, 613.

[52] St. Louis, K. & N. W. R. Co. v. Knapp, 61 S. W. 300, 160 Mo. 396.

land, the extent and condition of its improvements, its quantity and productive qualities, and the uses to which it might reasonably have been applied at the time it was taken by the railroad company, taken with the general selling price of lands in the neighborhood at the time.[58]

I may further say to you that the fact that the plaintiff is entitled to recover something is not in question. I do not understand that counsel representing the defendants take the position that the plaintiff, ———, is not entitled to recover at all. The fact for you to determine, then, is how much he is entitled to recover. Much testimony has been adduced in reference to the value of this entire tract. It is proper to hear evidence in reference to the value of the whole tract, and you will understand from what we have already said, as well as from what you have heard counsel say, that in determining the amount of damages you must take into consideration the value of the entire tract of land before the railroad company entered upon it and the value of the entire tract afterwards. It is proper for you, in determining what the value of the land then was, to take into consideration the character of the land. Without some knowledge of the character of the land, you could place no estimate upon its value; neither could you fix the amount of damages. It is very proper, therefore, that you should know the character of the land, its location, its location with reference to this borough or other improvements, the fact that it is traversed by a stream, the use and character of the land, whether low and swampy or hilly. It is proper that you should take into consideration the purposes for which it may be valuable, or might have been valuable, at that time; the purposes to which it may be adapted. In determining the amount of damages, you must necessarily take these facts into consideration. You would fix a value upon the premises of a particular description. For instance, you would fix a value upon good, improved farm land at a very much higher rate than upon wild, unimproved, and untillable land, which was not in proper shape for cultivation, and could not be so prepared. And so, in this case, it is proper for you to take into consideration the proximity of this land to and its contact with the borough. And it is proper for you to take into consideration any fact which may tend to add a value to that land. If any part of it was then valuable as building lots, and that fact added a value to the land, it is proper for you to take that into consideration; and, if the location and construction of the defendant's railroad across this land destroyed it in part, or took away any part of this land which might have had

[58] Reiber v. Butler & P. R. Co., 50 A. 311, 201 Pa. 49.

or had value for that purpose, it is proper for you to take that fact into consideration.[54]

§ 2276. Same—Unavailability of part not taken for former uses

You are instructed that if, notwithstanding the switch facilities which the land of defendant had prior to the location across it of plaintiff's road, the jury believe that the portions of defendant's land not taken by plaintiff were, in fact, increased in value for sale in the market, and that such increase in value was caused by peculiar benefits resulting directly to said portions of said land from the location and building of plaintiff's road, and from the right to side-track and switch connections with said road, secured to said portions of land under Ordinance No. ——— of the city of ———, read in evidence by the plaintiff, then the jury are instructed that it is of no importance whether, after the building of said road, said property could or could not be used for the same purposes to which it had been formerly applied.[55]

§ 2277. Measure of damages for appropriation of part of railroad right of way by telegraph company

You are instructed that the railroad company is entitled to recover the reasonable value of the land taken for railroad purposes—the reasonable value to the railroad for railroad purposes as a right of way. It is entitled, further, to recover such consequential damages as are appreciably proved, and which you can determine from the evidence flowed from the taking of that right of way to the railroad company. That is a matter for you to determine from the evidence. I charge you, gentlemen, you are not to consider remote, contingent, and imaginary things that may never possibly happen, or that may possibly happen in the remote future.[56]

You are instructed that the amount of land taken in this case is the amount of land occupied by the poles of the telegraph and cable company, and by the fixtures for guy ropes.[57]

§ 2278. Taking right of way across another railroad

The jury are instructed that defendant railway companies cannot recover any damages against the petitioner in this case on account of having to stop and start their respective trains at the proposed crossing of the different railroad tracks in order to comply with the law of the state, and the jury will find no damages against the petitioner on account of any annoyance, delay, or ex-

[54] Reiber v. Butler, etc., R. Co., 50 A. 311, 201 Pa. 49.

[55] St. Louis, K. & N. W. R. Co. v. St. Louis Union Stockyard Co., 25 S. W. 399, 120 Mo. 541.

[56] Atlantic Coast Line R. Co. v. Postal Tel. Cable Co., 48 S. E. 15, 120 Ga. 268, 1 Ann. Cas. 734.

[57] Atlantic Coast Line R. Co. v. Postal Tel. Cable Co., 48 S. E. 15, 120 Ga. 268, 1 Ann. Cas. 734.

pense caused simply by so being compelled by law to stop before passing any of the proposed crossings.[58]

§ 2279. Appropriation by gas company of agricultural lands underlaid with coal

The court instructs the jury that the plaintiff is entitled to recover (1) the actual damages done in the construction of the line to the surface, including injury to fences and crops; (2) the depreciation in value of the farm, as a whole, by the entry and appropriation of the gas company, excluding from consideration all servitude of the coal to the surface, and all damages that may result from negligence on the part of the company.[59]

§ 2280. Compensation for appropriating rights in public land of homestead entryman

You are instructed that this is an action for damages brought by the plaintiff against the defendant on account of the taking and appropriating of a right of way embracing ——— acres of land, over and across a quarter section of land, situate in said county and state, and described as follows, to-wit: The southeast quarter of the southwest quarter and the southwest quarter of the southeast quarter of section ———, and the northwest quarter of the northeast quarter and the northeast quarter of the northwest quarter of section ———, township ——— south, range ——— west, containing ——— acres. The plaintiff claims to be entitled to damages for the taking of such right of way by virtue of a homestead entry on said land made ———, by him, and his subsequent compliance with the United States laws, in relation to acquiring title to the public lands. Under the homestead laws of the general government, a person who is 21 years of age, and a citizen of the United States, and who has not had the benefit of the homestead laws, is qualified to make a homestead entry on not to exceed one quarter section of the public domain, and if the entryman subsequent to such entry, continues to reside upon and cultivate his entry, and does not at any time abandon his homestead entry for a longer period than six hours, he may, after five years of continuous residence and cultivation, prove up under his entry and obtain a patent for the land from the government. The entryman, under the said homestead laws, by such entry and subsequent residence and cultivation, acquires the right of possession of the land embraced in his entry, the right to use of the same (including the right to grass, and a sufficient amount of the timber growing thereon, if any, for firewood, and in the improvement of the land), the right

[58] Peoria & P. U. R. Co. v. Peoria & F. R. Co., 105 Ill. 110.

[59] McGregor v. Equitable Gas Co., 21 A. 13, 139 Pa. 230.

and ownership of all improvements put upon the land, and the right to acquire a full legal and equitable title thereto. By the act of putting on his homestead entry, the entryman acquires the exclusive right, by continuous residence and cultivation of the land, to obtain the full legal title, and his equities increase from the time of his entry to the expiration of the five years provided for in the government land laws; and if, at the end of five years, he has complied with the said laws in all particulars, and there is no valid adverse prior claimant, the government issues to him a patent for the land.[60]

§ 2281. Measure of damages where property is injured but no part is taken—Decrease in market value

§ 2281(1). Georgia

You are instructed that if you find there was damage, in order for you to ascertain how much, you would first determine under the testimony what its original market value was before the railroad attempted to come there, and then ascertain whether or not that market value has been decreased by reason of the railroad coming there, and the amount of that decrease would be the proper amount of your verdict.[61]

§ 2281(2). Nebraska

You are instructed that, in estimating the plaintiff's damages in this case, if you should find from the evidence that he has sustained any, by reason of the construction and operation of defendant's railroad, as alleged in the petition, you are at liberty to take into consideration the fair market value of plaintiff's property as it was before the road was built and in operation, and its fair market value after the road was built and in operation, and assess the plaintiff's damages at such sum as shall equal the difference between the two estimates, if you shall find there is any such difference; and, in ascertaining the fair market value of the property, you are not to determine that by what it would bring at forced sale, or from one that might buy it for speculative purposes, but what a reasonably prudent and competent man would pay for it provided he wanted it where it is, and as it is, and for his own use, and was willing and able to buy.[62]

§ 2282. Same—Necessity of showing depreciation in value in order to recover damages

The jury are further instructed that when an action is brought to recover damages, where no part of the plaintiff's property has been

[60] Burlington, K. & S. W. R. Co. v. Johnson, 16 P. 125, 38 Kan. 142.

[61] Streyer v. Georgia S. & F. R. Co., 15 S. E. 637, 90 Ga. 56.

[62] Beavers v. Missouri Pac. R. Co., 66 N. W. 821, 47 Neb. 761.

taken, but simply damaged, by a public improvement, damages cannot be had unless the property claimed to be damaged has been depreciated in value by the construction of the public improvement. In other words, if the fair market value of the property is as much immediately after the construction of an improvement as it was immediately before the improvement was made, no damages can be sustained and no recovery can be had. Therefore, in this case, if the jury believe from the evidence that the fair market value of the plaintiff's property was as much immediately after the construction of the defendant's railroad as it was immediately before, then he has sustained no damages which can be the subject of a recovery in this suit, and they should in such case find for the defendant.[63]

§ 2283. Same—Effect of decrease in rental value

You are instructed that it may be true you may find from the evidence that, in point of fact, the coming of the railroad will decrease the value of this property for rental purposes, but upon that alone you could not base a verdict for ———, unless you were satisfied from the testimony that the effect at the same time would be to decrease its market value.[64]

§ 2284. Recovery by abutting owner because of occupation of street by railroad

§ 2284(1). Alabama

You are instructed that, if you believe from the evidence that the plaintiff's property has been improved more than it has been damaged by the defendant's work complained of, when considered in connection with the whole improvement, you should find for the defendant.[65]

You are instructed that plaintiff's damage, if any, is the permanent damage done to his lot, as the net proximate result of the defendant's obstruction complained of, viewed in connection with the depot improvements of defendant, of which that structure is an incident.[66]

§ 2284(2). Iowa

You are instructed that you have, then, two principal questions of fact to determine from the evidence before you in this case, namely: First. Is the property depreciated in value by the laying down and operation of the railway track in question on ——— street, along, near, and adjacent to said property? Second. In what sum or amount? If you determine the first of the above questions or

[63] Stewart v. Ohio River R. Co., 18 S. E. 604, 38 W. Va. 438.

[64] Streyer v. Georgia S. & F. R. Co., 15 S. E. 637, 90 Ga. 56.

[65] Meighan v. Birmingham Terminal Co., 51 So. 775, 165 Ala. 591.

[66] Meighan v. Birmingham Terminal Co., 51 So. 775, 165 Ala. 591.

propositions in the affirmative under the evidence—that is, that there is a depreciation of said property as alleged—then you will next ascertain from the evidence the full amount or sum of such depreciation, and that will be your verdict for the plaintiff. The measure of plaintiff's damages, if any, would be all the damages she was entitled to at the time of the laying down of the track, or thereafter entitled to on account thereof, as shown by all the evidence, if any, shown. In other words, the measure of damages or the extent of her recovery would be the difference between the fair market value of the property in question, if any, immediately before laying the track on ——— street, and then the like value immediately thereafter, as disclosed by the evidence, irrespective of the benefit which may have resulted to the property of plaintiff from the laying down of the said ——— track on said ——— street. In passing upon this question of values, you may consider the nature and character and use of plaintiff's property immediately before laying the track and thereafter, and any and all inconveniences, if any, that might arise out of the peculiar use of ——— street by the railway track in question, along, near, and adjacent to said property on said street, as shown by the evidence before you.[67]

The jury are instructed that they must not allow plaintiff any damages which she may have sustained or will sustain, if any, by reason of any annoyance or inconvenience suffered by her in common with the rest of the public, by reason of the construction and operation of defendant's said railway track upon ——— street, as shown by the evidence. For all such damages, if any, plaintiff cannot recover in this action. Nor could you allow plaintiff for any inconvenience or loss, if any, which the evidence may show has been sustained to the business of the tenants ———, by reason of the construction and operation of said railway track, and which has not directly affected the value of plaintiff's own lot in question. Plaintiff cannot recover in this action for any loss or inconvenience to the business of her tenants alone.[68]

§ 2285. Compensation for changing location on farm of railroad right of way

The court instructs the jury that they will find for the defendant such a sum as they may deem from the evidence, to be the fair and reasonable market value of the triangular strip of land taken, considering it in relation to his farm. They will also find such other damages, if any, as directly result to the remainder of his farm by

[67] Cook v. Chicago, M. & St. P. Ry. Co., 49 N. W. 92, 83 Iowa, 278.

[68] Cook v. Chicago, M. & St. P. Ry. Co., 49 N. W. 92, 83 Iowa, 278. This is correct as far as it goes.

reason alone of the changing of the railroad from the old location to the new.[69]

The court instructs the jury that, in estimating the damages to which the defendant is entitled under the foregoing instruction, they will exclude from their considerations any damages that might reasonably be anticipated to result from the location, construction, and operation of the railroad as originally laid out on the old location, and to allow nothing to defendant therefor.[70]

§ 2286. Compensation for appropriation of water rights appurtenant to land

You are instructed that the compensation or measure of damages for you to find is the fair market value of the water right and the land taken, together with the amount of depreciation, if any, to the value of the land not taken, without regard to the proposed construction of waterworks by the petitioner. In other words, the land has a certain value as it stands to-day; when the springs are taken away, and the water taken away, the land is depreciated, presumably, and we will ask you to determine the depreciation with the water taken away, if any. In other words, what is the value to the premises of the water rights? So that the compensation to be paid ——— is the fair market value of the water right and the land taken, together with the amount of depreciation, if any, to the balance of his land by reason of this taking, and that is without regard to benefits, if there are any, by reason of the proposed construction of the waterworks by the petitioner.[71]

As you have been before instructed, where property is taken for public purposes the owner is entitled to its fair market cash value for the uses to which it may be most advantageously applied, for which it would sell for the highest price in the market; and if you should find from the evidence in this case that portions of the land taken border on the shores of ——— Bay, and that the lands immediately in front thereof are available for manufacturing purposes of any kind, and that, in order to utilize, lease, or sell them for such purposes, it would be necessary to have fresh water; that on other portions of the land not taken there is fresh water sufficient for the purpose; and that the construction of this road will interfere with the bringing of the water over the right of way—this is an element that you would have a right to consider in estimating the damages sustained. In this connection you should also take into consideration the fact that the railway company has stipulated in this case and agreed to construct culverts upon its right

[69] Louisville & N. R. Co. v. Wilson, 176 S. W. 980, 165 Ky. 151.

[70] Louisville & N. R. Co. v. Wilson, 176 S. W. 980, 165 Ky. 151.

[71] Town of Redmond v. Perrigo, 146 P. 838, 84 Wash. 407.

of way, under its track, for the transmission of water from all springs now upon the uplands not taken, and that the railway company would be bound by such stipulation to construct its road in such manner as to permit the flow of the water from such springs across its right of way.[72]

§ 2287. Compensation for deprivation of rights in percolating waters

You are instructed that, in addition to these rights and benefits arising from the flow of the river through this land, the defendants are the absolute owners of all such water as may be present in the soil of this land, and which does not constitute a part of the water of the river. This is usually called "percolating water." There is, however, no magic in the word "percolating"; and the fact that any witness may apply that word, or refuse to apply it, to any particular class of waters of which he may speak, is not conclusive of the question whether or not such water does or does not form part of the river. That question is to be determined by you from a consideration of the facts proven. The right and ownership of the defendants in this class of waters is distinct from, and much greater than, their right to the waters of the stream. As to the waters of the stream, they have a right only to the use of it on this land, and they do not own its corpus, or its body, or the very water itself; and they have no right to take it away from the land and use it on other lands, or to sell or dispose of it for use on other lands or at other places. But as to this other water, if any there is in this land, not a part of the stream, they are the absolute owners of it, to the same extent and as fully as they own the soil or the rocks or timber on the land. Therefore, if by any means they can separate this water from the land, they have an absolute right to the water thus separated, and may conduct it away and sell or dispose of it anywhere as they see fit, subject only to the limitation that they may not excavate or do anything on the land for the mere purpose of intercepting such water, and preventing same from flowing into the stream or water course on the land of another, and without intending to make any beneficial use of it themselves. Whatever additional market value this land may have had by reason of the presence therein of water of this class, or by reason of the feasibility of separating it from the land, or of using it on the land, or of conducting it to some other place for use or sale, or of the great market value of such water for such purposes, or by reason of all these things combined, or by reason of any other lawful benefit or advantage which this water gives,

[72] Seattle & M. R. Co. v. Roeder, 70 P. 498, 30 Wash. 244, 94 Am. St. Rep. 864.

this additional market value inures to the benefit of the defendants, and is a part of the compensation to which they are entitled in this case, as the value of the land to be condemned.[73]

You are instructed that, if the jury believe from the evidence that the subterranean waters in the land sought to be condemned are percolating without any definite channel, and that the same are not a subterranean water course or stream; and if they believe that such waters come onto said lands from the lands of others above, or pass from the lands sought to be condemned down to the lands of others lying below, and that such upper proprietors could, by the construction of tunnels or other works, cut off or divert said waters, or some part thereof, from the lands sought to be condemned, or that such lower proprietors could construct tunnels or other works on the lands lying below the lands sought to be condemned, which would have the effect of draining or depriving the lands sought to be condemned of their subterranean waters, to the extent that the owners of the land sought to be condemned could not make a practical use thereof, or of some part of said waters—then the jury are instructed that such upper and lower proprietors would have the same rights so to appropriate said waters on their lands as the defendants would have on the lands sought to be condemned; and the jury must take those facts into consideration so far as they diminish or destroy the value of the rights of the defendants to said waters, or such portion thereof as could be so diverted or drained so as to deprive defendants of the practical use thereof.[74]

§ 2288. Speculative damages

The jury are instructed that nothing should be allowed for imaginative or speculative damages, or such remote or inappreciable damages as the imagination may conjure up, and which may or may not arise at all in the future; and that "just compensation" means compensation for real, not speculative, damages; and that, unless actual damages are shown, only nominal damages can be awarded to the defendant for the extension of the street as prayed in the petition.[75]

§ 2289. Prospective increase in value of property taken or injured

§ 2289(1). California

The court instructs the jury that the location of the property, its surroundings, and all other things are to be considered, but you are not to indulge in speculation or conjecture. The law does

[73] City of Los Angeles v. Pomeroy, 57 P. 585, 124 Cal. 597.

[74] City of Los Angeles v. Pomeroy, 57 P. 585, 124 Cal. 597.

[75] Chicago & A. R. Co. v. City of Pontiac, 48 N. E. 485, 169 Ill. 155.

not require that the plaintiff, in order to take the land, should pay a value based upon speculation, or what might happen if certain things would occur.[76]

§ 2289(2). Missouri

The jury are instructed that they must not consider in estimating either the value of said land taken or the damages to the remainder thereof a mere possibility that electric railroads may be built to or near said property at some time in the future, and that said property may become at some time in the future available as subdivision property.[77]

§ 2289(3). Pennsylvania

You are instructed that the jury may take into consideration any purpose for which the land had value at the time of the entry of the railroad company, its quantity, its location with reference to other improvements, its adaptability for particular purposes giving it value; but it would be improper to arrive at the amount of damages by estimating the number of lots into which the whole tract or any part of it might be divided, and then estimating what such lots might, in the future, be sold for, and considering how the location of the road might affect the value of such lots.[78]

§ 2289(4). Texas

You are further instructed that you should consider the locality of said property and any increase or development thereof, if any, that might have been reasonably expected in the immediate future.[79]

§ 2290. As of what time damages or value estimated

§ 2290(1). Illinois

You are instructed that the highest and best use which the owner of the respective lots in question is entitled to have considered by the jury in fixing the compensation for land taken must be such a use or prospective use as affected the market value of said lots, respectively, on ———.[80]

§ 2290(2). Pennsylvania

You are instructed that it is not proper for you, in determining the value, or the amount of damages sustained by the plaintiff, to take the estimate of any one as to how many lots might be laid out upon the premises, and what these lots might have sold for in the event of their being sold. That would be fixing a measure of damages

[76] Sacramento Southern R. Co. v. Heilbron, 104 P. 979, 156 Cal. 408.

[77] Chicago, R. I. & P. Ry. Co. v. Lydik, 187 S. W. 891.

[78] Reiber v. Butler & P. R. Co., 50 A. 311, 201 Pa. 49.

[79] Crystal City & U. R. Co. v. Boothe (Civ. App.) 126 S. W. 700.

[80] Pittsburgh, C., C. & St. L. Ry. Co. v. Gage, 121 N. E. 582, 286 Ill. 213.

not as of the date of entry, but as of a future time. But your duty is to fix the measure of the damages sustained by the plaintiff at the time of the entry; and, as we have said, anything that then added value to the land, and any injury then sustained, must be taken into consideration by you.[81]

The jury are instructed that the damages, if any, to which the plaintiff is entitled, are to be estimated as of the date of the entry of the railroad company upon the land; but, as that time is now past, and by your verdict you must express the amount now due, you may take into consideration the time elapsed since the entry, and make reasonable allowance on account thereof, not exceeding the rate of ——— per cent. per annum.[82]

§ 2290(3). Texas

The jury are instructed that the measure of plaintiff' damages would be the difference in the value of the property immediately before and immediately after the construction of defendant's road, the undisputed evidence showing that such damage was much greater immediately after the construction of defendant's road, and while ——— street was thereby obstructed, than it was after the bridge was placed on ——— street over defendant's road, which was ——— months or a year after it [defendant's road] was constructed.[83]

2. *Particular Elements of Damage*

§ 2291. Adaptability of land to particular uses

§ 2291(1). Illinois

The court further instructs the jury that while it is proper for witnesses, in making their estimate of damages to be allowed the defendant, to take into consideration any use to which they believe, from the evidence, the property in question may be profitably appropriated, yet the jury are not bound to base their verdict upon the supposition that it would be appropriated to a use other than that to which it is now devoted.[84]

§ 2291(2). Iowa

Evidence has been introduced as tending to show that the tract of land sought to be condemned is of such a character and location that it affords favorable opportunity for the owners to plat it as a cemetery, and when so platted lots therein might be sold for cemetery purposes. As to the testimony so introduced, you are instructed that if you find from the evidence that the tract of land sought to be

[81] Reiber v. Butler & P. R. Co., 50 A. 311, 201 Pa. 49.

[82] Reiber v. Butler & P. R. Co., 50 A. 311, 201 Pa. 49.

[83] Denison & P. Suburban Ry. Co. v. Evans (Civ. App.) 47 S. W. 280.

[84] Phillips v. Town of Scales Mound, 63 N. E. 180, 195 Ill. 353.

condemned is of such a character and location as to afford favorable opportunity for the owners to plat the same for cemetery purposes, and you further find that by reason thereof it has a value above that which it otherwise would have as farm land, such fact should be taken into consideration by you in determining the amount of damage sustained by the plaintiffs, by reason of the taking of such tract: that is, you should take into consideration the fair market value of the tract, sought to be condemned, for any use to which it is adapted, in determining the difference between the fair market value of the entire farm of the plaintiffs, before such tract was taken, and the fair market value of such farm, after the tract in question was taken by condemnatory proceedings, and for no other purpose. The ultimate question for your determination, and the one which must determine the amount which you award the plaintiffs as just compensation for the land, is the difference between the fair market value of the entire farm of plaintiffs as it existed before the taking of the tract in question, and its fair market value after such tract was taken by condemnation.[85]

§ 2291(3). Pennsylvania

You are instructed that if the jury find that the land of ———, when it was entered upon by the railroad company, or any part of it, was ripe for laying out into town lots or for building improvements, was adapted to such use, and had an enhanced value for such purpose, the jury should consider such enhanced value in making up the verdict. The inquiry of the jury should not be limited to the value of the land as a farm, if it, or any portion of it, had a higher value for any other purpose to which it could then have been reasonably adapted.[86]

§ 2291(4). Texas

You are instructed that, in determining the value of the property, all the uses to which it may be applied and for which it may be adapted on the ——— day of ———, are to be considered, and not merely the condition that it was in at the time, and the use to which it has been applied by the owner.[87]

§ 2292. Adaptability of property as a reservoir site

I instruct you that the stipulation or agreement offered and received in evidence whereby the ——— Railroad Company agrees to so construct its proposed line of railway over respondents' alleged reservoir site as not to interfere with the proposed use of the same is binding on the railroad company, and is to be con-

[85] Watters v. Platt, 168 N. W. 808, 184 Iowa, 203.

[86] Reiber v. Butler & P. R. Co., 50 A. 311, 201 Pa. 49.

[87] Crystal City & U. R. Co. v. Boothe (Civ. App.) 126 S. W. 700.

sidered by you along with all the other facts in the case, and if you find, from the evidence, that respondents will not suffer any damages by reason of the agreement of the railroad company to so construct its road over said reservoir site as not to interfere with the use of the same, then you should not allow any sum on that account.[88]

I instruct that before the respondents would have the right to place a dam across the waters of ——— river, back up, or divert the waters of said river, they would have to obtain the consent of the lower riparian proprietors or acquire their rights by purchase, as it is the law in this state that the owner of land on the bank of a stream has a natural right to the use of the waters which flow in the stream adjacent to his land as it is wont to run without diminution or alteration.[89]

§ 2293. Consideration of uses only available by injuring lands of others

You are instructed that, if you find from the evidence that ——— can only be profitably worked by blasting it in such a manner that portions of it would fall upon land now owned by the railroad company, then you may disregard all the evidence of value as a quarry. The owners of ——— are by law required, if they desire to quarry the same, to so quarry their rock as not to interfere with the rights of others. If you find from the evidence that petitioner herein owns a right of way across the ——— donation land claim and up to the land of defendants, then it is the duty of the defendants or claimants to quarry the rocks so as not to interfere or trespass upon this right of way, and you are not to consider the inability of defendants or claimants to use this right of way on the ——— donation land claim as an element of defendants' damages whereby the property not taken by this action is damaged. The damage you are to consider is confined to that which arises and naturally flows from the appropriation of the land for a right of way across defendants' land, which is sought by this suit.[90]

§ 2294. Value of property taken to appropriator for intended specific future use

The jury are instructed that, if the jury find from any evidence that any witness who has given his opinion as to the market value of the property taken has based such opinion in part upon the

[88] Tacoma Eastern R. Co. v. Smithgall, 108 P. 1091, 58 Wash. 445.

[89] Tacoma Eastern R. Co. v. Smithgall, 108 P. 1091, 58 Wash. 445.

[90] Portland & S. Ry. Co. v. Ladd, 91 P. 573, 47 Wash. 88.

value of such property to the defendant for an intended specific future use, such opinion should be disregarded so far as it is so based upon the value for an intended specific future use.[92]

§ 2295. Probable manner of use by appropriator of part taken

§ 2295(1). Illinois

The jury are instructed that the ——— Company, by its petition, seeks to condemn the land of defendant for general railroad purposes and that they should not assess defendant's damages or offset benefits upon the idea that petitioner will operate its railroad as a street railroad.[93]

The jury are instructed that the ——— Company will have the right to haul along the right of way to be condemned both freight and passenger cars, and as many of either of such cars as it desires, and to perform all of the duties pertaining to a railroad as a common carrier.[94]

§ 2295(2). Indiana

You are instructed that the petitioner can hereafter lay any number of tracks it chooses on this right of way appropriated through the farm of the defendants, and can run any number of cars over such tracks, without being required to render to the defendants any additional compensation or additional damages, and that if you believe from the evidence that there is a probability of the petitioner's laying more tracks in the future on this right of way and running a greater number of cars over those tracks, and if you believe from the evidence that such additional tracks and cars would be an additional damage to the defendants, then you may properly consider such probability as an element of damage and grant compensation therefor in your verdict.[95]

§ 2296. Consideration of possible dangers from contemplated use of property taken by appropriator

The jury are instructed that the fear of some people in the community is not a proper basis on which the jury can fix damages growing out of the granting of this petition.[96]

The jury are instructed that defendant is not entitled to recover on account of any fears that the people may entertain as to possible or imaginary dangers growing out of the building and use of said dam by virtue of the condemnation of the property here sought to be condemned.[97]

[92] Halstead v. Vandalia R. Co., 95 N. E. 439, 48 Ind. App. 96.

[93] St. Louis & S. Ry. Co. v. Smith, 74 N. E. 1063, 216 Ill. 339.

[94] St. Louis & S. Ry. Co. v. Smith, 74 N. E. 1063, 216 Ill. 339.

[95] Union Traction Co. v. Pfeil, 78 N. E. 1052, 39 Ind. App. 51.

[96] Alabama Power Co. v. Carden. 66 So. 596, 189 Ala. 384.

[97] Alabama Power Co. v. Carden, 66 So. 596, 189 Ala. 384.

The court charges the jury that respondent is not entitled to any damages for imaginary fear on the part of the community that the building of such dam and maintaining the same will cause sickness in such community.[98]

The court charges the jury that in fixing the damages in this case they cannot consider the question of whether said land sought to be condemned is rendered of less market value by virtue of the fact that there exists in the neighborhood fears as to the possible injury to the value of said land growing out of the fact that sickness may be created, provided the same is not based on anything substantial, and that the fears are purely imaginary.[99]

§ 2297. Noise, smoke, cinders, etc.

§ 2297(1). Georgia

You are instructed that if you believe from the evidence that the running of trains on the street, with the noise, smoke, dust, etc., amounts simply to an inconvenience to the occupants, that is not damage; that is not a thing that you could treat as damage for which a money value could be given.[1]

§ 2297(2). Illinois

The jury are instructed that plaintiff cannot recover any damages caused by the use of defendant's road such as damage occasioned by smoke, ashes, or cinders deposited upon its premises, except for the time laid in and covered by the declaration; that is, from the time of the construction of the tracks to the commencement of this suit, to wit, on the ——— day of ———.[2]

§ 2297(3). Nebraska

You are instructed that, if you shall find for the plaintiff in this action, you should assess his damages at such sum as you shall find from the evidence that he has sustained by reason of the construction and ordinary operation of the defendant's railroad along and adjacent to plaintiff's property. The items to be considered by you in making your estimate of damages are the smoke, soot, and cinders which envelope or are thrown upon plaintiff's property, or the necessary approaches thereto, by passing engines, also the noise and jar of buildings caused by passing trains and engines, as well as the noise caused by ringing of bells, sounding of whistles, of engines used on the road, and also the inconvenience of ingress and egress to the property, if any, by being operated in an ordinary and proper manner proven. In short, you should consider every element arising out of the proper and ordinary op-

[98] Alabama Power Co. v. Carden, 66 So. 596, 189 Ala. 384.

[99] Alabama Power Co. v. Carden, 66 So. 596, 189 Ala. 384.

[1] Streyer v. Georgia S. & F. R. Co., 15 S. E. 637, 90 Ga. 56.

[2] Chicago, etc., R. Co. v. Hall, 90 Ill. 42.

eration of defendant's road that tends to diminish the value of plaintiff's property, so far as the same is shown by the evidence in this case.[3]

§ 2297(4). Texas

You are instructed that, in estimating the depreciation in value of plaintiff's property, if you believe there was any such depreciation under the foregoing instructions, you may take into consideration the depreciation, if any, that may have been caused by the excavations on ——— street, and also any depreciation in value of said property you may believe was occasioned by the probable fact that defendant in operating and using its road would make unusual and loud noises, such as ringing of bells and blowing of whistles, and would emit from its engines smoke and cinders, and would cause other like annoyances naturally incident to the operating and using cars on said railway.[4]

§ 2298. Injury to business, inconvenience, expense, etc.

§ 2298(1). Illinois

The court instructs the jury that under the law the railroad company is not required to fence its right of way until its railroad has been in actual operation, with trains running over it, for the term of ——— months, and it is proper for you to consider this fact in estimating the plaintiff's damages.*

The jury are instructed that, in awarding compensation for the extension of ——— street across the railroad of the defendant company, they are not to take into consideration any expense caused to the company by planking or graveling the road.[5]

§ 2298(2). Oklahoma

You are instructed that in determining the amount of compensation to be awarded to the ——— Company, in this case, you may properly take into consideration all evidence tending to show the actual value of the premises of what it is proposed to deprive it of, the actual loss to be suffered by the ——— Company, from the loss, destruction, or depreciation of the improvements placed by them on this property especially adapted to the conduct of its business, the reasonable cost of removal, if you find removal to be necessary, and of refitting in other locality for the further conduct of business as shown by the evidence.[6]

[3] Beavers v. Missouri Pac. R. Co., 66 N. W. 821, 47 Neb. 761.

[4] Ft. Worth & N. O. Ry. Co. v. Pearce, 12 S. W. 864, 75 Tex. 281.

* St. Louis & S. Ry. Co. v. Smith, 74 N. E. 1063, 216 Ill. 339.

[5] Chicago & A. R. Co. v. City of Pontiac, 48 N. E. 485, 169 Ill. 155.

[6] Oil Fields & S. F. Ry. Co. v. Treese Cotton Co., 187 P. 201, 78 Okl. 25.

§ 2299. Damages as affected by improvements on the part of land taken and the necessity of removing or reconstructing them

See, also, ante, § 2298(2).

You are instructed that, in estimating the damage or depreciation to defendants' said property you may take into consideration the reasonable value, if any, of that part of the improvements to be lost in the taking of said strip, or the amount, if any, necessary to be expended by defendants for removal of said improvements from said strip, or the necessary reasonable cost, if any, for the reconstruction of said improvements, so as to conform to the size of defendants' remaining property.[7]

§ 2300. Inconvenience and expense caused by building railroad across farm

§ 2300(1). Iowa

You are instructed that the law presumes that the defendant railroad company will furnish and construct an adequate crossing sufficient to meet the necessities of the plaintiff. In estimating the damages in this case, you should assume that such adequate and sufficient crossing will be provided by the railroad company.[8]

You are instructed that under the law the plaintiff is entitled to one adequate crossing across defendant's right of way on his farm, at such a reasonable place as plaintiff may designate, and defendant will be bound to furnish such crossing at such place upon the request of the plaintiff for the same; but whether such adequate crossing will be a surface crossing or an under crossing you have nothing to do with in this case, but should, without regard thereto, fix the plaintiff's damages in accordance with the instructions here given you.[9]

§ 2300(2). Kentucky

You are instructed that, if the jury believe from the evidence that the defendant, while in and about the construction of said railroad, through the farm occupied by the plaintiff, destroyed his passway or crossings out to the public road, it was their duty to provide a crossing in reasonably good order and condition, and within a reasonable time after the original crossing was destroyed, and if the jury believe from the evidence that said crossing was not provided in a reasonable time, after the destruction of the then existing crossing, they should find for the plaintiff.[10]

You are instructed that, if you believe from the evidence that the defendant negligently tore down plaintiff's fences, or if you be-

[7] City of San Antonio v. Fike (Tex. Civ. App.) 224 S. W. 911.

[8] Lough v. Minneapolis & St. L. R. Co., 89 N. W. 77, 116 Iowa, 31.

[9] Lough v. Minneapolis & St. L. R. Co., 89 N. W. 77, 116 Iowa, 31.

[10] Louisville & E. R. Co. v. Hardin, 117 S. W. 381.

lieve from the evidence that it was necessary to tear down said fences in the prosecution of the construction of said road, and defendant tore down said fences and failed for an unreasonable length of time to provide fences so as not to expose his farm and premises to the depredations of stock, they should find for the plaintiff.[11]

§ 2300(3). Oklahoma

You are instructed that, in arriving at the amount of damages that the defendant has sustained, first, you will determine the value of the land taken by the plaintiff for its right of way; second, the injury or damages to the remaining portion of the land of the defendant by reason of the construction of the railroad and the depreciation of the land taken. In estimating the damages you may take into consideration the market value of the land taken at the time the same was taken, and, in determining the injury to the balance of the tract, you may consider the separation of the pasture, improvements, and water facilities, and their convenient connections, or inconveniences of crossing the railroad with farm machinery to farm separate tracts, the increased care and watchfulness necessary at all times while working in the immediate vicinity of the road with horses and farm implements, the anxiety and uneasiness and disturbance of that sense of safety and security to all members of the family while engaged in their different lines of production on the different portions of the farm, and the ill shape and the inconvenient shape the remainder of the farm is left in for farming purposes, the inconvenience of crossing the railroad to farm portions of the land cut off from the residence, of the hauling the products of the farm to the barn across the railroad, of the carrying stock to and from one part of the farm to another for water, pasturage, and other purposes, in fact, anything that would injure the salable value of the farm.[12]

§ 2300(4). Texas

The jury will also, in addition to the value of the land, estimate the damages, if any, which the value of the land has sustained by reason of the railroad running through it, less any benefits, if any, that are peculiar to this tract or piece of land arising, if any, from the construction and operation of the road through it, taking in view the use to which the land condemned will thereafter be applied by the railroad and its future results.[13]

[11] Louisville & E. R. Co. v. Hardin, 117 S. W. 381.

[12] Wichita Falls & N. W. Ry. Co. v. Munsell, 132 P. 906, 38 Okl. 253.

[13] Crystal City & U. R. Co. v. Boothe (Civ. App.) 126 S. W. 700.

§ 2301. Expenses caused railroad by construction of public highway across its right of way

The court declares the law to be that the defendant is not entitled to any damages in this case on account of putting in an electric crossing bell, nor for the expense of maintaining said bell.[14]

You are instructed that, if you find from the evidence that said electric bell is merely a precaution exercised by the railway company to lessen the liability for accident, and that said bell was not required by the county court or the railroad and warehouse commissioners of ———, then said railway company cannot recover for erecting or maintaining said bell.[15]

§ 2302. Interference by railroad with right of access to land

You are instructed that evidence has been given that, in the construction of the plaintiff's railroad on the ——— foot strip of land condemned, a cut of varying depth has been made and is being made on a strip of land for the laying of railroad track. It is admitted by the defendant that all of said ——— acre tract of land lies on the northwest side of the right of way of said railroad. If you find from the preponderance of the evidence that the defendant owned no land on the other side of said railroad right of way opposite said ——— acre tract of land, and that there was no public highway on the opposite side of said railroad right of way, which highway was separated from said ——— acre tract of land by said railroad right of way, then you will not allow her any damages on account of said cut interfering with, or depriving her of access from the remainder of said ——— acre tract of land to the opposite side of said railroad.[16]

§ 2303. Injuries to abutting owner by building viaduct in street —Diversion of traffic

The jury are instructed that the plaintiffs herein are not entitled to recover because of any alleged injury resulting to the fair cash market value of said premises because of any alleged diversion of traffic off from ——— street, in front of said premises, by the construction of said viaduct, even if they believe from the evidence that any such diversion of traffic has in fact resulted from such cause.[17]

§ 2304. Valuation of lands containing building stone

In this case, if you should find that land taken contains building stone, you are instructed that the measure of compensation is the

[14] Franklin County v. Missouri Pac. Ry. Co. (Mo.) 210 S. W. 874, 4 A. L. R. 133.

[15] Franklin County v. Missouri Pac. Ry. Co. (Mo.) 210 S. W. 874, 4 A. L. R. 133.

[16] Vandalia R. Co. v. Furnas, 106 N. E. 401, 182 Ind. 306.

[17] City of Chicago v. Spoor, 60 N. E. 540, 190 Ill. 340.

fair market value of the land taken with the building stone in it, and the profits or the price or value of such building stone, if the same or any part thereof will be taken by the proposed right of way, should not be considered by you as building stone in arriving at your verdict. The number of tons of building stone that could be gotten from the land, and the value per ton thereof, or the royalties thereon, are not to be considered except as they may guide you in fixing the value of the lands taken or injury to quarry lands; and as a special rule for your guidance in arriving at the value of any portion of the quarry which you may find from the evidence will be taken, and of the amount of damages to any portion of the quarry not taken, I instruct you that the compensation to be awarded by you to the owners is to be estimated by a reference to the uses for which the property is suitable, having regard to the existing business or wants of the community, or such as may be reasonably expected in the near future.[18]

§ 2305. Consideration of easement as enhancing value of property

The court instructs the jury that, as bearing upon the question of the value of the land, testimony was introduced as to the means of access to the land over a road running through the land of R. In this connection you are instructed that, if you believe that for a period of ten years immediately preceding the construction of the ditch the plaintiffs and others having occasion to use the road were permitted by R. to use the road in question without objection or protest for the full period of ten years, such usage by plaintiffs and others would create an easement or right of way across the land of R.[19]

3. *Deduction of Benefits*

§ 2306. Right to set off benefits against damages

Setting off benefits against damages from change of grade of street, see post, § 3898.

§ 2306(1). Indiana

You are instructed that the Constitution of this state provides that no man's property shall be taken by law without just compensation, but it is the law of this state, as applied to the location of public highways, that benefits derived by reason of a road having been laid out may suffice to constitute just compensation for land taken and appropriated for a road within the meaning of the constitutional provision requiring such compensation to be made. So in this case, if you find from the evidence that the lands of ei-

[18] Seattle & M. R. Co. v. Roeder, 70 P. 498, 30 Wash. 244, 94 Am. St. Rep. 864.

[19] Grimm v. Elkhorn Valley Drainage Dist., 152 N. W. 374, 98 Neb. 260.

ther of the separate remonstrators will be damaged by reason of the location of the proposed road, or by reason of the appropriation of a part of his real estate for such purpose, or that such remonstrator will be entitled to some compensation for the land so taken, still, if you further find that the real estate of such remonstrator will be benefited in a sum equal to or greater than such damages, and the value of the real estate so appropriated, then and in that case such remonstrator should not recover on his claim for damages, and your verdict as to him and on the issue of damages should be for the petitioners.[20]

The jury are instructed that, when one's property is taken for the location of a public highway, the owner is entitled to a just compensation for what is taken, including compensation for inconveniences imposed, and for such additional fences as may reasonably be required by the opening of the highway. But it is not essential that the compensation rendered shall be in money or other property. Benefits accruing to the land upon which the highway is laid by reason of its establishment thereon, if any, are to be reckoned as compensation, and, if such benefits equal the amount of damages, then there can be no recovery.[21]

§ 2306(2). Massachusetts

The jury are instructed that the respondent city is entitled to have allowed by way of set-off the benefit, if any, to the property of the petitioner from the sewer; but the benefit to be set off must be some direct, peculiar, and special benefit derived by the petitioner's estate from the sewer, and not the general benefit acquired by this and other estates adjacent to the sewer.[22]

§ 2306(3). Missouri.

You are instructed that the only question for the jury to determine is whether the property of defendant not taken by plaintiff was or was not increased in market value by benefits thereto, derived as aforesaid, and, if it was so increased in market value by benefits, then whether such increase was sufficient to compensate defendant for the strip of ground taken by plaintiff, and also for the damages, if any, resulting from such taking to the remainder of the property.[23]

§ 2306(4). Washington

You are instructed that, if you find that respondents' lands in either or both instances are damaged as hereinbefore defined to you more than they are so benefited by the taking of the lands

[20] Glendenning v. Stahley, 91 N. E. 234. 173 Ind. 674.

[21] Fifer v. Ritter, 64 N. E. 463, 159 Ind. 8.

[22] Clark v. Worcester, 125 Mass. 226.

[23] St. Louis, K. & N. W. R. Co. v. St. Louis Union Stockyard Co., 25 S. W. 399, 120 Mo. 541.

sought to be condemned, then the difference between the amounts of damages found by you under these instructions and the amount of such benefits, in case you find the respondents are so benefited by such taking, should be the amount of your verdict in each of the cases in favor of the respective respondents.[24]

You are instructed that, if you find from the evidence that the respondents in one or both of the cases are so benefited by the construction and opening of said road as much or more than they are damaged thereby, as damages are hereinbefore defined to you, then you should find for such respondents in either instance in nominal damages only.[25]

§ 2307. Constitutional restriction on right to deduct benefits in certain cases

You are instructed that in estimating the damages which the plaintiff will be entitled to recover, if you find him entitled to recover anything, you must consider as an element of damages the actual market value of the strip of land actually taken by the railroad company at the time it was taken, irrespective of any benefit from the proposed railroad.[26]

§ 2308. What are benefits which may be set off

§ 2308(1). Maryland

The court instructs the jury that, in making up their verdict as to benefits to be assessed to the property owner, the only matter for their inquiry is the amount of increase in the actual market value of the remainder of the lot on ——— not taken, which will be caused by the acquisition, through these proceedings by the mayor and city council of ———, of title to her land condemned and taken by the city in and for the opening of ——— street from ——— street to ———, and their verdict as to benefits should be limited to such increase, if any there be, and they cannot inquire into or take into consideration the amount allowed by the commissioners for opening streets, or the amount that the jury may allow the property owner as damages for the land so condemned and taken by the city.[27]

§ 2308(2). Massachusetts

The jury are instructed that, if you are satisfied that the laying out and construction of the respondents' railroad has created or occasioned any benefit or advantage to the lands of the petitioner, described in his petition or immediately adjoining or connected

[24] State v. Kelley, 182 P. 942, 108 Wash. 245.

[25] State v. Kelley, 182 P. 942, 108 Wash. 245.

[26] Enoch v. Spokane Falls & N. Ry. Co., 33 P. 966, 6 Wash. 393.

[27] Mayor and City Council of Baltimore v. Megary, 89 A. 331, 122 Md. 20.

therewith, rendering the part not actually occupied by the respondents more convenient or useful to the petitioner, or giving it some peculiar increase of value in the market, as compared with other lands generally in the vicinity, it will be your duty to allow for such benefit or increase of value by way of set-off, in favor of the respondents, but that, on the other hand, if the construction of the respondents' railroad, by increasing the convenience of ——— generally as a place of residence, and by its anticipated and probable effect or influence in increasing the population, business, and general prosperity of the place, had been the occasion of an increase in the salable value of real estate generally near their depot, including the petitioner's said lands, and thereby occasioning a benefit or advantage to him in common with other real estate owners in the vicinity, this benefit would be too contingent, indirect, and remote to be brought into consideration in this question of damages to a particular parcel of land.[28]

The jury are instructed that, for the purposes of this trial, the land may be considered as taken by the respondents, when their track was actually staked out and its precise location thereby indicated; that any benefit to the petitioner's property, in order to be allowed to the respondents by way of set-off, must be some increase upon the value which it had at the time of such taking, and not at any previous time; and that no allowance is to be made for any effect produced by the general expectation that there was to be such a railroad, or by the passage of its charter.[30]

§ 2308(3). Missouri

You are instructed that, in estimating the damages to the land, the jury will consider the quantity and value of the land taken by the railway company for right of way and the damage to the whole tract by reason of the road running through it, and deduct from these amounts the benefits, if any, peculiar to said tract of land arising from running the road through the same. And by peculiar benefit to the land is meant such benefits as that land derives from the location of the road through it as are not common to the other land in the same neighborhood.[31]

§ 2308(4). North Carolina

You are instructed that the measure of damages in this particular case is the difference between the reasonable market value of this lot of ——— before this strip of land was taken and the reasonable

[28] Upton v. South Reading Branch R. Co., 62 Mass. (8 Cush.) 600; Meacham v. Fitchburg R. Co., 58 Mass. (4 Cush.) 291.

[30] Meacham v. Fitchburg R. Co., 58 Mass. (4 Cush.) 291.

[31] St. Louis, O. H. & C. Ry. Co. v. Fowler, 44 S. W. 771, 142 Mo. 670; Wyandotte, etc., R. Co. v. Waldo, 70 Mo. 629.

market value of this lot immediately after it was taken, and the difference between the two would be the measure of the damages; that is, whatever you may find that to be, less such peculiar benefits and advantages as have accrued to the land in controversy, not common to all other people who live on that street which it improved.[33]

The court instructs the jury that they will consider any special benefit to plaintiff from the construction of the railroad, and offset same against such damage as they may allow, and in this connection they may consider the increased value of plaintiff's timber, in that the railroad makes it more salable and more accessible to market, and makes a market for cross-tie timber; his timber lying on both sides of the road. But the jury will bear in mind that the plaintiff is entitled to have, in estimating the increased value of his timber, the benefit of all advantages common to others.[34]

§ 2308(5). Texas

In this connection the jury are instructed that in estimating the benefits, if any, which the land not actually taken by the railway may receive because of the construction of the road through it, the jury are not permitted to consider any benefits, if any, which the community in general, or surrounding property owners, if any, may receive by reason of the construction of the railway through said land; but said benefits, if any, must be confined to the peculiar benefits which this particular tract of the plaintiffs, through which the railroad runs, will receive, and no other.[35]

§ 2308(6). Utah

You are instructed that, in determining the question as to whether any benefits have accrued to the remaining portion of the land by reason of the construction and operation of the railroad on the land taken, you should not take into consideration any benefits shared by the defendants as owners of this land with the community in general, but only such benefits as are special to this particular property.[36]

§ 2308(7). Washington

You are instructed that the owner of lands through which a highway is established is entitled, in common with the general public, to travel on such highway, and, although by reason of such improvement such travel may be rendered easier or more pleasant for such owner yet the benefit afforded to him thereby is a general benefit in common with the remainder of the public; and you will

[33] Lanier v. Town of Greenville, 93 S. E. 850, 174 N. C. 311.

[34] Haislip v. Wilmington & W. R. Co., 8 S. E. 926, 102 N. C. 376.

[35] Crystal City & U. R. Co. v. Boothe (Civ. App.) 126 S. W. 700.

[36] Salt Lake & U. R. Co. v. Butterfield, 150 P. 931, 46 Utah, 431.

not, in arriving at your verdict in either of these cases, make any deduction from any damages you may find in favor of the owner by reason of this mere right to travel over the proposed highway.[37]

§ 2309. Speculative benefits

You are instructed that, in considering that question, you are not to consider any speculative damages or benefits either way. You are to take the testimony as reasonable men, and not take into account any speculative or imaginary damage that might result to this property, and at the same time you are not to consider any possible, speculative, or imaginary increase in value. You are to take the reasonable, natural result that will flow from the railroad coming there, both as to increasing and diminishing the value of ———'s property.[38]

D. Evidence and Matters Pertaining to Remedy

§ 2310. Burden of proof

You are instructed that the burden rests upon the plaintiff here to satisfy you as to the amount of damages to which he is entitled. He must satisfy you that he has been injured; that he has been damaged; and he must satisfy you as to the amount of such damage.[39]

§ 2311. Evidence on question of value—Effect of offer by condemnor

You are further instructed that in considering the question of the actual value of the property in controversy you will exclude from your mind all testimony relative to any offers that might have been made or claimed to have been made by the railroad company through its president or any other person. The only purpose for the admission of such testimony was to show that the plaintiff had attempted to agree with the defendants, and all testimony in relation to any offer that might have been made upon the part of the railway company is hereby withdrawn and excluded from your consideration for any other purpose than that stated.[40]

§ 2312. Same—Price paid

You are instructed that evidence has been introduced in this case of the amount paid by the defendant for the real estate, a part of which has been condemned by the plaintiff. You should consider such evidence of the purchase price paid by the defendant in

[37] State v. Kelley, 182 P. 942, 108 Wash. 245.

[38] Streyer v. Georgia S. & F. R. Co., 15 S. E. 637, 90 Ga. 56.

[39] Reiber v. Butler & P. R. Co., 50 A. 311, 201 Pa. 49.

[40] Metropolitan St. Ry. Co. v. Walsh, 94 S. W. 860, 197 Mo. 392.

connection with all the other evidence in the case in determining the market value of the property condemned.[41]

§ 2313. Same—Price obtained for adjoining land

You are instructed that you are entitled to consider what defendant sold the adjoining tract for, the tract to ———, and the price he got for it; but you are not bound to act upon that alone, and you ought not to act upon that alone, but in connection with other evidence. Defendant had the right, if he wished, to give that land to the railroad company, or sell it for what it was worth, or less than it was worth, or more than it was worth, if he could get it; so what he got for that land is not binding upon you for the price to be fixed by you upon this property, but only as an item of evidence in arriving at what you believe from the whole evidence to be the actual value or the actual market value of the property now in question.[42]

§ 2314. Effect of expert testimony as to value and damages

The jury are instructed that in regard to the evidence before you of experts and others concerning the value of the land taken by the railroad company, and the actual damage, if any, done to the defendants' land, you are not bound by the testimony of such witnesses, but you may apply your own judgment and knowledge as to such values and damages in arriving at your verdict in connection with the testimony offered in this case at the trial.[43]

§ 2315. Right of jury to discredit testimony as to value or damages

You are further instructed that if you believe, from the entire testimony and from your inspection of the premises, that any witness has magnified or exaggerated the value of the land taken or the damages to the land not taken, on account of his interest in the suit or his prejudice or want of knowledge or experience or truthfulness, then you have the right, and it is your duty, to disregard the evidence of such witness in so far as the same is unjustly magnified or unjustly increased, either as to the value of the land taken or the damages to the property of defendant not taken.[44]

§ 2316. Right of jurors to use personal judgment and experience in weighing testimony

§ 2316(1). Alabama

You are instructed that the opinions of witnesses as to the market value of property should be weighed by the jury in the light

[41] Halstead v. Vandalia R. Co., 95 N. E. 439, 48 Ind. App. 96.

[42] West v. Milwaukee, L. S. & W. Ry. Co., 14 N. W. 292, 56 Wis. 318.

[43] St. Louis, O. H. & C. Ry. Co. v. Fowler, 44 S. W. 771, 142 Mo. 670.

[44] David Bradley Mfg. Co. v. Chicago & S. Traction Co., 82 N. E. 210, 229 Ill. 170.

of other evidence, and the opportunity of the witnesses to know such value, and the reasonableness or unreasonableness of their estimate of such value. The jury are not bound to take any man's opinion of such value, but may act on their own judgment and good sense in arriving at a just value, in the light of the whole evidence.[45]

§ 2316(2). California

The jury are instructed that, in estimating damages, they are permitted to exercise, in weighing the evidence, their individual judgment as to values upon subjects within their knowledge which they have acquired through experience and observation.[46]

§ 2316(3). Iowa

You are instructed that you have the right to use your own knowledge of the values of lands, the operating of railroads, and of affairs generally, in connection with the testimony as to the values and damages which has been given by the witnesses. By this is meant that you are not obliged to rely wholly upon the opinions of the witnesses as to the value of this land or as to the damages, but that, in connection with such opinions, you may use and be guided by your own judgment on such matters.[47]

§ 2317. Effect of view of premises

§ 2317(1). Illinois

The court further instructs the jury that, if they believe from the whole evidence that they have, from personal examination of the premises, arrived at a more accurate judgment and determination as to the value of the premises sought to be taken, and of the amount of damages, if any, than is shown by the evidence in open court, then and in that case they may, upon the evidence, rightfully fix the value of land taken and the amount of damage, if any, over and above special benefits, if any, at the amount so approved by their judgment, so formed from personal examination of the premises as a jury, even though it may differ from the amount testified to, and from the weight of testimony given by witnesses in open court.[48]

§ 2317(2). Iowa

The jury are instructed that the purpose of viewing the premises is to enable the jury better to understand the testimony of the witnesses respecting the same, and more intelligently apply such testimony to the issues before them, and not to make them silent wit-

[45] Meighan v. Birmingham Terminal Co., 51 So. 775, 165 Ala. 591.

[46] Beveridge v. Lewis, 67 P. 1040, 137 Cal. 619, 59 L. R. A. 581, 92 Am. St. Rep. 188.

[47] Hoyt v. Chicago, M. & St. P. Ry. Co., 90 N. W. 724, 117 Iowa, 296.

[48] Guyer v. Davenport, R. I. & N. W. Ry. Co., 68 N. E. 732, 196 Ill. 370.

nesses in the case. You will consider the evidence in the light of your view of the premises, but you must determine the facts of the case from the evidence alone. You must not base your verdict in any degree upon your examination of the premises.[49]

§ 2317(3). New Jersey

You have listened to all the evidence in this case, but you may use your own judgment in connection with the testimony that is before you. The whole question is a question of opinion, and the very object in sending you to look at this property was to enable you to form your own opinion as to the question which you are now called upon to decide, giving due consideration, of course, to the evidence which has been presented, and giving it such weight as you think it is entitled to. But nevertheless beyond that you have a right to use your own judgment in connection with the testimony, and say what you think the landowners ought to have for the value of the strip taken, and the cost of restoring their plant on some other part of the property.[50]

§ 2317(4). Pennsylvania

You are instructed that the fact to be determined by you is a fact that witnesses are unable to demonstrate before you like they might many facts. It is largely a matter of opinion. In fact, you determine the facts from the opinion of witnesses given upon the stand under oath, from the evidence in the case; and, of course, you have a right to take into consideration that you were upon the premises, and have seen, so far as possible to see, the injury done to the premises, if any; and from such knowledge as you necessarily received by the inspection of the premises, with the evidence in the case which you have since heard, you are to render a verdict. The verdict you will render will be for the amount due at this date.[51]

§ 2317(5). Washington

You have been permitted, gentlemen of the jury, under the direction of the court, to view the premises sought to be condemned in this case, and also the lands of the respondents which they claim will be injured by reason of the taking of the land sought. You are impaneled for the purpose of estimating the damages which the petitioner must pay to the respondents for the taking and injuriously affecting their property. In cases of this kind, no certain amount can be mathematically fixed as the amount of the damages which should be awarded. You must, therefore, trust somewhat to

[49] Guinn v. Iowa & St. L. Ry. Co., 109 N. W. 209, 131 Iowa, 680.

[50] Hinners v. Edgewater & Ft. L. R. Co., 69 A. 161, 75 N. J. Law, 514.

[51] Reiber v. Butler & P. R. Co., 50 A. 311, 201 Pa. 49.

your own judgment in arriving at this definite amount, and one of the objects and purposes of the view which you have made is to enable you to use your own senses and judgment by obtaining such information as an eyewitness can gain of the general quality and condition of the land, the uses to which it has been put or to which it is applicable, the manner in which the taking of a part of the tract would affect the residue, the location of the road, and better to understand and apply the evidence of the witnesses who have testified before you. As to these matters, you must remember as part of the evidence in this case what you witnessed in viewing the premises, and you have the right, and it is your duty, to use your senses; and, if any witness has testified to anything which you know, by the evidence of your own senses on the view, is false, you would not be bound to believe, and, indeed, you could not believe, the witness, and you may disregard his testimony, although no other witness has testified on the stand as the jury knows it to be; and if, in your judgment, the evidence is conflicting as to the value of the property taken and the injury to the balance, you should resort to the knowledge gained upon your view as bearing upon the weight to be given to the various and conflicting statements and estimates.[52]

§ 2318. Questions for jury

The jury are instructed that the issue in this proceeding is as to the compensation the city should pay the railroad company for the right to extend ——— street across the lands, right of way, and tracks of the company, from the east side of the same to the west side of the same, for the width of ——— feet, subject to the joint use of said lands, right of way, and tracks by the railroad company for railroad purposes, etc.[53]

The jury are instructed that they have nothing to do, in determining the amount of compensation, with the necessity or desirability of the proposed extension of ——— street.[54]

§ 2319. Trial de novo on appeal from award of commissioners

The jury are instructed that you must be satisfied as to the damages sustained by the defendant from the testimony which is produced before you, without reference to any testimony which was produced before the commissioners and uninfluenced by their report.[55]

[52] Seattle & M. R. Co. v. Roeder, 70 P. 498, 30 Wash. 244, 94 Am. St. Rep. 864.

[53] Chicago & A. R. Co. v. City of Pontiac, 48 N. E. 485, 169 Ill. 155.

[54] Chicago & A. R. Co. v. City of Pontiac, 48 N. E. 485, 169 Ill. 155.

[55] Sharpe v. United States (C. C. A. N. J.) 112 F. 893.

§ 2320. Form of verdict

The jury are instructed that the form of their verdict in this case may be as follows: "We, the jury, find for the defendant, and fix the compensation for land taken for right of way at ——— dollars. We further fix the damages sustained by the defendant by reason of the construction and use of petitioner's railway over defendant's said land at ——— dollars." [56]

E. Title Acquired by Condemnor

§ 2321. Land taken for sewer purposes

The jury are instructed that the respondent city, by the order by which the land was taken and the sewer located, acquired the right to construct and maintain a sewer within the limits of the location, and to enter upon the land to make repairs, to reconstruct and make such changes as it saw fit in the sewer, and subject to these rights of the respondent the petitioner remained the owner of the land, and had the right to use and improve it in any manner he saw fit.[57]

[56] Peoria, etc., R. Co. v. Sawyer, 71 Ill. 361.

[57] Clark v. Worcester, 125 Mass. 226.

CHAPTER CXXIII

EQUITY

§ 2322. Trial of exceptions to report of auditor.

§ 2322. Trial of exceptions to report of auditor

I charge you, gentlemen, that the report of the auditor is to be taken as prima facie correct, and the burden is upon the party making the exceptions to the report of the auditor; the burden being upon the party making exceptions to the report of the auditor to show to the reasonable satisfaction of the jury that the report is erroneous or incorrect, under the evidence submitted upon the case and taken by the auditor. This question, however, is to be determined by the jury from a consideration of the evidence which was taken before the auditor, and which has been read in your hearing upon the trial of this case; it being for the jury to determine, from a consideration of the evidence as read to you and submitted to you upon this trial, whether or not the jury is satisfied, whether or not it appears to the reasonable satisfaction of the jury that the findings of the auditor were erroneous in the parts excepted to and as claimed by the defendants filing the exceptions.[1]

[1] Livingston v. Wynne, 93 S. E. 877, 147 Ga. 307.

CHAPTER CXXIV

ESCAPE

§ 2323. Elements of offense.
2324. Intent of defendant.

§ 2323. Elements of offense

You are instructed that to permit one to go at large as applied to a prisoner held for trial is to permit him to go whithersoever he will, without the restraint of either guard or prison walls. It is to let him go out of custody free from the restraint of custody and at his own will. A prisoner who is kept under guard by the sheriff, to whose custody and keeping he is committed, is not at large in the sense and meaning of the law.[1]

The court instructs the jury that, if you further believe from the evidence that the defendant, while so having the custody of said ———, voluntarily and intentionally kept him out of jail with the purpose and intention that he should not be confined in jail, and if you further believe from the evidence that the defendant, while so having the custody of said ——— and keeping him out of jail, voluntarily allowed the said ——— to be unguarded and to go at large, you will find him guilty as charged.[2]

§ 2324. Intent of defendant

The court instructs the jury that the indictment in this case charges the defendant with voluntarily permitting ——— to escape from his custody and go at large, and you are instructed that, as to the question of intent involved in the charge, it is not necessary that the defendant should have had the intent to protect the said ——— from punishment of any offense for which he may have been in custody, but it is sufficient if the defendant at the time had the intent to allow or permit the said ——— to escape from his immediate custody and go at large.[3]

[1] Houpt v. State, 140 S. W. 294, 100 Ark. 409, Ann. Cas. 1913C, 690.

[2] Houpt v. State, 140 S. W. 294, 100 Ark. 409, Ann. Cas. 1913C, 690.

[3] Houpt v. State, 140 S. W. 294, 100 Ark. 409, Ann. Cas. 1913C, 690.

CHAPTER CXXV

ESCROW

§ 2325. Effect of delivery of deed by depositary.

§ 2325. Effect of delivery of deed by depositary

You are instructed that, if the jury believe from the evidence that the plaintiff delivered the deed of ——— to his son, to be held by him in escrow, and did not know at that time that the latter was attorney for R. for the purpose of procuring rights of way for the construction of a railway, and if they further believe that the said son delivered the said deed to the said R. without any statements of the conditions required by his father, then they are instructed that the defendant company, acting under said deed, was not a trespasser.[1]

You are instructed that, if the jury shall believe that plaintiff did not know that his son, to whom the deed was delivered as depositary, was attorney or counsel as aforesaid, and shall further believe that the son accompanied delivery of deed to R. with a statement of conditions required by his father, then they are instructed that the defendants can claim no right under the deed without compliance with such conditions.[2]

[1] Virginia Passenger & Power Co. v. Patterson, 51 S. E. 157, 104 Va. 189.

[2] Virginia Passenger & Power Co. v. Patterson, 51 S. E. 157, 104 Va. 189.

CHAPTER CXXVI

ESTOPPEL

§ 2326. Elements of equitable estoppel.
2326(1). Delaware.
2326(2). Michigan.
2327. Necessity that one asserting estoppel shall have suffered prejudice.
2327(1). Delaware.
2327(2). Virginia.
2328. Necessity of showing reasonable anticipation that another would act on representations.
2329. Representations as to ownership of property.
2330. Effect of disclaimer of title.
2330(1). Kansas.
2330(2). Kentucky.
2331. Same—Pointing out boundary line.
2332. Purchase of land in reliance on statements of another as to boundaries.
2333. Acquiescence in statements made by another.
2334. Failure to assert claim.
2334(1). Michigan.
2334(2). Missouri.
2335. Assuming to act in official capacity.
2336. Effect of prior recognition of capacity, character, or status.
2337. Negligence—Effect of placing it in power of another to injure a third person.
2338. Against whom available—Effect of representations by lessee of personalty on lessor.

§ 2326. Elements of equitable estoppel

§ 2326(1). Delaware

You are instructed that an estoppel is where a person by his conduct induces another to believe in the existence of a particular state of facts, and the other acts thereon to his prejudice, the former being estopped in such an event as against the latter, to deny that that state of facts does in truth exist.[1]

§ 2326(2). Michigan

The court instructs the jury that an equitable estoppel may arise where one person has induced another to act upon the supposition that a certain state of facts exists which does not exist in fact, or has pursued a course of conduct in respect to his own property or rights which has led another into expenditures which are to be lost, or into action which is to prove detrimental, if the party so misleading is allowed afterwards to assert rights inconsistent with such previous course of conduct.[2]

[1] Donovan v. Maloney, 84 A. 1032, 3 Boyce, 453.

[2] Kiowiatkowski v. Duluth-Superior Dredging Co., 167 N. W. 970, 201 Mich. 251.

§ 2327. Necessity that one asserting estoppel shall have suffered prejudice

§ 2327(1). Delaware

You are instructed that an essential element of estoppel is, that one party should have relied upon the conduct of the other, or have been induced by it to put himself in such a position that he would be injured if the other should be allowed to repudiate his action.[3]

§ 2327(2). Virginia

The jury are instructed that, if estoppel by the conduct of the defendant is relied on by the plaintiff, the party sought to be estopped must have caused the other party to occupy a more disadvantageous position than he would have occupied but for such conduct; and if the jury believe from the evidence that at the time the defendant signed the stamped indorsement, "Payment guaranteed, protest, demand and notice of nonpayment waived," the plaintiff was the holder of said notes, that M., the maker of said notes, was dead, and that the plaintiff's rights have not been impaired, nor the prosecution of its rights against the said M., nor the defendant, prevented by his subscribing to the said stamped indorsement, then the jury are instructed that the said defendant is not estopped by that act from setting up the defense that the indorsement on said notes was neither made nor authorized by him.[4]

§ 2328. Necessity of showing reasonable anticipation that another would act on representations

I charge you that, if it be insisted that the defendant could have prosecuted ——— and refrained from prosecuting him because of the promise of the plaintiff to go to ——— and attach the cotton, that that would not amount to estoppel, because it is not the policy of the law in the state of ——— to collect debts by criminal prosecution. So that plaintiff could not reasonably have anticipated that the defendant would be caused a loss by his promise to go to ——— to seek to find the cotton, and, if found, to attach it for his rent.[5]

§ 2329. Representations as to ownership of property

You are instructed that if B. did represent to defendant, while he, B., was in possession of the property now claimed by the plaintiffs, that one-fourth of the water flowing in the ditch was

[3] Jones v. Savin, 97 A. 591, 6 Boyce, 180.

[4] Bowman v. First Nat. Bank of Broadway, 80 S. E. 95, 115 Va. 463.

[5] Markert v. North Augusta Warehouse & Fertilizer Co., 92 S. E. 201, 107 S. C. 135.

the property of D., and used the inducements alleged to induce the defendant to go there, and settle, and defendant, relying on his representation, did so go to that valley, and enter upon the possession of the ranch and water right, under and by virtue of any alleged purchase or agreement by B. from or with D., these plaintiffs are estopped, as B. himself would be, if he were the plaintiff in this action, from denying such right of defendant to one-fourth interest in the water right forever after, and this, if D. never had any right or interest in the property whatever, or if there was no such man in being.[6]

§ 2330. Effect of disclaimer of title

§ 2330(1). Kansas

You are instructed that a purchaser of property upon which a mortgage lien is claimed has a right to rely upon the statement of the holder of that claimed lien, and if you find that the defendants in this case, through their agents, stated to the plaintiff that they wanted a release from said mortgage for the cattle purchased by defendants from said ——— and covered by said mortgage, and you should further find that the plaintiff, after an investigation from a source it deemed proper, stated that forty head of cattle were all it claimed of said cattle, and the defendants, being induced by said representations to believe said statements, and relying thereupon, fully consummated said sale and paid out all of the purchase price for said cattle, a part of which was paid this plaintiff, being the amount claimed by plaintiff as due them, then in that case the plaintiff would be estopped from claiming a further lien on the property.[7]

§ 2330(2). Kentucky

The jury are instructed that if, before the P.'s had obtained their deed from ——— for the land in contest, and before they had paid for the same, one or both the P.'s went to defendant, and asked him if he had any claim on said land, and he told him or them he did not claim any land on the south side of ———, and they were induced to take the deed and pay for said land by reason of said statement of defendant, then defendant is barred of now setting up claim to said land against their vendee, the plaintiff.[8]

§ 2331. Same—Pointing out boundary line

You are instructed that, although you may find and believe from the evidence in the case that plaintiff pointed out to one ———

[6] Campbell v. Shivers, 25 P. 540, 1 Ariz. 161.

[7] Drumm-Flate Commission Co. v. Barnard, 72 P. 257, 66 Kan. 568.

[8] Ratcliff v. Belfont Iron-Works Co., 10 S. W. 365, 87 Ky. 559.

the south line of his property as being substantially the same line where defendant built the fence, yet, unless you further so find and believe that said ——— relied upon said act, and thereafter continuously claimed right and title up to that line, and pointed out the same to defendant at the time defendant bought from ——— as being the south line, and, unless both ——— and defendant continuously used, occupied, and claimed the property up to that line, and made valuable and substantial improvements thereon, relying upon such act of plaintiff, plaintiff is not estopped by that act to recover any land, if any, south of said line, which you believe from the evidence he is otherwise entitled to recover.[9]

§ 2332. Purchase of land in reliance on statements of another as to boundaries

You are instructed that, although the jury should believe from the evidence that the mouth of ——— mentioned in plaintiffs' deeds is at the point marked "CM," and should further believe from the evidence that defendant has been in the adverse possession of the land in controversy as defined in instruction No. ———, they should nevertheless find for plaintiffs if they believe from the evidence that before plaintiffs purchased the land they consulted or advised with defendant as to the boundary claimed by him, and were informed by him that the boundary claimed by him did not cover the land in controversy, and on the faith of these statements believing them to be true they purchased and paid for the land. In such case the jury should find for plaintiffs, upon the ground that the defendant by his statements estopped himself from setting up claim to the land as against plaintiffs.[10]

§ 2333. Acquiescence in statements made by another

You are instructed that, if you find from the evidence that the automobile described in the plaintiff's complaint was purchased by the defendant, or by defendant and T. jointly, and that defendant directed or participated in the sale of said automobile to the plaintiff; and if you further find that in making said sale the said T. represented to the plaintiff, in the presence of the defendant, that the said automobile was free and clear of incumbrances; and if you further find that the said defendant did not deny such statement; and if you further find from the evidence that thereafter, relying on said statement, plaintiff purchased said automobile, and that at the time of such purchase there was a conditional sale agreement on file with an unpaid balance thereon—then defendant is liable for the damage, if any, caused to plaintiff by rea-

[9] Dee v. Nachbar, 106 S. W. 35, 207 Mo. 680.

[10] Ward v. Middleton (Ky.) 124 S. W. 823.

son of the sale to plaintiff of said automobile so incumbered upon such representations.[11]

§ 2334. Failure to assert claim

§ 2334(1). Michigan

You are instructed that, if you find that ———, the insurance adjuster, told ——— on ———, when he adjusted the first loss on the stock, that his name was not mentioned in the policy, and he had no interest in it, then he is estopped from claiming that he was deceived by the representations made by ——— that he was protected by the policy.[12]

You are instructed that, if you find that ——— knew that the insurance was not in his name, as ——— had written him, and neglected to look after his own interest, then he is estopped from claiming that he had been deceived by the defendant and cannot recover.[13]

§ 2334(2). Missouri

The jury are instructed that if, from the evidence, you believe that on the ——— day of ———, the defendant and one N. concluded negotiations whereby said N. agreed to convey to defendant ——— acres of land, including the land in controversy, at the agreed price of $———; and that said ——— acres was part of the ——— acres, of which plaintiff owned at that time an undivided one-fourth; and if you further find that said parties undertook to carry out said agreement, and to consummate said sale and conveyance on that day, with the knowledge and acquiescence of plaintiff; and that it was the intention and purpose of said N. to convey all his interest and claim in and to said ——— acres to said defendant by the deed that day written by plaintiff; and that said plaintiff knew and acquiesced in the said intended conveyance; and that said defendant paid $———, and accepted the deed so written, believing at the time that it did, in fact, convey all of N.'s interest in and to the ——— acres of land; and if you further believe that said defendant afterwards took possession of said ——— acres of land under his said purchase from N., and continued in possession thereof until the commencement of this suit,—then the court declares the law to be that said plaintiff is estopped and precluded from maintaining this action against said defendant, no matter whether the deed written by him for

[11] Karadimas v. Angel (Wash.) 194 P. 775.

[12] Seaman v. Rindge, Kalmbach, Logie & Co., 161 N. W. 919, 195 Mich. 417. Action by mortgagor for breach of contract by mortgagee to keep property insured.

[13] Seaman v. Rindge, Kalmbach, Logie & Co., 161 N. W. 919, 195 Mich. 417.

N. on said ——— day of ———, actually and correctly described said land or not.[14]

§ 2335. Assuming to act in official capacity

You are instructed that, where one assumes to act as an officer of a municipal corporation, he may not, when challenged for those acts, deny that he was acting in an official capacity. He is estopped, not merely as against his assumed principal, but also as against the state.[15]

§ 2336. Effect of prior recognition of capacity, character, or status

You are instructed that, even though you may find that C., at the time plaintiff contracted to saw or cut defendant's timber into lumber, was under contract with the defendant to operate its sawmill and to pay for all the expenses of operating its sawmill and manufacturing its lumber, the plaintiff would not be bound by the said contract between said C. and the defendant, unless such contract was brought to his attention; and, if defendant's authorized officers or agents, acting in conjunction with said C., entered into a contract with the plaintiff to saw its timber into lumber, and at the time of making such contract with plaintiff such authorized officers or agents led the plaintiff by their words or conduct to believe that he was contracting with the defendant, the defendant would be estopped to set up a contract it had previously made with said C. as a defense to this action, unless defendant or C., or some other person brought to the attention of the plaintiff the terms of such contract so previously made.[16]

§ 2337. Negligence—Effect of placing it in power of another to injure a third person

You are instructed that the possession of personal property raises a presumption of ownership in the possessor. If in fact defendant A. was the owner of the property which is the subject of this action, and he permitted defendant R. and wife to remove the same from a distant part of the state to ——— county, and they afterwards shipped the same to ——— in said county in the name of the defendant R., and R. and wife held themselves out to the public as the owners of the property, used the same in their business, and mingled it with other property purchased by them; and if you further find that defendant A. made no effort to inform the public as to rights in the property,—then the court instructs you that it is your duty to weigh all said circumstances in detail, and

[14] Price v. Hallett, 38 S. W. 451, 138 Mo. 561.

[15] State v. Dawe, 177 P. 393, 31 Idaho, 796.

[16] Rice-Brown Lumber Co. v. Fleetwood, 203 S. W. 692, 134 Ark. 340.

if, after full and fair consideration, it is your belief, under the evidence and circumstances proved, that a man of ordinary business prudence, at the time plaintiff made the loan, would have been justified in acting on the belief that R. and wife owned the property, and that plaintiff was acting in good faith in making the loan, it will be your duty to find for the plaintiff.[17]

You are instructed that, where one of two innocent parties must suffer for the wrongdoing of a third, the penalty must fall upon him that places power in said third party to do the injury. If both plaintiff and defendant were acting in good faith, and defendant permitted his property to be so used as to raise a reasonable belief in the minds of others that the property belonged to third persons, and such third persons afterward secured a loan from plaintiff on said property, then defendant has no right to the possession of said property till plaintiff's loan is satisfied.[18]

§ 2338. Against whom available—Effect of representations by lessee of personalty on lessor

You are instructed that if you find, from the evidence in this case that H., the interpleader herein, by written lease, rented or hired the property in controversy herein to the ——— Company by the terms of which lease such company had the option to purchase said property upon the payment of the sum stipulated therein, and wherein it was stipulated that the said H. had the option to declare said lease at an end upon the condition thereof being broken, then I instruct you that in the law the title to the said property remained in the said H. and a creditor of the lessee (the ——— Company) acquired no right to said property paramount to the rights of the said H. by the furnishing of goods or extending of credits to the lessees upon the strength of the statement by the lessees that they were the owners of the said property.[19]

The court further instructs the jury that, if you find from the evidence that plaintiffs extended credit to the ——— Company upon the representation of said company, or a duly authorized agent thereof, that the property in controversy herein was the property of the ——— Company, yet such representation did not give the plaintiffs the right to attach, and their attachment does not constitute a lien on said property paramount to or against the rights of the said H., unless you further find that the said H. had actual knowledge and notice that said ——— Company had made such representations.[20]

[17] Alexander v. Logan, 70 P. 339, 65 Kan. 505.

[18] Alexander v. Logan, 70 P. 339, 65 Kan. 505.

[19] Burke v. Sharp, 115 S. W. 145, 88 Ark. 433.

[20] Burke v. Sharp, 115 S. W. 145, 88 Ark. 433.

CHAPTER CXXVII

EVIDENCE

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§ 2339. Presumption of knowledge of law

The jury are instructed that ignorance of the law on the part of any litigant is no excuse, when it comes to a determination of his rights with an adversary in the courts. The presumption prevails that every man knows the law. Some evidence has been introduced in the trial of this case on behalf of the plaintiff tending to establish the fact that the plaintiff was ignorant of his rights under the compensation law of the state of ———, and that he did not know there was such a law. I instruct you that you have no right to consider this fact, if you find it to be one, in determining whether or not the plaintiff elected to take compensation under the compensation law, nor should you consider such fact for any purpose whatever in determining the respective rights of the plaintiff and defendant in this case.[1]

The jury are instructed that every person of sound mind and mature age is presumed to know the law.[2]

§ 2340. Presumption from failure to produce evidence

Presumption from failure to produce grantor in deed attacked as fraudulent, see post, § 2714.

Presumption in criminal cases from failure to produce evidence, see ante, § 1966.

§ 2340(1). United States

Gentlemen of the jury, I have this notion about a lawsuit, that it is the function of the lawsuit to get at the truth of a case and that it is the duty of the parties to a lawsuit to exhaust reasonably within their power, as the jury reasonably sees the power is within their reach, the avenues of testimony leading to a determination of the truth, and, in determining where the facts of this case lie, it is proper for you to look to the manner in which this case is presented to you to determine whether or not the parties to this case, either or both of them, have reasonably exercised the opportunities open to them to enlighten you as to what the facts are, and if you find in the reason of things, as these circumstances illuminate your judgment, that there were reasonably at hand, within the command of either party to this case, witnesses who might give you valuable testimony upon any proposition, who were not put upon the stand, you are permitted to draw such inferences as reasonable men would draw under such circumstances from the failure to employ such opportunity. Only reasonable diligence in the elucidation of the truth is required of the parties, but there has appeared in this case a series of matters upon which one witness appears from this testimony to have been capable of speaking, who was not placed upon

[1] Tolge Mahogany Co. v. Burrows (Ind.) 130 N. E. 865.

[2] Ogborn v. Hoffman, 52 Ind. 439.

the stand—the mother of the plaintiff. She could have told us whether or not, in some degree at least, the witness ——— told the truth. She could have told us in some degree or not whether in fact the plaintiff got home from ——— on the morning of ——— or later. She could have told us whether or not the plaintiff had an engagement ring produced at or about the illuminating time. She could have thrown some light upon the credibility of ——— and ———. She could have told us something about ——— and the conduct of the plaintiff there. She could have told us something about this charge against the plaintiff of drinking. And I regret, in the capacity of the court, affording full opportunity to throw onto these transactions all the light reasonably possible, that she was not put upon the stand, and it is for you to draw such inferences as are reasonable under the circumstances because of the failure to put this person upon the witness stand. And if in your consideration of this case, as you review the testimony and go down the procession of witnesses and the series of facts to which they attempt to testify, you find that the defense any place was derelict in the exercise of reasonable diligence in putting the testimony of witnesses before you, you will draw just exactly the same inferences against the defendant.[8]

§ 2340(2). Massachusetts

The jury are instructed that there has been some reference made to the failure of the plaintiff to call certain witnesses. Where testimony is within the reach of one party and not within the reach of the other, and the party does not produce the testimony—as, if he has a document, a letter, or some written instrument that is entirely within his control and he does not produce it—it is sometimes said that the jury have a right to infer that the party does not produce it when he can because it would be against him if he did produce it. Some times that is true, where the witness is entirely within the power or within the control of one party or the other. But where the witness is equally within the reach of one party as well as the other, then the question would come whether there should be any inference drawn from the fact that neither party called him. Perhaps they say that "he cannot do any good for us"—he cannot do any good, in the opinion of the plaintiff, for the plaintiff; and the defendant says he cannot do any good for the defendant. It is for the jury to say, under all the circumstances, what the fair inference is from leaving the witness off. But where one party or the other calls a witness, then you consider the testimony, and there is no occasion to comment then, or to criticise one party or

[8] Young v. Corrigan (D. C. Ohio) 208 F. 431.

the other who does not call such a witness, but take the testimony of the witness as he is called.[4]

§ 2341. Circumstantial evidence

In criminal cases, see ante, § 1983.

§ 2341(1). California

You are instructed that presumptive or circumstantial evidence is admissible in civil cases. When direct evidence cannot be produced, minds will form their judgments on circumstances. So in this case it is not necessary that the plaintiff produce direct evidence as to what caused the casing, mentioned in this case, to fall, if any casing did fall; but such cause may be inferred from all of the circumstances in the case.[5]

§ 2341(2). Delaware

You are instructed that circumstantial evidence is where, some facts being proved, another fact, the fact in issue, follows as a natural or very probable conclusion from the facts actually proved, so as readily to gain the assent of the mind from the mere probability of its having occurred. It is an inference of a fact from other facts proved.[6]

The jury are instructed that proof by circumstantial evidence is the proof of one fact by proving the existence of certain other facts. The fact to be proved by circumstantial evidence must, to the satisfaction of the jury, be reasonably, naturally and probably inferred from the existence of other facts proved.[7]

§ 2342. Effect of verbal admissions

Admissions of defendant in criminal case as evidence, see ante, § 1971.

§ 2342(1). Illinois

The jury are instructed that, while admissions are competent to be given in evidence against the party who makes them, they are often of an inconclusive and unsatisfactory character, depending very much on the circumstances under which they were made. It is the province of the jury to decide the weight to be given to admissions, and in so doing you have a right to take into consideration the circumstances under which they were made, and the relation and condition of the parties to such admissions, and the ability of witnesses to recollect such admissions as they were originally made.[8]

[4] Harriman v. Reading & L. St. Ry. Co., 53 N. E. 156, 173 Mass. 28.

[5] Arundell v. American Oilfields Co., 160 P. 159, 31 Cal. App. 218.

[6] Fahey v. Niles, 108 A. 135, 7 Boyce, 454.

[7] Cecil v. Mundy (Super.) 92 A. 850, 5 Boyce, 291.

[8] Young v. Foute, 43 Ill. 33.

§ 2342(2). Iowa

The jury are instructed that the admissions of the deceased before his death will be considered by the jury with great care, and all the circumstances in connection therewith, his suffering, whether he was in such condition as to speak with mature consideration and due deliberation, and whether he spoke in regard to his legal rights, or whether he referred to and meant that defendant was not to blame for any willful intent to injure him or to cause said accident, and then give his admission such meaning as you believe from all the circumstances he intended it to have, and give such weight thereto as in your judgment it may be entitled to. The admission of deceased will not be conclusive as to what he stated. You will consider all the testimony in relation to said matter, and will then come to such conclusion in relation thereto as in your judgment the whole evidence will justify.[9]

§ 2342(3). Oregon

You are instructed that there has been some evidence here of admissions in this case, and I instruct you that oral testimony respecting verbal statements or admissions made by a party should be received by you with caution, for the reason that the party making his statement may not have clearly stated his own meaning, or the party receiving the statement may have gathered a wrong impression as to what the party making the statement intended to say.[10]

§ 2343. Effect of offer of compromise

The jury are instructed that an offer to settle this suit by the defendant is not an admission of its liabilities, and in ascertaining the fact as to whether the defendant is liable to the plaintiff for damages you cannot take into consideration any action or statement made by the claim agent in reference to a settlement or a compromise of the case in fixing the original liability of the defendant.[11]

§ 2344. Best and secondary evidence

The jury are instructed that no rule of law requires all the evidence, or the strongest evidence, of the matters in dispute, but only that is excluded which, from the nature of the case, supposes evidence superior in quality or grade behind, in the power of the party whose duty it is to produce the same; that is to say, the party whose duty it is to prove a fact must produce the best evidence which, from the nature of the case, must be supposed to exist of such fact, and to be within the control of the party.[12]

[9] Cooper v. Central Railroad of Iowa, 44 Iowa, 134.

[10] Gleason v. Denson, 132 P. 530, 65 Or. 199.

[11] St. Louis Southwestern Ry. Co. v. Mitchell, 171 S. W. 895, 115 Ark. 339, Ann. Cas. 1916E, 317.

[12] Vigus v. O'Bannon, 8 N. E. 778, 118 Ill. 334.

§ 2345. Weight and effect of expert testimony

Weight of expert testimony on issue of sanity, see post, § 3060.

§ 2345(1). Georgia

You are instructed that the opinions of experts on any question of science, skill, trade, or like questions are always admissible, and such opinions may be given on the facts as proved by other witnesses. Therefore, gentlemen of the jury, you are to determine what evidence is expert testimony and who are experts, if any are sworn in this case, and, should you find that there is expert testimony in this case, you should not then yourselves just arbitrarily disregard this testimony.[13]

§ 2345(2). Illinois

The jury are instructed that, in determining the question as to whether the fence was sufficient to turn hogs, horses, sheep, and cattle, the jury have a right to take the testimony of farmers who are acquainted with fences.[14]

§ 2345(3). Indiana

The jury are instructed that the opinions of expert witnesses are admissible in evidence for the consideration of the jury. The opinions of such witnesses are not admitted for the purpose of controlling the judgment of the jury, but to be considered for what they are worth in your opinion, when considered with the other evidence in the case. If you think from all the evidence in the case that you ought to reject the testimony of the expert witnesses or any of them, you have the right to do so.[15]

The jury are instructed that, if you find that any of the facts embodied in the questions, submitted to these witnesses, or either of them, has not been proved, then the weight to be given the evidence of each is weakened by so much, at least, as the facts are not proved. If you find that none of the material facts embodied in said questions are proved by a fair preponderance of the evidence, then you may disregard said evidence as worthless.[16]

The jury are instructed that the opinions of the experts are to be considered by you in connection with all the other evidence in the case. You are not to act upon them to the entire exclusion of other testimony. You are to apply the same general rules to the testimony of experts that are applicable to the testimony of other witnesses, in determining its weight. Taking into consideration the opinions of the experts, and giving them just weight, you are to determine for yourselves, from the whole evidence, whether

[13] Pritchett v. Moore, 54 S. E. 131, 125 Ga. 406.

[14] Illinois Cent. R. Co. v. Swearingen, 47 Ill. 206.

[15] Nordyke & Marmon Co. v. Whitehead, 106 N. E. 867, 183 Ind. 7.

[16] Terre Haute Traction & Light Co. v. Payne, 89 N. E. 413, 45 Ind. App. 132.

the defendant is guilty, as she stands charged, beyond a reasonable doubt.[17]

§ 2345(4). Iowa

The court instructs the jury that medical men have been called as experts on both sides to give opinions as to the condition of plaintiff. Some of these opinions are based on what are designated as hypothetical questions. If the evidence introduced upon the trial shows the acts, conduct, demeanor, and condition of plaintiff to have been as stated in such hypothetical questions, then the testimony of medical men of large experience, based upon such questions, may be given such weight and value as you believe them fairly entitled to. If, however, the evidence does not sustain the supposed state of facts presented in the hypothetical questions asked such medical witnesses, then you should attach no weight whatever to the answers of the medical experts founded thereon. The value of such opinions depends upon whether or not the facts upon which they are based are the facts as shown by the evidence in the case. You should also give the opinions of medical witnesses who have testified from personal knowledge such weight as you believe them fairly entitled to.[18]

The court instructs the jury that testimony has been given by certain witnesses who, in law, are termed experts, and in this connection I would suggest to you that, while in cases such as the one being tried, the law receives the evidence of men, expert in certain lines, as to their opinions derived from their knowledge of particular matters, the ultimate weight which is to be given to the testimony of expert witnesses is a question to be determined by the jury, and there is no rule of law which requires you to surrender your own judgment to that of any person testifying as an expert witness, or to give controlling effect to the opinion of scientific witnesses; in other words, the testimony of an expert, like that of any other witness, is to be received by you and given such weight as you think it is properly entitled to; but you are not bound or concluded by the testimony of any witness, expert or other.[19]

The jury are instructed that the court has allowed in this case the introduction of evidence known as expert testimony, and has allowed expert witnesses to testify as to what, in their opinion, was the cause of the death of ———. But, gentlemen of the jury, their opinion so expressed is not binding or conclusive upon you. It is for you to determine from all the facts and circumstances de-

[17] Epps v. State, 1 N. E. 491, 102 Ind. 539.

[18] Bird v. Hart-Parr Co., 146 N. W. 74, 165 Iowa, 542.

[19] Moore v. Chicago, R. I. & P. Ry. Co., 131 N. W. 30, 151 Iowa, 353.

veloped in this case, including the opinion of said expert witnesses, what, in fact, was the cause of the death of said ———? And you are to give to their opinion such weight and credit as you shall deem it entitled to after taking into consideration their knowledge and skill as disclosed in their testimony, and all the other facts and circumstances shown and developed in their testimony.[20]

§ 2345(5). Michigan

The jury are instructed that, if you reach that point, whether plaintiff is entitled to compensation for the loss of the arm and the pain and suffering that was incident to the injury that was in his arm, whether caused by this or something else, then, gentlemen of the jury, you should determine from the facts in the case whether that injury was due to the accident or whether it was due to some other cause, and, in considering that, take into consideration all the testimony that was offered here. With regard to that some expert testimony has been offered on both sides. One physician, the physician who treated plaintiff, who saw the hand, gives his opinion as to the cause of the conditions he saw. Another physician gives his opinion with regard to the results that were found. All that testimony, gentlemen of the jury, is opinion testimony, and with regard to opinion testimony I will say this: That you may take into consideration, and give the opinion testimony that is offered on both sides, such weight as you think it is entitled to. But, after all, opinion testimony, gentlemen of the jury, is not the testimony of persons who testify as to facts, and it is entitled, therefore, only to such weight as you, in your sound judgment and discretion, think that it is entitled to. It is very proper in matters of this kind that require scientific knowledge—that require more knowledge, as far as technical points are concerned, than you or I, being laymen, are expected to have—it is proper to bring in persons who, by reason of long study and knowledge in the technicalities involved are competent to express their opinions upon the subject. In cases tried in this court we have nice questions in engineering, and nice questions in medicine, and sometimes nice questions in law, and you are entitled on these technical questions and subjects to the opinion of persons learned in these sciences; and in this case you have heard the opinions of the two physicians. One physician said that such an injury as was described—that is, an injury from a blow—might have resulted in the condition which he found, and the other physician says in his judgment and opinion the results that were obtained were due, or more likely due, to the injury received from the grasping of this thistle. Now, gentlemen

[20] Morrow v. National Masonic Acc. Ass'n, 101 N. W. 468, 125 Iowa, 633.

of the jury, study over carefully, therefore, all that testimony, and be guided by the opinion that seems to you to be the most reasonable under all the facts and circumstances as they are offered in testimony in this case.[21]

You have heard the testimony of these physicians, who have given evidence upon that point, and testified as experts, giving opinions. That class of testimony is proper and competent concerning matters involving special knowledge or skill or experience upon some subject which is not within the realm of the ordinary experience of mankind, and which requires special research and study to understand The law allows those skilled in that special branch to express opinions, and, upon a hypothetical state of facts stated to them, to say whether or not, according to their experience and research, a fact may or may not exist. But, nevertheless, while their opinions are allowed to be given, it is entirely within the province of the jury to say what weight should be given to them. Jurors are not bound by the testimony of experts. Their testimony is to be canvassed as that of any other witness. Just as far as their testimony appeals to your judgment, and convinces you of its worth, you should adopt it; but the mere fact that witnesses are called as experts, and give opinions upon a particular point, does not necessarily obligate the jury to accept their opinions as to what the facts are, in the face of the testimony of witnesses claiming to have actual knowledge of the facts.[22]

§ 2345(6). Missouri

You are instructed that the testimony given by the experts and physicians who testified in this case is to be taken and considered by the jury like the evidence of other witnesses who testify in the case; and the opinions on questions of insanity, which have been given by medical experts, are proper testimony before you, but are subject to the same rules of credit or discredit as the testimony of other witnesses, and are not conclusive on the jury. Those opinions neither establish, nor tend to establish, the truth of the facts upon which they are based. Whether the matters testified to by the witnesses in the case as facts are true or false is to be determined by the jury alone, and you must also determine whether the facts and matters stated and submitted to the experts in the hypothetical questions are true in fact and have been proved in the case.[23]

The jury are instructed that the opinions given by the medical experts in this cause are testimony before you and subject to the

[21] Hull v. Detroit United Ry., 123 N. W. 571, 158 Mich. 682.

[22] Olson v. Village of Manistique, 68 N. W. 986, 110 Mich. 656.

[23] State v. Crane, 100 S. W. 422, 202 Mo. 54.

same rules of credit or discredit as the testimony of other witnesses. The opinions neither establish nor tend to establish the truth of the facts upon which they are based. Whether the matters testified to by the witnesses in the cause, as facts, are true or false, is to be determined by the jury alone. Neither are the hypothetical questions put to the medical experts by the counsel in the cause evidence of the truth of the matters stated in these questions.[24]

The court instructs the jury that they are not bound by the testimony of the expert witnesses, but in considering such testimony the professional standing and experience of such witnesses must be taken into consideration in arriving at a verdict.[25]

You are instructed that, with respect to expert testimony, or, in other words, the opinion of the doctors, you may take into consideration whether such opinions are supported or refuted by other testimony in the cause. You may also take into consideration the professional learning, skill, ability, and experience of such experts.[26]

§ 2345(7). Montana

You are instructed that expert evidence is entitled to importance only when fairly given by one properly accredited through his experience and study in the particular science upon an hypothesis which is true in the relation of its parts to the whole case, which is the subject of inquiry; that is to say, the value of the opinion of an expert witness depends upon the knowledge, learning, and experience of the expert and upon the facts upon which it is based. Therefore in this case, if you find that the opinions expressed by any expert testifying herein were given in answer to hypothetical questions which were incomplete in the presentation of the material facts as shown by the evidence, you are at liberty to give the testimony of such expert only such weight as you believe it may be entitled to in view of all of the established facts in the case.[27]

§ 2345(8). Nebraska

The jury are instructed that in weighing expert testimony, it is important that you should consider whether the fact upon which the opinion of the witness is given has been satisfactorily proven and whether the expert is in any way biased and prejudiced as shown by the evidence. You should also consider what experience, skill, and learning in his profession the expert is shown to have. In weighing expert testimony offered for the purpose of contradicting the testimony of other witnesses who have positively stated

[24] State v. Wertz, 90 S. W. 838, 191 Mo. 569.

[25] Cosgrove v. Burton, 78 S. W. 667, 104 Mo. App. 698.

[26] Fullerton v. Fordyce, 44 S. W. 1053, 144 Mo. 519.

[27] Schumacher v. Murray Hospital, 193 P. 397, 58 Mont. 447.

facts claimed by them to have been within their personal knowledge, you should not fail to distinguish between those inferences or conclusions of the expert which are shown to be only probable and generally true, and which have their exceptions, and those other inferences and conclusions, if any, which are necessary and invariable, and which have no exceptions. You should also consider whether the opinion of the expert is speculative, theoretical, and states only the belief of the witness, while yet some different opinion, conclusion, or inference may be drawn from the same facts. You will further understand that the question in dispute in this case, of whether the plaintiff's arm was broken or not, is not for the expert to determine. That question is alone for you to determine from all the testimony in the case.[28]

§ 2345(9). New York

The jury are instructed that the evidence of the physicians and all the other testimony is entirely for you, and the court will not say, as matter of law, that they are not entitled to any greater weight. You may find that it is enitled to no greater weight than any other evidence, or you may find that it is of greater weight. It is a question of fact for you to determine, and the jury has a right to disregard such evidence entirely, and you have a right to regard it.[29]

§ 2345(10). Oklahoma

You are instructed that certain persons have been permitted to testify in this case as expert witnesses, and in this connection you are instructed that an expert witness is one who is skilled in any particular art, trade, or profession, being possessed of peculiar knowledge concerning the same, acquired by study, observation, and practice. Expert testimony is the opinion of such a witness based upon the facts in the case as shown by the evidence, but it does not tend to prove any fact upon which it is based, and before you can give any weight whatever to expert testimony you must find from the evidence that the facts upon which it is based are true. The jury is not bound by expert testimony, but it should be considered by you in connection with the other evidence in the case. And you are instructed that the testimony given by the physicians and experts who testified in this case is to be taken and considered by the jury like the evidence of the other witnesses who testified in the cause; and the opinions on questions of paresis, nervous disturbances, insanity, and other matters involved in this case which have been given by the medical experts are subject to

[28] Modern Brotherhood of America v. Cummings, 94 N. W. 144, 68 Neb. 256.

[29] People v. Ferraro, 55 N. E. 931, 161 N. Y. 365.

the same rules of credit or discredit as the testimony of the other witnesses, and are not conclusive on the jury. These opinions neither establish nor tend to establish the truth of the facts upon which they are based. Whether the matters testified to by the witnesses in the cause are facts, or true or false, is to be determined by the jury alone; and you must also determine whether the facts and matters stated and submitted to the experts in the hypothetical questions are true in fact and have been proven in the case.[30]

§ 2345(11). Pennsylvania

We will now come to the medical testimony. I will say to you on that score that you are not bound to decide this case according to the views of the doctors one way or the other. The doctors are not the jury. They cannot take the stand, and say such and such is the case, and then decide the case. Although you have been told that you are bound by the evidence, or as much of it as you believe, when you come to medical testimony or any other expert testimony, that is merely opinion testimony. It may be of value and it may be of no value, just as it appeals to you. One side puts an expert on the stand and he gives his opinion, and the other side puts an expert on the stand and you get the opinion of that doctor. They are both cross-examined, and it is for you to decide in considering all their evidence whether you will be guided to any degree by their opinions, whether you think they are worthy of any consideration, or whether you think they are not worthy of consideration at all. If you think they are worthy of consideration, you will decide how much they are worth and how much you will give to them, judging by the examinations and cross-examinations and the whole probabilities of the testimony as applied to the facts as you find them. If you consider the testimony cannot do you any particular good, you will dismiss it, but whether you will dismiss it or not is entirely a matter for you, and what effect you will give to it is also a matter for you.[31]

§ 2345(12). Wisconsin

You are instructed that there has been considerable testimony in this case given by experts, and many questions were put and answered upon a hypothetical state of facts. In weighing the answers to such questions, it is important for you to keep in mind the facts which were stated in such questions upon which said experts were called to give their opinions. If such facts were not in material respects the same as you find them to exist, after consid-

[30] Chicago, R. I. & P. Ry. Co. v. Penix, 159 P. 1141, 61 Okl. 4.

[31] Commonwealth v. Shultz, 70 A. 823, 221 Pa. 466.

eration in this case, such opinions would be necessarily weak, if not valueless.[32]

§ 2346. Value and weight of opinions of nonexperts

You are instructed that in this case persons have been permitted to testify to certain statements, acts, and conduct of the plaintiff, and to express their opinions, based upon such statements, acts, and conduct, as to whether or not the plaintiff was sound or unsound in his mental, physical, and nervous condition. These witnesses are what are known in law as nonexpert witnesses, and in determining the value of the opinion of such a witness you may take into consideration the intelligence shown in his examination, his opportunities for acquiring the knowledge upon which his opinion is based, his previous personal acquaintance with the plaintiff, its character and the length of time it existed, his freedom from bias or interest, the absence of finely spun theories from his conception of the whole matter, the fullness of the facts within his knowledge, and the accuracy of his memory. No rule can be laid down as regards the amount of knowledge which the nonexpert must possess. The weight that the opinion of such a witness shall have is for the jury alone to determine.[33]

§ 2347. Nonexpert opinion as to mental capacity

You are instructed that testimony has been given in this case consisting of opinions of nonexpert witnesses as to the unsoundness of mind of the testator, ———, and in relation thereto said witnesses have testified to certain facts and circumstances which they claim to have observed as to the acts, appearance, and conduct of said ——— both before and after the times of the execution of the said will and the codicil thereto. The law requires the opinion of such witnesses to be based upon facts which are given in evidence and detailed to the jury by said witnesses before giving said opinion, and it is for you to say what weight is to be given to such opinion of any such witnesses after first determining whether the facts and circumstances testified to by him and detailed to the jury upon which said opinion is based, are consistent with unsoundness of mind as elsewhere defined in these instructions. With such limitation, the weight to be given the opinions of witnesses, both expert and nonexpert, is a matter peculiarly within your sound judgment and discretion, and you should consider, in connection therewith, the facts disclosed by those witnesses who have given opinions of unsoundness of mind, based upon their observations of the deceased as detailed in evidence, and also whether or not the facts enumerated in the hypothetical questions pro-

[32] Hedger v. State, 128 N. W. 80, 144 Wis. 279.

[33] Chicago, R. I. & P. Ry. Co. v. Penix, 159 P. 1141, 61 Okl. 4.

pounded to expert witnesses have been established by the evidence offered and admitted upon the trial.[34]

§ 2348. Documentary evidence

The jury are instructed that if you find from the evidence that errors occur in the bill rendered to the defendant or in the book, both of which are in evidence in this case, and that the witness C., or the plaintiff, had any connection therewith, you are entitled to consider their connection with any such errors, and the nature of such connection, in considering and weighing their testimony in this case, together with the other evidence in the case; and you are further instructed that you are the judges of the credibility of the witnesses and the weight of the testimony on both sides of the case.[35]

The court instructs the jury as a matter of law that the certificate of the secretary of state of the state of ———, under the great seal of the state, is conclusive evidence as against any and all papers in the case that the title to the lands described in the deed of trust was, on the ——— day of ———, in the state, and not in any other person or persons.[36]

§ 2349. Books of account

The court instructs the jury that the counsel for the plaintiff have agreed that the accounts offered by the defendant in evidence, and taken from his books, shall have the same effect as though the books themselves had been duly proved and produced in court; but, unless the jury believe from the evidence that the books from which said accounts were taken were books of original entry, then the same are not evidence in favor of the defendant on this trial.[37]

§ 2350. Proof of handwriting

The jury are instructed that, although a witness may swear that he has seen defendant write, yet this is not proof of the execution of an instrument in writing purporting to be executed by defendant, unless the witness is able to distinguish the signature to said instrument as that of the defendant, according to the belief of the witness, founded on his previous knowledge of the handwriting of defendant.[38]

The jury are instructed that the proof of the signature of defendant to the note in question cannot be made by comparison with other signatures, but the proof of his handwriting must be made by witnesses who have seen defendant write and are familiar with his signature, or who have seen letters or other documents which the

[34] In re Law's Estate, 138 N. W. 531, 158 Iowa, 609.

[35] Lonergan v. Courtney, 75 Ill. 580.

[36] Ryan v. Brant, 42 Ill. 78.

[37] Shrewsbury v. Tufts, 23 S. E. 692, 41 W. Va. 212.

[38] Putnam v. Wadley, 40 Ill. 346.

defendant has, in the course of business, recognized or admitted to be in his own handwriting.[39]

§ 2351. Proof of handwriting by comparison—Establishment of standard of comparison

The jury are instructed that, if it be true, as the defendant claims by his witnesses that the witness A. wrote the letter or the paper called the notice Exhibit ———, then it follows that there is no testimony before you to show that defendant wrote the C. paper, because it is only upon the identification of the writer of the first paper that the identification of the writer of the C. paper rests. If you should find that the defendant did not write the first paper, the notice paper, if you should find that as a fact, then, I repeat, there is no testimony to warrant you in finding that he wrote the C. paper; but, if you do find as a fact that he wrote the first paper, taking into consideration all the testimony which you have heard regarding other writings to which I have not referred, the testimony of Mrs. ——— to the effect that he gave it into her hand and made some alterations upon it in her presence, if you believe that he wrote the first paper, the notice paper, then there is testimony, called expert testimony, before you from which you may infer, from which you may believe, that he wrote the second paper, called the C. communication.[40]

§ 2352. Right to introduce parol evidence to control or affect written agreement

You are instructed that there was a writing between these parties, which purports to embody at least some portion of the contract between them. So far as it covers the negotiations of the parties it must control. No parol evidence here could change the agreement which the parties have put into the writing, or the stipulations which the parties have put into the writing. They must control, as against other or parol evidence as to what was said. It does not necessarily prevent the plaintiffs from showing that stipulations between the parties were not put in the contract; that all the representations which the parties made were not put in the contract.[41]

§ 2353. Relative weight of positive and negative testimony

§ 2353(1). North Carolina

You are instructed that, as a general rule of evidence, affirmative testimony is regarded as stronger than negative; in other words,

[39] Putnam v. Wadley, 40 Ill. 346. It did not appear in this case that any instrument, which could be used as a standard of comparison, was properly in evidence for other purposes.

[40] People v. Fletcher, 44 App. Div. 199, 60 N. Y. Supp. 777.

[41] Palmer v. Roath, 49 N. W. 590, 86 Mich. 602.

the rule is that the testimony of a credible witness that he saw or heard a particular thing at a particular time and place is regarded as more reliable than that of any equally credible witness with the same opportunity who testified that he did not hear or see the same thing at the same time and place. The reason for this rule is that the witness who testifies to a negative may have forgotten what actually occurred, while it is impossible to remember what never existed.[42]

§ 2353(2). Wisconsin

You are instructed that positive testimony of a small number of witnesses that they saw or heard a given thing occur, will outweigh the negative testimony of a greater number of witnesses that they did not see or hear it, provided the witnesses are equally credible; but in connection with this instruction should be considered the relative means or opportunity of the several witnesses to see or hear the occurrence, and it should be carefully kept in mind that it only applies when the witnesses are equally credible.[43]

§ 2354. Preponderance of evidence

§ 2354(1). United States

You are instructed that the "preponderance of the evidence" does not mean that the plaintiff must produce a greater number of witnesses than the defendant. It is sufficient to entitle her to a verdict that you are reasonably satisfied from all the evidence that the allegations of the complaint are true.[44]

§ 2354(2). California

Hersberger v. Pacific Lumber Co., 88 P. 587, 4 Cal. App. 460. To same effect, see Pennsylvania Ins. Co. v. Carter (Pa.) 11 A. 102, in § 2354(9).

§ 2354(3). Illinois

You are instructed that the plaintiff is not bound to prove his case beyond a reasonable doubt, but is merely bound to prove it by a preponderance of the evidence.[45]

You are instructed that the weight of the testimony does not necessarily depend on the greater number of witnesses sworn on either side of a question in dispute, but you are at liberty, as jurors, to consider all the facts and circumstances appearing from the evidence in the case, determining from that which of the witnesses are worthy of the greater credit; and if you believe, from the evidence that the evidence of a small number of witnesses on one side is more

[42] McMillan v. Atlanta & C. Air Line Ry. Co., 90 S. E. 683, 172 N. C. 853.

[43] Draper v. Baker, 21 N. W. 527, 61 Wis. 575, 50 Am. Rep. 143.

[44] Louisville & N. R. Co. v. White (C. C. A. Ala.) 100 F. 239, 40 C. C. A. 352.

[45] Pierson v. Lyon & Healy, 90 N. E. 693, 243 Ill. 370.

credible and trustworthy than the evidence of the greater number on the other side, then the evidence preponderates on the side of the smaller number of witnesses.[46]

The jury are instructed that, where witnesses testify directly opposite to each other on a material point, the jury are not bound to consider the point not proved; that they have a right to regard all surrounding circumstances proved on the trial, and give credence to one witness over the other, if they think such facts and circumstances warrant it; that in this case, although the plaintiff, upon the question whether she fell from the car on the street, may testify one way, and the conductor and policeman may swear the other way, the jury are not bound to consider the point not proved, but may give credence to the plaintiff upon this point, if they believe that the facts and circumstances bearing on the point in evidence warrant their doing so.[47]

The jury are instructed that the fact that the number of witnesses testifying on one side is larger than the number testifying on the other side does not necessarily alone determine that the preponderance of evidence is on the side for which the larger number testified. In order to determine that question, the jury must be governed by and take into consideration the appearance and conduct of the witnesses while testifying, the apparent truthfulness of their testimony or the lack of it, their apparent intelligence or the lack of it, their opportunity of knowing or seeing the facts or subjects concerning which they have testified, or the absence of such opportunity, their interest or the absence of interest in the result of the case; and from all these facts as shown by the evidence, and from all the other facts and circumstances so shown, the jury must decide on which side is the preponderance. After fairly and impartially considering and weighing all the evidence in this case, as herein suggested, the jury are at liberty to decide that the preponderance of evidence is on the side which in their judgment is sustained by the more intelligent, the better informed, the more credible, and the more disinterested witnesses, whether these are the greater or the smaller number. But the jury have no right to disregard capriciously the testimony of the larger number of witnesses, nor to refuse to give whatever consideration, in their judgment, should attach naturally to the fact that the larger number testify one way. The element of numbers should be considered, with all the other elements already herein suggested, for whatever in the judgment of the jury that element is worth, and the evidence of the smaller number cannot be taken by the jury in preference to that of the

[46] St. Louis & O. Ry. Co. v. Union Trust & Savings Bank, 70 N. E. 651, 209 Ill. 457.

[47] West Chicago St. R. Co. v. Liserowitz, 64 N. E. 718, 197 Ill. 607.

larger number, unless the jury can say, on their oaths, that it is more reasonable, more truthful, more disinterested, and more credible.[48]

§ 2354(4). Indiana

The jury are instructed that the burden rests upon the plaintiff of proving the material facts averred in the complaint. Whether the facts are material, however, need not cause you trouble, as that is a question of law for the court. You find what facts have been proved, and, in determining what have been proved, it will be necessary for you to consider what facts have been attempted to be proved, and by whom—that is, by which party. If the plaintiff asserts a fact, and offers evidence to prove it, and the defendant offers evidence to disprove it, you will then weigh all of the evidence on that point. If you find that the evidence of the plaintiff outweighs that of the defendant, you should find the fact proved, and it should become a part of your verdict. If the evidence of the defendant upon that point outweighs that of the plaintiff, you will leave that fact out of your verdict. And it may arise that you will find the evidence equally balanced upon a fact asserted by the plaintiff: that is, you will find that, after you have carefully considered all of the evidence upon such fact upon both sides, you are unable to determine which side has the preponderance. In such case you should omit the fact asserted from your verdict. These remarks apply to the facts averred, and upon which proof was offered by the plaintiff; the same will apply to facts asserted by the defendant. After plaintiff has made proof of facts to entitle her to recover, her recovery may be defeated by other facts proved, which avoid the effect of the facts so proved by the plaintiff. These facts are averred by the defendant, and constitute a part of the defense. The burden of proving such facts is upon the defendant by a fair preponderance of the evidence.[49]

§ 2354(5). Kansas

You are instructed that the burden of proof is upon the plaintiff, and she must make out her case by a preponderance of the evidence. By "preponderance of evidence" is not meant the mere greater number of witnesses upon the one side or the other, but that evidence which is most convincing and satisfactory to the minds of the jurors. In determining upon which side the preponderance of the evidence is, the jury may take into consideration the opportunities of the several witnesses for seeing and knowing the things about which they testify; their conduct and demeanor while testifying; their interest, if any, or want of interest, if

[48] Gage v. Eddy, 58 N. E. 1008, 179 Ill. 492.

[49] Pittsburg, C., C. & St. L. Ry. Co. v. Burton, 37 N. E. 150, 139 Ind. 357.

any, in the result of the suit; the probability or improbability of the truth of their several statements, in view of all the other evidence and other facts and circumstances appearing upon the trial; and from all the circumstances determine the weight or preponderance of the evidence. The jury are the sole judges of the weight of the evidence and the credibility of the witnesses.[50]

§ 2354(6). Michigan

You are instructed that the burden of proof is on the plaintiff. She must establish her case by a fair preponderance of evidence, and where the testimony is evenly balanced your verdict should be for the defendant.[51]

The jury are instructed that the burden of proof rests upon the plaintiff to make out the facts, which I have stated to you are essential to establish his case, by a fair preponderance of evidence. By this is meant such evidence as, when weighed with that which is offered to oppose it, has more convincing power in the minds of the jury. It is not a technical term at all, but means simply that evidence which outweighs that which is offered to oppose it. It does not necessarily mean that a greater number of witnesses shall be produced on the one side or the other, but that, upon the whole evidence, the jury believe the greater probability of the truth to be upon the side of the party having the affirmative of the issue.[52]

§ 2354(7). Nebraska

You are instructed that by a preponderance of the evidence is meant not necessarily the greater number of witnesses, but that amount of evidence which, taken on the whole, produces the stronger impression upon the minds of the jury and convinces you of its truth when weighed against the evidence in opposition thereto.[54]

§ 2354(8). Oklahoma

You are instructed that by a preponderance of the evidence is not necessarily meant the greater number of witnesses, but by a preponderance of the evidence is meant that evidence, which, in the light of all of the evidence, facts, and circumstances in proof in the case, is most satisfying and convincing to the minds of the jurors.[55]

You are instructed that by a "fair preponderance of the evidence" the court does not mean necessarily the largest number of witnesses who may have testified in the case as to any given controverted

[50] City of Kansas City v. Bradbury, 25 P. 889, 45 Kan. 381, 23 Am. St. Rep. 731.

[51] Murdock v. Roe, 152 N. W. 969, 186 Mich. 233.

[52] Strand v. Chicago & W. M. Ry. Co., 34 N. W. 712, 67 Mich. 380.

[54] Jerich v. Union Pac. R. Co., 151 N. W. 310, 97 Neb. 767.

[55] Chicago, R. I. & P. Ry. Co. v. Penix, 159 P. 1141, 61 Okl. 4.

fact, but that greater weight of the evidence, which, after a full and candid consideration of all the evidence, satisfies and convinces your judgment of the truth of the plaintiff's contention.[56]

§ 2354(9). Pennsylvania

You are instructed that the preponderance of evidence in a case is not alone determined by the number of witnesses testifying to a particular fact or state of facts. In determining upon which side the preponderance of the evidence is, you should take into consideration the opportunity of the several witnesses for knowing the things about which they testify; their conduct and demeanor while testifying; their interest or lack of interest, if any, in the result of the suit; the probability or improbability of the truth of their several statements, in view of all the other evidence, facts, and circumstances proved on the trial—and from all those circumstances determine upon which side is the weight or preponderance of the evidence.[57]

§ 2354(10). Vermont

You are instructed that the issue in this case is whether or not the defendant delivered the thirty tubs of butter. The plaintiffs having brought their suit, the law casts upon them the burden of making out their case by a fair preponderance of the evidence. There is no technical meaning to the term, "preponderance of the evidence." It simply means that the burden is cast upon them to support their claim by a greater weight of evidence than the evidence adduced against their claim by the defendant; that is, the evidence produced by the plaintiffs must, in your judgment, weigh at least a little more than the evidence produced by the defendant against that claim. If the evidence, in your judgment, is just evenly balanced, the plaintiffs would not be entitled to recover. Their evidence must weigh a little more, at least, than the evidence on the part of the defendant. Then, with this rule in mind, this is the question for you to determine in this case, and find your verdict accordingly: Was there a delivery by the defendant of these thirty tubs of butter according to the contract between himself and the plaintiffs?[58]

§ 2354(11). Wisconsin

You are instructed that the burden of proof is upon the plaintiff to satisfy you by a fair preponderance of the evidence.[59]

[56] Missouri, O. & G. Ry. Co. v. Parker, 151 P. 325, 50 Okl. 491.

[57] Pennsylvania Ins. Co. v. Carter, 11 A. 102.

[58] Noyes v. Parker, 24 A. 12, 64 Vt. 379.

[59] Parker v. Fairbanks-Morse Mfg. Co., 110 N. W. 409, 130 Wis. 525, approving the use of the word "fair."

The jury are instructed that many of the claims of the plaintiff as to just what occurred have been denied by the defendant's witnesses, and you will be called upon to find the facts you believe to be established by the fair weight of all the evidence, as embodied in the special verdict submitted to you.[60]

You are instructed that it is incumbent on the party upon whom the burden of proof rests, to establish the existence of a fact in controversy, to satisfy you by a preponderance of evidence that such fact does exist; otherwise, you should find to the contrary—that is to say, you should carefully weigh all the evidence produced by both parties bearing on any such controversy, and determine upon which side such evidence preponderates, if you can. If the same is so evenly balanced that you cannot determine on which side the same preponderates, or if you conclude that the preponderance of evidence is against the party on whom the burden of proof rests, or if, notwithstanding there is to your minds a preponderance of evidence tending to establish a fact in controversy, you are yet not satisfied of its existence, your finding should be against the party on whom the burden of proof rests. Such finding should be in favor of the side on which the burden of proof rests only when you are satisfied that the preponderance of evidence in respect to the controversy tends to establish the existence of the fact involved, and you are satisfied to a reasonable certainty that the fact does exist which such preponderance of evidence tends to establish. You are further instructed that the term "preponderance of evidence," as here used, does not necessarily mean the greatest number of witnesses. It frequently happens that there are more witnesses on one side of a controversy than on the other, yet the greatest weight of evidence is on the side of the lesser number of witnesses; and in all such cases it is the weight of evidence that counts, and should govern the finding of a jury. Keep in mind what is here said in regard to the degree of certainty to which you should arrive in respect to the existence of a fact in controversy in order to warrant a finding in favor of the party on whom the burden of proof rests, and the explanation of the term "preponderance of evidence," and apply the same to each question submitted.[61]

You are instructed that preponderance, of course, means the most weight.[62]

[60] McKeon v. Chicago, M. & St. P. Ry. Co., 69 N. W. 175, 94 Wis. 477, 35 L. R. A. 252, 59 Am. St. Rep. 910, approving the use of the word "fair."

[61] Pelitier v. Chicago, St. P., M. & O. Ry. Co., 60 N. W. 250, 88 Wis. 521, approving the expression "reasonable certainty."

[62] Thomas v. Paul, 58 N. W. 1031, 87 Wis. 607.

§ 2355. Proof by testimony of witnesses of adverse party

The jury are instructed that, if you believe from the evidence that the defendant was guilty of ———, as charged in the declaration, then it makes no difference as to the responsibility of the defendant whether such ——— appears and is proved by the testimony on the part of the plaintiff or by the testimony of the defendant's own witnesses.[63]

[63] Keokuk Northern Line Packet Co. v. True, 88 Ill. 608.

CHAPTER CXXVIII

EXCHANGE OF PROPERTY

§ 2356. Measure of damages for breach of contract.
2356(1). Iowa.
2356(2). Michigan.
2356(3). North Dakota.

§ 2356. Measure of damages for breach of contract

§ 2356(1). Iowa

You are instructed that unless you find the defendant has proved his affirmative defense aforesaid, and further find that defendant is not entitled to credit for the groceries shipped from W. to E., invoiced at $———, you must find for the plaintiff for the full amount of the difference of $——— between the price of the land and the stock of groceries at E. as claimed, with ——— per cent. interest thereon from ———; and if you find the defendant has not established his affirmative defense, but that he is entitled to the credit of said $———, you will deduct that sum from the $———, and find for the plaintiff for the balance, with interest thereon from ———. If you find the defendant entitled to said credit of $———, and that he has established by the evidence, as hereinafter stated, his affirmative defense, your verdict must be for the defendant. If you find the plaintiff entitled to recover the entire amount of the difference between the price of the land and the stock at E. you will also add to this sum the amount of freight paid by him, which was $———, and include the entire sum in the verdict; but if you find the defendant entitled to credit of $——— for the shipment of goods from W., and that the plaintiff was not justified in refusing the acceptance thereof, he cannot recover anything for the freight paid by him thereon. With regard to the shipment of groceries of $——— from W. to E., in order to prevent a credit for the full amount thereof upon the plaintiff's claim, the burden of proof is upon him, and he must prove, by the preponderance or greater weight of evidence before you, that the amount of goods, or substantial portion thereof, were either unmerchantable, worthless, or not equal in condition and quality to like goods in the stock at E. taken by the plaintiff from the stock there in the first place, from the defendant's store at that place. If the plaintiff has so proven substantially as he alleges, he was justified in refusing to accept the same, and you will not allow credit therefor. If he has failed to so prove, he was not so justified, and you will allow defendant credit for the full amount of $———. Plaintiff was not required to open and examine all

the boxes of said goods, if those opened disclosed such a condition as to show that the shipment, as a whole, did not substantially correspond with the warranty, if you find there was one.[1]

§ 2356(2). Michigan

So, gentlemen of the jury, it then comes down to a question of the value of the property. It is for you to determine, therefore, what damages the plaintiff has sustained, if any, by reason of the entering into of this contract. To ascertain and determine that you are to use your judgment from the evidence in the case, the evidence that has been introduced upon the trial of the case as to the value of the respective pieces of property. In determining this, it is your duty to determine it by a preponderance of the evidence; that is, by the weight of the evidence. As to both the value of the ——— street property and of the ——— street property, after having ascertained and determined by a preponderance of the evidence the value of each piece of property, you are then to deduct from the value, for instance, of the ——— street property, the amount of the mortgage on that property, and from the ——— street property the amount of the mortgage that is on that property, and the difference would be the amount of the damages which plaintiff claims to have sustained in this case. You are to arrive at the damages in that manner, and in this connection you are instructed that values are to be ascertained as of the date of the breach of the contract.[2]

§ 2356(3). North Dakota

In case you find for the plaintiff, your verdict will be for such amount as you will find to be the difference, if any, between the value of the ——— bushels of seed wheat at the time and place it was to be delivered and the value at ——— of the ——— bushels of wheat which was on deposit in the elevator at said date, together with interest thereon at the rate of ——— per cent. per annum from said date.[3]

[1] Brunsvold v. Medgorden, 153 N. W. 163, 171 Iowa, 413. This was an action to recover the balance of the purchase price of a tract of land exchanged by the plaintiff for a stock of goods of the defendant.

[2] Hamburger v. Berman, 168 N. W. 925, 203 Mich. 78.

[3] Talbot v. Boyd, 88 N. W. 1026, 11 N. D. 81, involving a contract by defendant to exchange his seed wheat for an equal amount of plaintiff's wheat.

CHAPTER CXXIX

EXECUTION

§ 2357. Validity of levy on goods in the possession of one other than the execution debtor.
2358. Claims by third persons—Burden of proof.
2359. Liability for seizure and sale of property after payment of debt.

§ 2357. Validity of levy on goods in the possession of one other than the execution debtor

The jury are instructed that, if you should find from the evidence that the rails, at the time the levy was made, were in the possession of the railroad company, then the sheriff would have no right to take possession as the property of ———; but the mere piling of the rails upon the wharf of the railroad company would not constitute such a possession of them by the railroad company as would prevent the sheriff from making a valid levy upon them as the property of ———, if you find that the rails were in fact the property of ———.[1]

§ 2358. Claims by third persons—Burden of proof

I charge you that the burden is on the plaintiff to make out a prima facie case that the property is defendant's, which burden is discharged if he shows that defendant was in possession of the property at the time of the levy, and that then the burden shifts to claimants to overcome this, and to show to your reasonable satisfaction their ownership.[2]

§ 2359. Liability for seizure and sale of property after payment of debt

The court instructs the jury that if the jury believe, from the evidence, that said debt had been paid off before defendant became the purchaser thereof, and that said defendant knew that to be true, or if plaintiff paid said debt before any notice of its assignment then the same is not a bona fide debt in defendant's hands against plaintiff, and all proceedings by defendant to enforce the executions mentioned in the evidence to satisfy such debt were and are null and void, and plaintiff is entitled to recover herein whatever damage he has sustained by reason of seizure and sale of the property complained, not, however, beyond the amount claimed by him in the petition.[3]

[1] Coos Bay, R. & E. R. R. & Nav. Co. v. Siglin, 53 P. 504, 34 Or. 80.
[2] Lightman Bros. & Goldstein v. Epstein, 51 So. 164, 164 Ala. 660.
[3] Commonwealth v. Burnett (Ky.) 44 S. W. 966.

CHAPTER CXXX

EXECUTORS AND ADMINISTRATORS

§ 2360. Right to personal estate.
2361. Right of action for conversion.
2362. Claim against estate for services performed for decedent.
2362(1). Michigan.
2362(2). Missouri.
2363. Same—Sufficiency of evidence.
2364. Sale of lands to pay debts—Action by heirs to recover land.
2365. Accounting by administrator—Right to credit for moneys alleged to have been paid over to distributees and then loaned to administrator.

§ 2360. Right to personal estate

The court instructs the jury that the personal representative of Mrs. ——— is entitled to receive her share of the proceeds of the sale of crops planted and grown upon the land which she held as life tenant during her lifetime.[1]

The court instructs the jury that personal property descends to the personal representative of the deceased, and not to the heirs, and that the administrator in this case is in no way bound by the decree rendered in the partition suit of ——— et al. v. ——— et al., read in evidence, as to any personal property or choses in action mentioned therein in which Mrs. ——— had an interest at the time of her death; such personal representative not being a party either individually or in his representative capacity to the partition suit.[2]

The court instructs the jury that the words "personal representative" mean administrator or executor.[3]

§ 2361. Right of action for conversion

The court instructs the jury that personal property descends to the personal representative of a deceased person, and not to the heirs, and hence, if you find from the evidence, first, that plaintiff is the administrator of the estate of Mrs. ———, deceased: second, that Mrs. ——— died on or about ———; third, that at the time of her death she was entitled to the one-half of one-third of the wheat crop, or some part thereof, raised by defendant under an agreement with Mrs. ——— for the crop year of ———: fourth, that defendant converted said wheat to his own use, or the proceeds thereof, and has not returned same to Mrs. ——— or her administrator—then you will find for the plaintiff, and assess

[1] Perkins v. Goddin, 85 S. W. 936, 111 Mo. App. 429.
[2] Perkins v. Goddin, 85 S. W. 936, 111 Mo. App. 429.
[3] Perkins v. Goddin, 85 S. W. 936, 111 Mo. App. 429.

his damages at such an amount as you believe, from the evidence, was the fair reasonable market value of the wheat, or the proceeds thereof.[4]

§ 2362. Claim against estate for services performed for decedent

§ 2362(1). Michigan

You are instructed that it is not necessary in this class of cases to show that at a given time before the rendition of services an oral contract was entered into on a particular day, on the one part, to work and perform services, in order to authorize a recovery; but you must be satisfied, by a fair preponderance of evidence, that it was distinctly understood by both these parties that the claimant was to work for his uncle, L., and that L. was to pay for the work performed or done; that is, you must find that whatever services, if any, were performed by claimant were performed by him in the expectation that the services were to be paid for, and that, on the other hand, L., the deceased, received the benefit of such services expecting to pay for them.[5]

§ 2362(2). Missouri

The jury are instructed that, if they believe from the greater weight of evidence in the cause that plaintiff worked and labored or performed services as housekeeper, servant and nurse for ——— from ——— to ———, the date of his death, or any part of the time, and that such services and work were done and performed at the request and during the lifetime of said ———, under his promise that he would pay plaintiff for such work and services, and that he failed to so pay her for same, then his estate is liable to plaintiff for the reasonable value of such services, and their verdict should be for plaintiff for such sum, not exceeding the amount claimed, "unless you further find from the evidence that said claim is barred by the statutes of limitation of the state of ——— or by the statutes of the state of ———.[6]

§ 2363. Same—Sufficiency of evidence

You are instructed that while the burden is on plaintiff to establish a contract between herself and ——— to pay her for her services, such contract need not be proved by positive and direct testimony but may be inferred from all the facts and circumstances proven and in evidence and the nature of the services rendered, and if from all the facts and circumstances in evidence the jury believe there was a contract and that such services were rendered under said agreement, and, if the jury further believe that plaintiff

[4] Perkins v. Goddin, 85 S. W. 936, 111 Mo. App. 429.

[5] Hooker v. Van Slambrook, 86 N. W. 402, 127 Mich. 61.

[6] Lipperd v. Lipperd's Estate, 163 S. W. 934, 181 Mo. App. 106.

did the work for the decedent under such agreement expecting to receive pay therefor, then, decedent's estate is liable to plaintiff for the reasonable value of such services, not exceeding the amount claimed.[7]

§ 2364. Sale of lands to pay debts—Action by heirs to recover land

You are instructed that, if the jury find from the evidence that the land in controversy was patented to K., that he died before the ———, and that plaintiffs have established the fact of heirship as claimed, this would constitute a prima facie case entitling them to recover the land sued for, unless you further find, under the instructions hereinafter given you, that defendant has shown title out of K.'s estate to himself, or unless plaintiffs' title is defeated by limitation; and you will, in case you find the above facts proved, and that defendant has not shown title out of K.'s estate as aforesaid, or unless defeated by limitations, you will find a verdict for plaintiffs.[8]

You are instructed that the transcript or certified copies of orders of probate proceedings from the probate court of ——— county in the estate of K., deceased, introduced in evidence by the plaintiffs and defendant, establishes (1) a valid administration on said estate; (2) an order to sell at public sale the land certificate by virtue of which the land in controversy was located; (3) a return of said sale by the executor ordered by the court to make it, and the order of the court recognizing the return of said sale, amounting to a confirmation or approval thereof. These facts prima facie vested the title to said land certificate in the purchaser, R.; and the deeds from said R.'s heirs to ——— and ———, introduced in evidence by the defendant, ———, had the effect to vest title of said R. in the defendant, provided it further appears from the evidence, and you so find, that said R. paid the amount of the purchase money for said land warrant No. ———. And if you so find the facts to be, you need go no further in your investigation of this case, but will return a verdict for defendant.[9]

§ 2365. Accounting by administrator—Right to credit for moneys alleged to have been paid over to distributees and then loaned to administrator

The jury are instructed that, if you shall find in this case that there has been any distribution of the estate by the administrator —if anything has been paid upon the share of this widow, and re-

[7] Lipperd v. Lipperd's Estate, 163 S. W. 934, 181 Mo. App. 106.

[8] Corley v. Anderson, 23 S. W. 839, 5 Tex. Civ. App. 213.

[9] Corley v. Anderson, 23 S. W. 839, 5 Tex. Civ. App. 213.

ceived by her upon that share—he should have credit for it upon his account; and it does not make any difference whether he turned around and borrowed it the next minute or not. Take a case like that: When the money has been paid over to the widow, that discharges his obligations so far as that money is concerned; and although he might have borrowed it the next moment, and used it for his own purpose, and although he may have been unfortunate in that use, although he may not have given her security, although we may feel it was a very unwise thing for her to do—a very improper thing for her to do—nevertheless, if there was such an advancement, it is the end of the matter, and he should be allowed in this account. His liability to her would have to be enforced elsewhere. No trouble would arise in a case of that kind where it is clearly shown that the money was absolutely paid over and afterwards borrowed, but more difficulty arises where, from the character of the transaction, the proceedings are not so clear; as, for instance, where the arrangement is made and no money actually passed. This may be done. The true test is, what was the understanding of the parties?[10]

You are instructed that, if the understanding of the parties was, in this transaction, that money, or a share, or a portion of a share, of this widow, was to be used by this administrator, or rather by T., in his personal capacity, and used for his own purpose, he to account to her for it as a part of her estate, then he should be allowed for it here; otherwise he should not. So much, in a general way, upon that subject. If you find that either by the terms of the contract, or, although it was not by the terms of the contract, by their agreement, or tacit acquiescence afterwards, the money of the estate was so used, then it should be allowed; but if it was paid without her direction or consent, either tacit or expressed, it should not be allowed. If she merely sanctioned the payment out of interest which should be paid upon her share of the estate—as, for instance, if she had received a portion of this estate, and had loaned it to T., and had stipulated that the house should be paid for out of the interest upon that—it would not justify payment from any other source. You will have to inquire into the facts, and say whether you believe the understanding between them to have been that the money of the estate—money coming into the estate from the obligations of the estate—was to be used or not. If it was, it is an advancement; if not, it is not. Under this same class comes the subject of loans. Now, as a general rule, an administrator has no business to loan the money of the estate. His office requires him to get the money and distribute it, not loan it; and while,

[10] Ward v. Tinkham, 32 N. W. 901, 65 Mich. 695.

under some circumstances, it may be a proper thing to do, if all the parties interested acquiesce—and while, as a matter of fact, I know it is frequently done, and perhaps for the interest of estates—ordinarily that is not a power of the administrator; but, on the other hand, he may loan the money for anybody who chances to let him loan it for them; and if, after he has distributed a portion of this estate, if any of the parties desire him to loan it, he can do so. If Mrs. ——— received from him, either by the payments of money to her, or by an arrangement to do so, and so treated it, or any portion of this estate, as her share, or part of her share, and then authorized him to loan it, he would have a right to do so. But the fact that he loaned it—loaned money of the estate, as money of the estate—by her consent, would not be a proper thing for him to do —would not justify it. How far it might go to relieve the bondsmen upon their bond in any other proceeding we need not inquire: but I think an estate can hardly be complicated so much as to say that money loaned by the consent of one of the heirs should be allowed an administrator in his account because it was a hardship on a bondsman—would hardly do. If they had been in a situation to acquiesce, and the loan was a proper one, and the administrator acted in good faith, it might possibly be different. But I instruct you in this case that no such loan should be allowed, nor should any loan be allowed here unless you find that the circumstances were such as to warrant you in coming to the conclusion that the widow and the administrator made the arrangement by which the money loaned was to be treated as the property of the widow herself. If you find that such an arrangement as that was made, then it should be allowed to him in his account here, and she would have to seek her remedy elsewhere.[11]

I think, gentlemen, the substance of the direction with regard to the loan of $——— was this: That if you find that, by an arrangement made between the widow and the administrator, he was to take the sum of $——— of her money, and loan it either to himself or to ———, or, in other words, if she loaned it to him as a part of her share, whether that agreement was expressed or tacit, that it should be allowed; but I instruct you this is not to be inferred merely from the fact that he used it, and that she afterwards loaned it, but will depend upon something in the nature of an agreement between them, or the understanding between them. It is true that, after using it, they might make an express agreement that it should be treated as hers, and in that case it would be proper to allow it; in other words, it is necessary to have it appear here that the parties treated this money that was loaned to T.

[11] Ward v. Tinkham, 32 N. W. 901, 65 Mich. 695.

as the widow's money; and, if she made an arrangement or had an understanding with him by which he borrowed from her $——— of the money of the estate, it might be perhaps concluded that it was her money, or so understood between them. It will depend upon the evidence that throws light upon what their mutual understanding was. If the understanding was that he was to loan money of the estate, he had no right to have any such understanding; but if they treated it as an advancement to her, and a loan by her to him, it is enough.[12]

The burden of proof in the case, gentlemen, is upon the administrator. He must establish his right to have these items allowed by a preponderance of proof. I may add, in recurring to what has been said as to the arrangement of a loan, that the law requires good faith upon the part of the administrator; and you are not to imply a consent to treat money as an advancement from light circumstances, but it must appear plainly; and it must also appear that the arrangement, if tacit, was made with the full understanding on the part of the widow; at least there should be a freedom from fraud on the part of the administrator, and a freedom from concealment. If, however, you find an absolute agreement—an express agreement—to so treat it, it should be allowed in this case. I was saying that the preponderance of proof is upon the administrator to establish his claims here. He comes here with his account. He says: "This is my statement of what I have done with the estate;" and he must vindicate it by a preponderance of proof.[13]

[12] Ward v. Tinkham, 32 N. W. 901, 65 Mich. 695.

[13] Ward v. Tinkham, 32 N. W. 901, 65 Mich. 695.

CHAPTER CXXXI

EXEMPTIONS

§ 2366. Who entitled to exemptions—Who are householders.
2367. Debts against which exemption may be claimed.
2367(1). Indiana.
2367(2). Kentucky.
2368. Proceedings necessary to enforce right—Filing inventory.
2369. Determination of value of property of debtor and accounting for proceeds.
2370. Presumption and burden of proof as to residence of debtor.
2371. Waiver.

§ 2366. Who entitled to exemptions—Who are householders

As to what constitutes a householder within the meaning of the statute, I instruct you that a householder is the father or head of a family, whom he supports or assists in supporting. It is not necessary that the family should keep house in the ordinary sense of that term. The father, as head of a family, may put his family out to board, and still be entitled to the benefit of the law. If the plaintiff, at the time of said demand for exemption, and after the bringing of this suit, was supporting his wife, or aiding in her support, and was intending to continue to live with her, and to return to ——— to reside or remain permanently, or indefinitely, when his business in ——— was terminated and finished, then he was a householder within the meaning of that term in the statute providing for the exemption of property from sale on execution.[1]

§ 2367. Debts against which exemption may be claimed

§ 2367(1). Indiana

You are instructed that, as to the nature of the debt to satisfy which the property was taken, the plaintiff introduced no evidence; but the judgment upon which the execution was issued has been read in evidence, and that shows that it was founded upon a contract. This evidence was introduced by the defendant, it is true; but the plaintiff is entitled to the benefit of it, as if he had introduced it himself.[2]

§ 2367(2). Kentucky

The court instructs the jury that the plaintiff was not entitled by law to have set apart to him, as a housekeeper with a family, any portion of the tobacco sold by the sheriff under the executions of defendant against plaintiff, as exempt to him, or in lieu of pro-

[1] Astley v. Capron, 89 Ind. 167. [2] Astley v. Capron, 89 Ind. 167.

visions not on hand, at the time of the sale of the tobacco; said execution debts having been created prior to ———.[3]

§ 2368. Proceedings necessary to enforce right—Filing inventory

You are instructed that, to enable plaintiff to claim the benefit of the exemption provided in section ——— it was necessary for him to file an inventory, under oath, of the whole of the personal property owned by him, and, inasmuch as the proofs in this case show that no such inventory was filed, you are charged that the plaintiff cannot recover under the provisions of said section ———.[4]

§ 2369. Determination of value of property of debtor and accounting for proceeds

You are instructed that the affidavit attached to the inventory shows that certain articles therein named have been sold, but does not show what disposition was made of the proceeds; but the same articles are mentioned in the inventory and referred to by the affidavit as marked ———, and evidence of the value of said articles has been given to the jury, and if the jury shall find from the evidence that the value of said articles, together with the value of the other property named in the inventory, does not exceed the sum of $———, then that would be a sufficient accounting of the proceeds of the articles sold, to comply with the law in that respect.[5]

It is unnecessary that I should give you any particular instructions in regard to value. The evidence is before you, and if, in your judgment, you can determine from it the value of the property to a reasonable certainty, it is sufficient. All you have to do is to say what that value is.[6]

§ 2370. Presumption and burden of proof as to residence of debtor

You are instructed that, the residence of the plaintiff having been shown to be in ——— for a number of years before he went to ———, it will be presumed to have continued in ——— until it is shown that he acquired a residence elsewhere. The burden of proof is therefore on the defendant to show that the plaintiff had acquired a residence elsewhere than in ——— before the commencement of this suit.[7]

§ 2371. Waiver

Upon the question of waiver the court instructs you that if the plaintiff, at about the time of the seizure, signed the paper put in evidence by the defendant, understanding at the time what it was,

[3] Commonwealth v. Burnett, 44 S. W. 966.

[4] Mann v. Welton, 32 N. W. 599, 21 Neb. 541.

[5] Astley v. Capron, 89 Ind. 167.

[6] Astley v. Capron, 89 Ind. 167.

[7] Astley v. Capron, 89 Ind. 167.

and that it was a surrender of his right to any exemption, and delivered such paper to ——— or ———, or intentionally did any other act or thing which gave the creditor or officer to understand that he surrendered this item of $———, this would amount to a waiver of that item; but if, on the other hand, he signed this paper, believing it to be a receipt, as he says, for the goods he was then to take for his family use, or did not fully understand that it was a waiver of his exemption right, such paper would not amount to a waiver, and you are to determine this question from all the evidence put into the case.[8]

[8] Charpentier v. Bresnaham, 41 N. W. 856, 74 Mich. 48.

CHAPTER CXXXII

EXPLOSIVES

§ 2372. Duty of owner or custodian to guard against injuries to public.
2372(1). North Carolina.
2372(2). Oklahoma.
2373. Liability for injuries resulting from blasting operations.
2374. Explosion of fireworks as part of entertainment—Duty to spectators.
2375. Duty to keep children away from explosives.
2375(1). Alabama.
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2376. Defense of compliance with city regulations.
2377. Contributory negligence.
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2381(2). Rhode Island.
2382. Matters considered on issue of negligence.
2383. Sufficiency of evidence in action for injuries from explosion.
2383(1). Alabama.
2383(2). Oklahoma.

§ 2372. Duty of owner or custodian to guard against injuries to public

§ 2372(1). North Carolina

The court instructs the jury that if you find, by the greater weight of this evidence, that the defendant was constructing a well there, and that they left lying around on the ground, as testified to by plaintiff and some of the witnesses, these highly dangerous explosives, dynamite caps, and, that defendant left them there loose, without any inclosure, no fence around there, nothing to warn the plaintiff of their presence, and that it was a public place, and that the plaintiff was attracted there by the presence of other children, and, seeing it lying there, and not knowing what it was and its dangerous nature, he took it home, as he contends, and was injured, as he contends, if you find all of that by the greater weight of the evidence, then the court charges you that would be negligence for which the defendant would be liable, and if you find that such negligence was the proximate cause of the plaintiff's injury, then you will answer the first issue, "Yes." [1]

The court instructs the jury that if you find that, after using these dynamite caps, defendants, or their employés, went away and left them on the ground, as testified to by the plaintiff, without any inclosure or warning to plaintiff, that would be a negligent act, and if plaintiff, not knowing of its dangerous nature, in the innocence

[1] Barnett v. Cliffside Mills, 83 S. E. 826, 167 N. C. 576.

of youth, took it to his home and broke it with a hammer, and it exploded and injured him, if you find there was an injury, and that such negligence was the proximate cause of the injury, upon the facts outlined, by the greater weight of the evidence, then you will answer the first issue "Yes."[2]

§ 2372(2). Oklahoma

You are instructed that if you believe from a fair preponderance of the evidence in this case that the defendant ———, negligently and carelessly threw out its powder cans with small quantities of powder therein, and negligently permitted them to remain there unprotected, and you further believe that the plaintiff was a young boy not of mature years and discretion, and did not understand or appreciate the dangerous condition of the powder, and that the negligence of the defendant company, if you find that it was negligent, was the proximate cause of the plaintiff's injuries, that is, that the plaintiff's injuries were directly caused as a result of said negligence, you will find for the plaintiff; otherwise you will find for the defendant.[3]

§ 2373. Liability for injuries resulting from blasting operations

Liability of adjoining landowner, see ante, § 641.

The jury are instructed that it is no defense or answer to an action of this character that defendant, in exploding the blast in question, used and employed skillful and experienced men, and, in everything appertaining to blasting, it used and exercised the highest degree of care; and I charge you that defendant is liable to damages for the death of said ———, if you find that his death resulted from the firing of the blast in question, even if it used the highest and utmost care and skill in firing and exploding it.[4]

§ 2374. Explosion of fireworks as part of entertainment—Duty to spectators

You are instructed that the defendant's amusement committee did not warrant the safety of spectators who were there. Everybody who went there went there with full knowledge that, where fireworks are to be exploded, there is always some risk. The amusement committee were not experts, and did not claim to be. So I instruct you that if you find that this defendant, by its amusement committee, exercised due care to employ a competent and skillful person to manufacture, produce, and discharge the fireworks, upon

[2] Barnett v. Cliffside Mills, 83 S. E. 826, 167 N. C. 576.

[3] Folsom-Morris Coal Mining Co. v. De Vork, 160 P. 64, 61 Okl. 75, L. R. A. 1917A, 1290.

[4] Munro v. Pacific Coast Dredging & Reclamation Co., 24 P. 303, 84 Cal. 515, 18 Am. St. Rep. 248. The evidence showed that the blast was exploded in a thickly settled portion of the city.

this occasion, and in addition to that exercised proper precautions for the protection of the spectators by keeping them a reasonable distance from the place of discharge, if you find the defendant observed its duties in this respect, it was not guilty of negligence.[5]

§ 2375. Duty to keep children away from explosives

See, also, ante, § 2372(2).

§ 2375(1). Alabama

The jury are instructed that the defendant had the right to store this powder in the magazine, and keep it there, and there was no absolute duty resting on it to keep it locked or guarded from access by children or others, unless the situation and surroundings would reasonably indicate to an ordinarily prudent person in charge of such magazine that it might be tampered with and ignited, so as to cause injury to children or others. The duty of the defendant in this regard depends entirely on the surrounding circumstances which may be in evidence, and of this the jury are the judges.[6]

§ 2375(2). North Carolina

The court instructs the jury that one who maintains dangerous instrumentalities or appliances on inclosed premises, of a nature likely to attract children at play, or permits dangerous conditions to exist, while not liable to an adult under those circumstances, is liable to a child so injured, though a trespasser at the time the injuries were received.[7]

§ 2376. Defense of compliance with city regulations

You are instructed to inquire what direction the city engineer gave, if he did give directions. It would not be conclusive upon this subject should the mayor, himself or through the engineer, have given directions not requiring ordinary care and diligence. Inquire whether the directions did require ordinary care and diligence.[8]

§ 2377. Contributory negligence

The jury are instructed that, if the plaintiff went over towards his working place, the place where he usually worked, and used such ordinary care as an ordinarily prudent man would exercise, and had such regard for his own safety as an ordinarily prudent man would have, with the knowledge of all of the facts and circumstances that the evidence shows you he did have knowledge of, then he cannot be said to have himself either caused or contributed to his injury. But, on the other hand, if the defendant shows you

[5] Sebeck v. Plattdeutsche Volksfest Verein (C. C. A. N. Y.) 124 F. 11, 59 C. C. A. 531.

[6] Chambers v. Milner Coal & Ry. Co., 39 So. 170, 143 Ala. 255.

[7] Barnett v. Cliffside Mills, 83 S. E. 826, 167 N. C. 576.

[8] Central of Georgia Ry. Co. v. Bernstein, 38 S. E. 394, 113 Ga. 175.

by a preponderance of the evidence that there was a condition existing there which caused the plaintiff to know and appreciate as a man of ordinary prudence that there was a danger in going there, a danger to his person; that there was a liability of some such thing happening as did actually happen, and that the plaintiff went there in a spirit of imprudence, lack of ordinary care, willing to take a risk, knowing that there was a risk and still willing to hazard it, then the plaintiff cannot recover, if a preponderance of the evidence shows you that the plaintiff went there knowing and realizing that there was a danger, but willing to take that risk and danger, then he cannot recover for the happening of something which he was fairly apprised of and appreciated, if that was his situation.[9]

§ 2378. Same—Care required from children

The jury are instructed that, if the jury believe from the evidence that ——— was of sufficient intelligence to know and appreciate the danger from a powder explosion, or the danger that would result from setting fire to this powder, and that, if set fire to, it was likely to cause death, then you must find a verdict for the defendant.[10]

§ 2379. Unavoidable accident

The court instructs the jury that, if you believe from the evidence in the case that the explosion could not have been anticipated nor averted by human foresight, you must find a verdict in favor of the defendant.[11]

The court instructs the jury that, if they believe from the evidence in the case that the explosion would probably have occurred, regardless of whatever means might have been employed, and that the magazine was located at a proper place, they must find a verdict in favor of the defendant.[12]

§ 2380. Presumptions and burden of proof

The court instructs the jury that the burden of proof in this case is on the plaintiff to show that the explosion alleged occurred by reason of the negligence of the defendant or its servants or agents.[13]

[9] American Glycerin Co. v. Hill (C. C. A. Okl.) 255 F. 841, 167 C. C. A. 169.

[10] Chambers v. Milner Coal & Ry. Co., 39 So. 170, 143 Ala. 255.

[11] Whaley v. Sloss-Sheffield Steel & Iron Co., 51 So. 419, 164 Ala. 216, 20 Ann. Cas. 822.

[12] Whaley v. Sloss-Sheffield Steel & Iron Co., 51 So. 419, 164 Ala. 216, 20 Ann. Cas. 822.

[13] Whaley v. Sloss-Sheffield Steel & Iron Co., 51 So. 419, 164 Ala. 216, 20 Ann. Cas. 822.

§ 2381. Same—Res ipsa loquitur

§ 2381(1). Oklahoma

You are instructed that the fact that the plaintiff was injured does not presume negligence on the part of the defendant; but you are to determine from all the evidence in the case whether or not the defendant was negligent.[14]

§ 2381(2). Rhode Island

You are instructed that there is a law which prevails in this state to the effect that where the cause or the instrumentality of the accident is under the control of the defendant, and an accident occurs, such as does not ordinarily occur when prudence and due care in the conduct of the business has been exercised, in such case the very fact that the accident has occurred is prima facie evidence of negligence on the part of the person under whose control the cause or this instrumentality existed when the accident occurred. So that, if you find by a fair preponderance of evidence in this case that this explosion—the original explosion, I mean—occurred upon the ——— premises, and was under the ——— control, in that case there is an inference, the law draws the inference, that the explosion was the result of negligence on the part of the defendant company, and the law imposes upon the defendant the burden of explaining away and freeing itself from the imputation of negligence, which arises from the very fact that the explosion occurred; and if the defendant has failed in your minds to explain away and to free itself from the imputation of negligence which has arisen, in that case you will be justified, under the law in inferring that the explosion occurred by reason of the defendant's negligence.[15]

§ 2382. Matters considered on issue of negligence

You are instructed that the court has permitted evidence in other cases of blasting to go to the jury only as circumstances for you to weigh in coming to a conclusion as to the character of this particular blast. Determine whether this particular blast was done in the same manner as in previous or subsequent blasts. The court will permit you to consider the evidence as to the character of other blasts solely to aid you in arriving at the conclusion whether the same character of blasting prevailed in this particular blast.[16]

[14] Folsom-Morris Coal Mining Co. v. De Vork, 160 P. 64, 61 Okl. 75, L. R. A. 1917A, 1290.

[15] Kearner v. Charles S. Tanner Co., 76 A. 833, 31 R. I. 203, 29 L. R. A. (N. S.) 537.

[16] Central of Georgia Ry. Co. v. Bernstein, 38 S. E. 394, 113 Ga. 175.

§ 2383. Sufficiency of evidence in action for injuries from explosion

§ 2383(1). Alabama

The court instructs the jury that if, from all the evidence in this case, you find that the cause of the explosion lies wholly within the realm of conjecture and doubt, you must find a verdict in favor of the defendant.[17]

§ 2383(2). Oklahoma

You are instructed that the plaintiff must make out his case by a fair preponderance of the evidence. If he fails to do this or if the evidence is equally balanced your verdict should be for the defendant.[18]

[17] Whaley v. Sloss-Sheffield Steel & Iron Co., 51 So. 419, 164 Ala. 216, 20 Ann. Cas. 822.

[18] Folsom-Morris Coal Mining Co. v. De Vork, 160 P. 64, 61 Okl. 75, L. R. A. 1917A, 1290.

CHAPTER CXXXIII

EXTORTION

§ 2384. Elements of offense.
See, also, Threats.

§ 2384. Elements of offense

You are instructed that under the statutes of this state "extortion" is defined as the obtaining of property of another with his consent, induced by a wrongful force or fear, or under color of official right, and that the fear such as will constitute extortion may be induced by a threat, either to accuse a person or any relative of his, or member of his family, of any crime, or to expose or to impute to him or them any deformity or disgrace, or to expose any secret affecting him or them.[1]

[1] Wilbur v. Blanchard, 126 P. 1069, 22 Idaho, 517.

CHAPTER CXXXIV

FACTORS

§ 2385. Who are factors.
2385(1). Maryland.
2385(2). Wisconsin.
2386. Degree of skill and knowledge required from factor.
2386(1). Maryland.
2386(2). Minnesota.
2386(3). Missouri.
2387. Care required with regard to inspection and classification of goods consigned.
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2389. Duty of factor with respect to time of sale.
2389(1). Missouri.
2389(2). North Carolina.
2390. Duty of factor with respect to sale of perishable goods.
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2391. Power of factor to sell on credit.
2392. Authority of factor to receive price of property sold.
2393. Duty of factor on refusal of purchaser to carry out contract of sale.
2394. Duty to notify principal in case of failure to sell.
2395. Duty to notify principal in case of failure of purchaser to pay.
2396. Rights of principal where factor undertakes to purchase goods.
2397. Duty with respect to return of unsold goods.
2398. Duty to account for proceeds of goods.
2399. Liability for failure to follow instructions of principal.
2399(1). Illinois.
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See, also, Brokers; Principal and Agent.

§ 2385. Who are factors

§ 2385(1). Maryland

You are instructed that a factor is a commercial agent to whom the possession of personal property is intrusted by or for the owner to be sold, for a compensation, in pursuance of the agent's usual trade or business.[1]

§ 2385(2). Wisconsin

You are instructed that a factor is an agent employed to sell, or to purchase and sell, goods or other personal property intrusted to his possession for a compensation commonly called a factorage or commission.[2]

§ 2386. Degree of skill and knowledge required from factor

§ 2386(1). Maryland

The jury are instructed that, if the jury find from the evidence that goods were consigned by the defendants to the garnishees, on which the said garnishees had made advancements prior to the issuing and service of the attachment in this case, and that also prior thereto the said garnishees had accepted an order drawn by the said defendants in favor of a certain ———, and shall further find that the said goods were sold by the said garnishees, and there remained no balance on the sales thereof in their hands after reimbursing themselves for their advancements and deducting proper charges and commissions for the said sales, and the discharge of the order before mentioned, then the plaintiff is not entitled to recover, provided the said garnishees used reasonable skill and ordinary diligence in effecting the sales of said goods, and sold the same at the dates shown by the accounts offered in evidence by the garnishees, and for the best rates then obtainable for said goods in the market.[3]

§ 2386(2). Minnesota

You are instructed that a factor is bound to possess a reasonable degree of skill and knowledge, and to exercise that skill and knowledge with reasonable care and prudence. He undertakes for that degree which an ordinarily discreet, prudent, and diligent man

[1] Rowland v. Dolby & Statton, 59 A. 666, 100 Md. 272, 3 Ann. Cas. 643.
[2] Beardsley v. Schmidt, 98 N. W. 235, 120 Wis. 405, 102 Am. St. Rep. 991.
[3] Whitney v. Wyman, 24 Md. 131.

would exercise in his own business, under the circumstances. If he exercises less than that degree of skill and knowledge, and loss ensues, he is liable therefor. If, for example, he delays a sale of goods consigned to him for an unreasonable length of time, and the goods depreciate in value, so that his principal loses, he is liable for such loss.[4]

§ 2386(3). Missouri

The jury are instructed that, by the general law of the land, commission and forwarding merchants, like other agents, are required to follow the directions of their principals, to act with good faith, and with ordinary care, skill, and diligence in regard to the business committed to them by their principals, and if, notwithstanding a compliance with these duties, losses occur in such business, such losses must be borne by the principal, and the commission or forwarding merchant is not responsible.[5]

§ 2387. Care required with regard to inspection and classification of goods consigned

You are instructed that, as to the proper care and handling of the goods intrusted to them for sale, for their own protection in business, defendants had the right to know the quality and condition of the goods (the fish), before offering them for sale. Although not bound by law to have the fish inspected, they had the right to do so; but, in having the inspection made, it was their duty to use every reasonable care, such as men of ordinary prudence in their lines of business would use in the management of their own goods, their own fish, and they did not have the right to procure a careless or incompetent inspector, or make a careless inspection, and to make an untrue report of the condition of the fish; and if they employed such a careless or incompetent inspector, and he made a careless and untrue report, and carelessly or corruptly made a wrong classification of the plaintiff's fish, reporting fish as second class which ought to have been reported as first class, and thereby the sale of the plaintiff's fish was injured, and they were made unsalable, the defendants would be liable for such damages as the plaintiff sustained thereby.[6]

§ 2388. Care required from factor to prevent damage to goods consigned to him

You are instructed that the care which a consignee is required to take of goods consigned to him for sale is such care as a reasonably prudent man would take of his own property similarly sit-

[4] Roberts v. Cobb, 79 N. W. 540, 76 Minn. 420.

[5] Sigerson v. Pomeroy & Andrews, 13 Mo. 620.

[6] Spruill v. Davenport, 20 S. E. 1022, 116 N. C. 34.

uated. If the consignee fails to exercise such care, and the goods are damaged, he must account for the loss resulting therefrom.[7]

§ 2389. Duty of factor with respect to time of sale

§ 2389(1). Missouri

You are instructed that it was the duty of plaintiffs to sell the hay in question within a reasonable time after receiving the same, unless instructed by the defendant not to do so, and if the jury believe from the evidence in the case that the plaintiffs, by reason of negligence or carelessness on their part and without any instructions from defendant not to sell said hay, failed to sell the same within a reasonable time after it was received by them, and further believe that the defendant sustained damage by reason of such delay in the sale of said hay, then plaintiffs became liable to defendant for the amount of such damage, and it is the duty of the jury to take the same into consideration in arriving at a verdict in this case; and if the jury find from the evidence in the case that the amount of such damage was equal to, or in excess of, a sum equal to the difference between the price for which such hay was sold by the plaintiffs, and the amount of the several sums advanced by them to and for defendant including freight, commission, and other charges stated in their petition, if reasonable, then the plaintiffs are not entitled to recover in this action, and the verdict will be for defendant on the cause of action alleged in the petition; and, although the jury may believe that at the time defendant shipped the hay in question, or soon after, it instructed the plaintiffs to exercise their own judgment and discretion as to the sale of said hay, yet that fact did not authorize said plaintiffs to keep said hay on hand unsold an unreasonable length of time, and if the jury believe that plaintiffs negligently and carelessly failed to sell said hay within a reasonable time after receiving such instructions from defendant, then they are liable to defendant for such damage (if any) as the jury may believe defendant sustained by reason of such failure to sell said hay within a reasonable time.[8]

§ 2389(2). North Carolina

You are instructed that the defendants were bound to sell the fish of the plaintiff within a reasonable time after they were received, and for the best market prices they would bring in the ——— market; and after the plaintiff's letter of ———, it was the duty of defendants to sell at once for the best market price.[9]

You are instructed that, if defendants were instructed to sell at

[7] Ives v. Freisinger, 57 A. 401, 70 N. J. Law, 257.

[8] H. W. Benedict & Co. v. Inland Grain Co., 80 Mo. App. 449.

[9] Spruill v. Davenport, 20 S. E. 1022, 116 N. C. 34.

once by the plaintiff, it was their duty to sell as soon as they could sell, although they may have thought better prices could be obtained by waiting.[10]

§ 2390. Duty of factor with respect to sale of perishable goods

§ 2390(1). Minnesota

You are instructed that, if you believe from the evidence that plaintiff shipped the car of apples mentioned in the evidence to defendant on ———, to be sold by him on commission, that defendant knew of the arrival of the said car on the ——— day of ———, that defendant knew that the varieties of apples sent to him were not good keepers, and that they were easily affected by the hot weather which was prevailing at the time of the arrival of said car, that defendant made no effort to ascertain the condition of said fruit until about ——— days after the said date of shipment, when he found that the apples were unsalable as fruit in good condition, that defendant had an offer for the apples, which he declined because below the market value, and that the apples were finally sold ——— days after their shipment by plaintiff for less than the freight charges, then you should find for the plaintiff.[11]

§ 2390(2). New York

You are instructed that, if you believe from the evidence that defendant wrote to plaintiffs that he did not want to have his oranges sacrificed, and that if plaintiffs could not get a price averaging $———, they were to put them in cold storage until a good price could be obtained, and if you further believe from the evidence that when such oranges were received by plaintiffs they were decayed and unsalable, and could not be preserved in cold storage, and that the only way to minimize the certain loss upon the oranges was to re-assort and sell them at the earliest possible moment, and that plaintiffs pursued this course, then plaintiffs are entitled to recover.[12]

§ 2391. Power of factor to sell on credit

You are instructed that, in the absence of instructions or usage to the contrary, the factor has the implied power to sell the goods of his principal upon a reasonable credit, provided he exercises due care with respect to the responsibility of the purchaser and in the collection of the price.[13]

You are instructed that, if you believe from the evidence that

[10] Spruill v. Davenport, 20 S. E. 1022, 116 N. C. 34.

[11] Roberts v. Cobb, 79 N. W. 540, 76 Minn. 420.

[12] Lippman v. Brown, 88 N. Y. S. 141, 43 Misc. Rep. 632. The action was to recover the advances and commission of plaintiffs, after deducting the sum realized at the sale.

[13] M. M. Walker Co. v. Dubuque Fruit & Produce Co., 85 N. W. 614, 113 Iowa, 428, 53 L. R. A. 775.

the apples mentioned in the evidence were consigned by ——— to defendant without instructions to be sold on commission, the defendant had the implied power to sell the apples upon a reasonable credit, provided he exercised due care with respect to the responsibility of the purchaser and in the collection of the price.[14]

§ 2392. Authority of factor to receive price of property sold

You are instructed that a factor who is intrusted with the possession of property, or other indicia of authority to transfer it, has implied power to receive the purchase price for the vendor at the time that he sells and delivers the property, or the title deeds to it.[15]

§ 2393. Duty of factor on refusal of purchaser to carry out contract of sale

You are instructed that, if you find from the evidence that on ——— plaintiff employed defendant to sell the car of bananas mentioned in the evidence, then in transit from M. to some Northern market, the fruit to be delivered to purchaser as of date of shipment f. o. b. M., that defendant sold such car to parties unknown to plaintiff for $——— f. o. b. M., and so reported to plaintiff, that by reason of such report plaintiff diverted and delivered said car of bananas to defendant for such purchaser, that such purchaser refused to accept the fruit upon its tender to him by defendant, that defendant reported such refusal to plaintiff, saying that the fruit was very ripe, and asking if he should sell to best possible advantage, that plaintiff replied that defendant should use judgment and protect the interests of plaintiff, but that the purchaser should accept the fruit, and if you further believe from the evidence that plaintiff demanded the name of the purchaser, and that defendant declined to give such name, and that it was not the intent of the plaintiff to waive the said sale and consign the fruit to defendant to sell on plaintiff's account, but that the intent of plaintiff was that defendant should use his judgment in enforcing the contract against the purchaser, then, if you find that defendant did not insist on the acceptance of the fruit by the purchaser, but sold the car to other parties for less than that offered by the first purchaser, the law is for the plaintiff.[16]

§ 2394. Duty to notify principal in case of failure to sell

You are instructed that when a factor is instructed by his principal to sell, the factor is required to sell immediately, and, failing

[14] M. M. Walker Co. v. Dubuque Fruit & Produce Co., 85 N. W. 614, 113 Iowa, 428, 53 L. R. A. 775.

[15] Adams v. Fraser (C. C. A. Colo.) 82 F. 211, 27 C. C. A. 108.

[16] Mobile Fruit Co. v. Potter, 81 N. W. 392, 78 Minn. 487.

to effect said sale, said factor is required to notify his principal and ask for further instruction.[17]

§ 2395. Duty to notify principal in case of failure of purchaser to pay

You are instructed that, if you believe from the evidence that the eggs mentioned in the evidence and consigned by plaintiff to defendant were sold by defendant to the ——— company, that such company was a rival in business of plaintiff, and was unfriendly to plaintiff, that the defendant was not willing to deliver the eggs to such company, except upon payment of cash, and that defendant knew that such company was not buying the eggs on its own account, but to resell, if it could make a profit, and that its ability to take and pay for the eggs depended upon a consummation of a resale, and if you further believe from the evidence that such company failed to take and pay for the eggs on the date agreed, then, in that event, it was the duty of defendant to at once advise plaintiff of all the above facts, in order that plaintiff might determine as to the measures proper to be taken to protect its interests, and if you believe from the evidence that defendant failed in the performance of such duty, and plaintiff was injured by such failure, the law is for the plaintiff.[18]

§ 2396. Rights of principal where factor undertakes to purchase goods

You are instructed that, where a factor undertakes to buy cotton from himself belonging to his principal, then the man who sends the cotton there has the right to elect whether he will stand by the sale, which is improper, or whether he will demand the value of the goods. You are instructed, in this connection, that the mere fact that the defendant had made advances on the cotton mentioned in the evidence does not alter the above rule.[19]

§ 2397. Duty with respect to return of unsold goods

You are instructed that the goods mentioned in the evidence were sent by plaintiff to defendant to be sold on commission during a period of 30 days after their receipt by defendant with the express condition that all goods not returned at the expiration of that period should be charged to defendant, and if you find from the evidence that the contract contemplated a return of the unused goods after the expiration of the said 30-day period then defendant was not bound to return them at the very commencement of the thirty-first

[17] Moody v. Thompson (Okl.) 166 P. 96.

[18] Western Cold Storage Co. v. Winona Produce Co., 64 N. E. 496, 197 Ill. 457.

[19] Sims v. Miller, 16 S. E. 155, 37 S. C. 402, 34 Am. St. Rep. 762.

day after he received the goods, but was only required to return the unused goods with reasonable promptness.[20]

§ 2398. Duty to account for proceeds of goods

The jury are instructed that if the jury believe, from the evidence, that defendant, as the commission merchant of plaintiffs, received, on account of the grain in question shipped to him, as mentioned in the foregoing instruction, the money arising from the proceeds of the sale of such grain, or a check as money, of his own volition, which he has not paid over to plaintiffs, on demand made before commencement of this suit, then the jury should find for the plaintiffs.[21]

§ 2399. Liability for failure to follow instructions of principal

§ 2399(1). Illinois

The jury are instructed that, if they believe from the evidence that the plaintiff delivered the corn (——— bushels) to defendant, to be by him shipped from ——— to ———, to be there sold by defendant, and the sale to be accounted for, as alleged in the declaration, and that the defendant failed to comply with the contract, the plaintiff was entitled to all damages which he might appear to have sustained by reason of said failure.[22]

You are instructed that the plaintiff, unless restrained by stipulation in the contract, had the right to order the corn to be sold at any time after it arrived in ———.[23]

You are instructed that, under the contract sued on, defendant was bound to account for the amount for which the corn was sold, after deducting the proper expenses and charges, and also for the damages (if any) accruing to plaintiff in consequence of defendant wrongfully refusing or neglecting to sell the corn, if there was any wrongful refusal or neglect, unless plaintiff afterwards assented to such refusal or neglect to sell, and assented to receive whatever might be realized by the defendant from such grain after giving such assent; and if plaintiff gave such assent, he could not go back and claim damages of the defendant for such alleged neglect or refusal.[24]

§ 2399(2). Iowa

You are instructed that, if you believe from the evidence that the apples mentioned in the evidence were consigned by ——— to defendant, without instructions, to be sold on commission, and that defendant made advances and incurred expenses on account of such shipment, and that after making such advances defendant re-

[20] Main v. Olen, 49 N. W. 523, 47 Minn. 89.

[21] Reichwald v. Gaylord, 73 Ill. 503.

[22] Pulsifer v. Shepard, 36 Ill. 513.

[23] Pulsifer v. Shepard, 36 Ill. 513.

[24] Pulsifer v. Shepard, 36 Ill. 513.

ceived instructions from the consignor with respect to the manner and time of the sale of the apples, defendant had no power to sell contrary to such instructions without notice to his principal, unless this was necessary to protect his lien for his advances.[25]

§ 2399(3). Oklahoma

You are instructed that when a factor receives and accepts cotton to be sold by said factor for his principal at a certain market, he is bound by the instruction of his principal as to the time of sale, and if said factor fails to follow the instruction given by the principal, then the factor is liable to his principal for any damages sustained by his principal, by reason of said failure by said factor to obey and sell according to the instruction of his principal.[26]

You are instructed that if you believe from the evidence in this case that plaintiffs as factors advanced $——— on said ——— bales of cotton to ———, the defendant, then plaintiffs had a right to protect their lien, and for that purpose to refuse to sell on the instructions of the principal; provided the sale at said time would have caused plaintiffs to lose their lien or any part thereof, but if the sale had been made according to the instructions of the defendant and by reason of said sale, the plaintiffs would not have lost its lien, or any part thereof, then the plaintiffs were bound to sell said cotton according to the instructions of the defendant, and upon failure so to do the plaintiffs became liable to the defendant by reason of said failure to sell according to instructions, and you should so find.[27]

§ 2400. Ratification of unauthorized sale by failure to repudiate within reasonable time

§ 2400(1). Alabama

You are instructed that, if you find from the evidence that the cotton mentioned in the evidence was sent by defendant to plaintiff at S., to be there sold, and that plaintiff reshipped said cotton without the advice of the defendant, and the cotton was sold at a price less than might have been obtained at S., then it was the duty of defendant, if he wished to repudiate such sale, to do so within a reasonable time, and if you further believe from the evidence that plaintiff, after such reshipment and sale, immediately notified defendant thereof, and that defendant did not express any objection to such sale until after a period of about ——— months, then you are instructed as a matter of law that defendant did not disaffirm such

[25] M. M. Walker Co. v. Dubuque Fruit & Produce Co., 85 N. W. 614, 113 Iowa, 428, 53 L. R. A. 775.

[26] Moody v. Thompson, 166 P. 96.

[27] Moody v. Thompson, 166 P. 96.

sale within a reasonable time, and must be deemed to have ratified the sale.[28]

§ 2400(2). California

You are instructed that, if you believe from the evidence that defendant sold the prunes mentioned in the evidence below the price at which plaintiff directed them to be sold, and you further believe from the evidence that, after being informed of such sale, the plaintiff did not within a reasonable time express any dissatisfaction with the sale, then plaintiff must be deemed to have ratified it.[29]

§ 2401. Measure of damages for failure of factor to sell as instructed

You are instructed that, if you believe from the evidence that plaintiff gave instructions to defendant to sell the wool mentioned in the evidence immediately, and defendant failed to follow such instructions, then the measure of plaintiff's damages for such breach of duty by defendant is the market value of the wool within a reasonable time after the receipt by defendant of such instructions.[30]

§ 2402. Duty of factor to pay drafts drawn by customer

You are instructed that, if you believe from the evidence that there was an express agreement by defendant to pay drafts drawn by plaintiff in the regular course of business, or if you find from the evidence that an undertaking on the part of defendant to do so arose by necessary implication from the course of his dealings with plaintiff, then in that event defendant would be liable in damages for his refusal to pay the draft of plaintiff mentioned in the evidence if you find that defendant did so refuse to pay; and if you believe from the evidence that plaintiff, before drawing the draft in question, had consigned to defendant a quantity of ———, with instructions to sell and place the proceeds to the credit of plaintiff, that during the season of ——— and prior to ———, the date on which said draft was drawn, plaintiff had drawn various other drafts, and that they were all promptly paid on presentation and that on the day last mentioned plaintiff had to his credit with defendant a sum more than the amount of the draft in question, which defendant refused to pay, then you may infer an implied agreement to accept said draft.[31]

§ 2403. Liability of principal to factor for breach of warranty as to condition of property consigned for sale

The court instructs the jury that, if the jury believe from the evidence that there was no sale, but that the property was delivered

[28] Comer v. Way, 19 So. 966, 107 Ala. 300, 54 Am. St. Rep. 93.

[29] Kendall v. Earl, 44 P. 791, 112 Cal. xvii.

[30] Whelan v. Lynch, 60 N. Y. 469, 19 Am. Rep. 202.

[31] Moss v. Stokeley, 22 S. E. 692, 95 Ga. 675.

to the defendant to be sold at an agreed price upon a warranty that the property was sound, and the property was unsalable because the property was not as warranted, then it was the duty of the defendant to notify the plaintiff of the breach of the warranty, and offer to return the property to him, and he can recover no damages until his offer to return has been made to the plaintiff. His damages in such case would be any expense to which he may have been exposed for the keep of the property after he has offered to return the same, less any profit he may have made out of the contract.[32]

§ 2404. Right of factor to recover for advances for which drafts have been drawn on principal

The jury are instructed that, if ——— and ——— made advances of money to ——— on account of the property mentioned in the testimony, and they raised the money for the advances by drawing bills on their consignees in ———, and negotiating the same, they have no right to recover from ——— the amount of the advances without showing that the said bills, or some of them, have been dishonored, and that ——— have paid, or are liable to pay, the amount of same.[33]

§ 2405. Right of factor to lien for advances

§ 2405(1). Maryland

The court instructs the jury that, if you believe from the evidence that the goods on which plaintiff claims a lien were put into his possession by the defendants, not as a factor for sale, but after they had been sold, for the purpose of delivering them to the purchaser, then in that case the plaintiff cannot claim a lien which will enable him to repay himself out of the proceeds in defiance of the understanding that he was to deliver such goods to ———, and the law is for the defendants.[34]

§ 2405(2). Oklahoma

You are instructed that a factor who advances an amount of money to his principal upon cotton consigned to said factor has a lien upon said cotton to the amount advanced, together with interest and expenses of handling said cotton.[35]

§ 2406. Right of factor to sell for purpose of reimbursing himself

§ 2406(1). Georgia

You are instructed that, if you believe from the evidence that ——— shipped the ——— mentioned in the evidence to defendant,

[32] Jacobs v. Warthen, 80 S. E. 113, 115 Va. 571.

[33] Sigerson v. Pomeroy & Andrews, 13 Mo. 620.

[34] Rowland v. Dolby, 59 A. 666, 100 Md. 272, 3 Ann. Cas. 643.

[35] Moody v. Thompson, 166 P. 96.

to be sold on commission, and that defendant made advances on such goods, and that to protect himself, after the death of his principal, he sold such goods in good faith, then the law is for the defendant.[36]

§ 2406(2). Iowa

You are instructed that, if you believe from the evidence that the apples mentioned in the evidence were consigned by ——— to defendant without instructions to be sold on commission, and that defendant made advances to the consignor and incurred expenses on account of such shipment, and if you believe from the evidence that after such advances were made the consignor himself sold the apples, then defendant had no right, after such sale, to himself sell the apples to satisfy his lien for the said advances and expenses, unless you further believe from the evidence that such sale was necessary to the enforcement of his lien.[37]

§ 2406(3). Maryland

The jury are instructed that, if they find from the evidence that goods were consigned by the defendants to the garnishees, on which the said garnishees had made advancements prior to the issuing and service of the attachment in this case, and also prior thereto, the said garnishees had accepted an order drawn by the said defendants, in favor of a certain ———, offered in evidence by the garnishees, and shall further find that the said goods were sold by the said garnishees, and that neither at the time of serving said attachment nor since did there remain any balance in their hands upon said sales, after the reimbursing of themselves for their advancements and deducting proper charges and commissions, and the discharge of the order before mentioned, then the plaintiff is not entitled to recover.[38]

§ 2406(4). North Carolina

The court instructs the jury that a factor or commission merchant who has in possession cotton or other goods to sell at a certain limited price, and has made advances to the owner upon such cotton or goods, has a right to reimburse himself by selling the same at the fair market price, though below the limited price, if his principal refuses, upon demand or request, after a reasonable time, to repay the advances.[39]

[36] Willingham v. Rushing, 31 S. E. 130, 105 Ga. 72. Plaintiff sought to hold the defendant as an executor de son tort.

[37] M. M. Walker Co. v. Dubuque Fruit & Produce Co., 85 N. W. 614, 113 Iowa, 428, 53 L. R. A. 775.

[38] Whitney v. Wyman, 24 Md. 131.

[39] S. Blaisdell Co. v. Lee, 37 S. E. 509, 127 N. C. 365.

§ 2406(5). Virginia

The court instructs the jury that in ordinary dealings a factor must obey his principal's orders as to prices and sales, but if he advances on the goods to the principal, and demands payment of said advances, then, if his advances are not returned, he has a right to sell and reimburse himself; that he has then a special property in the goods, and a right to sell follows therefrom.[40]

§ 2407. Right to refuse to follow instructions where lien jeopardized by an opposite course

You are instructed that, if you believe from all the evidence that plaintiffs would have sustained a loss on their lien, or any part thereof, by following the instructions of the defendant to sell on ———, and that plaintiffs after refusing to so sell used due diligence to obtain the highest market value for said cotton, and used due diligence to protect their own rights and the rights of the defendant, in making the sale after the ———, and that they did obtain the best market value for said cotton and rendered a true and correct account to the said defendant, then you should find for the plaintiffs in such sum as you believe from the evidence that they are entitled to.[41]

§ 2408. Effect of having made advances as giving right to sell regardless of instructions as to time of sale

You are instructed that while, ordinarily, factors are generally bound to obey all orders of their principal, yet when they have made large advances, or incurred expenses on account of consignments, the principal cannot, by any subsequent orders, control their right to sell at such a time as, in the exercise of a sound discretion, and in accordance with the usage of trade, they may deem best to secure indemnity to themselves, and to promote the interest of the consignor; they acting, of course, in good faith and with reasonable skill.[42]

§ 2409. Power of factor to pledge property

You are instructed that, if you believe from the evidence that plaintiff employed W. as a factor to sell the personal property mentioned in the evidence, and gave W. the possession and control of such property, and subsequently, while W. was so in possession and control of such property, he pledged it to defendant as collateral security for a loan of $——— made to him by defendant in the ordinary course of business as bankers in good faith,

[40] George Campbell Co. v. Angus, 22 S. E. 167, 91 Va. 438.

[41] Moody v. Thompson (Okl.) 166 P. 96.

[42] Talcott v. Chew (C. C. Ga.) 27 F. 273.

without notice that such property belonged to plaintiff, but believing that W. was the owner, then the law is for the defendant.[43]

§ 2410. Liability of factor pledging goods consigned to secure his own debt

The court instructs the jury that if they believe from the evidence that H. consigned to B., for sale by him as a commission merchant, the tobacco in controversy, and that said B. hypothecated the tobaccos of said H. to secure money borrowed by said B., without said H.'s consent, such hypothecation was a conversion by B. of H.'s tobacco to his own use, and he was immediately upon such conversion liable to said H. for the value of said tobacco at the time of the conversion; and, further, that the right of a commission merchant to assign a debt due to him by his principal is different in law from the hypothecation of his principal's goods to secure the commission merchant's debts, and the court is now dealing with hypothecation by a commission merchant without transferring the debt due him for advances.[44]

The jury are instructed that, if the jury believe from the evidence that the plaintiff B. wrongfully hypothecated the tobaccos of H. for a debt of his own, and that such debt was in excess of his advances and charges to H., he is bound to account for the whole amount received upon such hypothecation, and must be taken to have sold the tobaccos for such amounts; and he cannot recover in this action without first accounting to H. respecting such hypothecation, and accounting for the whole amount received thereon.[45]

The jury are instructed that, if the jury believe from the evidence that B., in hypothecating the tobaccos of H., disposed not only of his own special interest therein, but disposed also of the entire property therein, by use of the symbols of title, and that any surplus which might arise from the sales of said tobaccos over and above the amount necessary to discharge in full the advances made thereon by B., and all charges made against it, would go to others than the consignor, and not be available for remittance to H. in due course of business, then and in that event the jury should regard the transaction as the conversion of said tobacco to his own use by B., and treat it as then fairly disposed of, as between H. and himself; and, if the jury so believe from the evidence, B. is liable to H. for the value of said tobaccos at the time he so disposed of them. All charges made against the tobaccos subsequent to the times of hypothecation must be stricken from the account

[43] Wesp v. Lazard, 6 P. 91, 66 Cal. 459.

[44] Halsey v. Bird (C. C. A. Va.) 99 F. 525, 39 C. C. A. 638.

[45] Halsey v. Bird (C. C. A. Va.) 99 F. 525, 39 C. C. A. 638.

against H., including commissions and charges upon the subsequent sales of tobacco by either B. or the bank or its agents.[46]

§ 2411. Principal without title to property—Liability of factor to owner for conversion

You are instructed that, if you believe from the evidence that the wheat mentioned in the evidence was the property of plaintiff, that he shipped it over the line of the ——— Railroad Company to his agents at ———, receiving a bill of lading for the said wheat, that W., by forging a bill of lading for said wheat, caused it to be diverted to, and delivered to, defendants, and that defendants, as factors, sold the said wheat as belonging to W. and accounted to him for the proceeds, then the law is for the plaintiff, although you may further find from the evidence that defendants acted in good faith in selling such wheat, in the belief that it was the property of W.[47]

§ 2412. Burden of proof—With respect to exercise of diligence by factor

§ 2412(1). New Jersey

You are instructed that, if the goods be returned damaged, the burden is upon the defendant to show that the injury was such as might occur even with the exercise of the requisite care; and if in this case you find that defendant failed to exercise such reasonable care with reference to the goods returned, then you will find for the plaintiff.[48]

§ 2412(2). North Carolina

You are instructed that, if defendants exercised proper care and diligence to sell the fish in the condition in which they were received, they performed their duty. The burden is upon the plaintiff to show a want of diligence, of which he must satisfy the jury.[49]

You are instructed that in this action, in which plaintiff seeks to recover the amount of an overdraft, and defendant sets up as a defense that the logs consigned to plaintiff were sold for less than the market value, the burden is on plaintiff to show the price for which the logs were sold, but upon defendant to show that plaintiff negligently sold them for less than the market value.[50]

§ 2413. Same—With respect to issue of ownership by consignor

You are instructed that, with reference to the burden of proof, it

[46] Halsey v. Bird (C. C. A. Va.) 99 F. 525, 39 C. C. A. 638.

[47] Johnson v. Martin, 92 N. W. 221, 87 Minn. 370, 59 L. R. A. 733, 94 Am. St. Rep. 706.

[48] Ives v. Freisinger, 57 A. 401, 70 N. J. Law, 257.

[49] Spruill v. Davenport, 20 S. E. 1022, 116 N. C. 34.

[50] Govan v. Cushing, 16 S. E. 619, 111 N. C. 458.

rests in this case upon the plaintiff to show that this grain was shipped by him, or by some one on his behalf. The grain was shipped in his name, and was received and reported upon by the defendant as plaintiff's grain. And if there was any fraud in this transaction, the burden of proof is upon the defendant, who has alleged it, to show it.[51]

§ 2414. Same—Action by factor to recover for overdraft

You are instructed that, as the defendants alleged in their answer that the plaintiff, by his negligence, carelessness, mismanagement, and inattention to business as a commission merchant, suffered the defendants' logs to be sold at a lower price than they should have brought, the burden is upon them to satisfy the jury that the plaintiff did by his negligence or carelessness, or by his mismanagement or inattention to business as a commission merchant, suffer their logs to be sold for a lower price than they should have brought, and that they must satisfy the jury by a preponderance of the evidence.[52]

[51] Holden v. Maxfield, 101 N. W. 955, 94 Minn. 27. In this case the defendant (the factor) alleged that the consignor was not the owner of the goods consigned and that he was trying to cheat the creditors of one who was the owner.

[52] Govan v. Cushing, 16 S. E. 619, 111 N. C. 458.

CHAPTER CXXXV

FAIR ASSOCIATIONS

§ 2415. Lease by association of amusement privileges—Liability of association for breach.
2416. Right of association to supervise and censor amusements.
2417. Liability for injuries to persons while participating in exhibitions or races.
2418. Same—Contributory negligence.

§ 2415. Lease by association of amusement privileges—Liability of association for breach

The court instructs the jury that the defendant had the right, by the resolution of ———, to designate the character of wheels which the plaintiff could operate, and by said resolution did designate candy wheels, dog wheels, and acquariums as proper wheels to be operated by the plaintiff; but the court further instructs the jury that the defendant did not have the right to prohibit the plaintiff from selling the privilege to operate a reasonable number of candy wheels, dog wheels, and acquariums. Therefore, if the jury believe from the evidence that the defendant, by the resolution of ———, introduced in evidence, prevented the plaintiff from operating, or selling the privilege to operate, a reasonable number of candy wheels, dog wheels, and aquariums, then the court instructs the jury that the defendant committed a breach of its contract, and is liable to the plaintiff for such actual damages as the evidence shows the plaintiff sustained as a result thereof. And the court further instructs the jury that, in determining what would be a reasonable number of said wheels, they may take into consideration all of the circumstances surrounding the conduct of said fair, including the size of the defendant's fair grounds, the attendance upon said fair, and the objects and purposes of said fair for the year ———.[1]

The court instructs the jury that, even though they may believe from the evidence that the plaintiff had the right under its contract to operate certain upright and flat wheels and other devices of like character, as claimed in its declaration, yet, if they further believe from the evidence that the plaintiff acquiesced in the terms offered it by the defendant, namely, the right to operate certain dog wheels, candy wheels, and aquariums, thereby inducing the defendant to believe that such performance was accepted by it as a complete performance of the defendant's obligations under its

[1] Virginia State Fair Ass'n v. Virginia Amusement Concession Corporation, 82 S. E. 176, 116 Va. 547.

contract with the plaintiff in this respect, it amounts to a waiver of the plaintiff's rights to operate said upright and flat wheels and other devices of like character, as claimed in the declaration, and the plaintiff cannot recover.[2]

The court instructs the jury that, in order for the plaintiff to recover in this action, the jury must believe from the evidence, first, that the upright and flat wheels and other devices of like character, which the plaintiff installed on the grounds of the defendant corporation, were not in violation of the contract between them, as explained in other instructions, and were not in violation of the law, and that the plaintiff was unlawfully and contrary to the plaintiff's right under the contract deprived of the right to operate the same upon the grounds of the defendant corporation by the defendant; and, second, that the plaintiff did not accept a certain number of wheels upon the grounds of the defendant corporation, to wit, ——— or more dog wheels, candy wheels, and aquariums, as a full compliance by the defendant with its contract to allow the plaintiff to operate upright and flat wheels and other devices of like character.[3]

§ 2416. Right of association to supervise and censor amusements

The court instructs the jury that, if they believe from the evidence that the plaintiffs, or any person or persons operating under them, operated upon the grounds of the defendant any devices where money was exchanged for money or which were contrary to good morals, or objectionable to the defendant, the defendant had the right at any time to close and remove such devices from its grounds without previous notice, assignment of cause, or rebate of purchase money.[4]

§ 2417. Liability for injuries to persons while participating in exhibitions or races

The court instructs the jury that the defendants were bound to adopt such precautions to keep the track clear, and prevent persons from driving on during the race, as men of ordinary care and prudence would adopt under similar circumstances, and it was not enough to order men off the track, but they should have had a force sufficient to keep them off, they being bound to use due and proper skill and care to prevent any person engaged in the race from being injured by the ignorant, negligent, or reckless acts of the spectators, or persons not engaged in the race; that

[2] Virginia State Fair Ass'n v. Virginia Amusement Concession Corporation, 82 S. E. 176, 116 Va. 547.

[3] Virginia State Fair Ass'n v. Virginia Amusement Concession Corporation, 82 S. E. 176, 116 Va. 547.

[4] Virginia State Fair Ass'n v. Virginia Amusement Concession Corporation, 82 S. E. 176, 116 Va. 547.

the degree of care the defendants were bound to use in such a case as this must be measured by the extent of peril to human life and limb which would be occasioned by neglect, and must therefore be the highest which may reasonably be exercised in order to prevent those injuries which human foresight could avert, but that the defendants were not bound at all events to keep the track clear, and the plaintiff did not make out his case by only showing that there was an obstruction on the track, but he must show that the defendants had in some way failed in their duty, which was to use every effort which reasonable men could be expected to use to keep the track clear.[5]

§ 2418. Same—Contributory negligence

The court instructs the jury that the plaintiff, in order to recover, must have been in the use of due and reasonable care, that is, the highest care which men of ordinary care and prudence would use in the same situation; but such care must be commensurate with the danger of the exercises which were to take place, and the risks to which those who participated in them would be subjected if, while traveling at high rates of speed, obstructions by individuals or teams were found upon the track, and whether the plaintiff was in the use of due care was a question to be determined by the jury, taking into view all the circumstances of the case. But, if the plaintiff rode in the way above supposed, he must show the jury that he was, in so doing, in the exercise of reasonable care, having regard to the matter in which he was engaged; that he had a right to believe that the defendants would exercise the highest care which reasonable men could do to prevent any obstructions being upon the track; but if, in spite of such care, there was still danger that there would be obstructions on the track, he was bound to consider this in determining the rate at which, and the mode in which, he would travel, and that, in determining whether or not the plaintiff was in the exercise of due care, it would be proper to consider the mode of riding (as testified to in this case) in such trials as adopted by others, and whether or not the mode adopted by the plaintiff was such as skillful and prudent men would adopt.[6]

[5] Goodale v. Worcester Agricultural Society, 102 Mass. 401.

[6] Goodale v. Worcester Agricultural Society, 102 Mass. 401.

CHAPTER CXXXVI

FALSE IMPRISONMENT

A. Civil Liability

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B. CRIMINAL LIABILITY

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A. CIVIL LIABILITY

§ 2419. Elements of cause of action

§ 2419(1). Alabama

You are instructed that, before you can find against the defendant for false imprisonment, you must be reasonably satisfied that the arrest of the plaintiff was illegal.[1]

§ 2419(2). Delaware

You are instructed that this is an action of trespass, brought to recover damages for an alleged false imprisonment of the plaintiff by the defendant. False imprisonment is an unlawful arrest and detention of the person of another, either with or without a warrant of arrest. It consists in an unlawful restraint upon a man's person, or control over the freedom of his movements, by force or threats; and every such restraint or confinement is unlawful, where it is not authorized by law. The actual detention of the person, and the unlawfulness thereof, constitute the trespass, the gravamen being the unlawfulness of the imprisonment; and for every such imprisonment the officer making the arrest is liable in damages.[2]

§ 2419(3). Pennsylvania

You are instructed that the plaintiff claims that the defendant, occupying the position of alderman in the city of ———, abused the powers conferred upon him by the laws of this state, by causing the plaintiff to be arrested upon a charge which the defendant knew to be baseless, or at least had no reasonable grounds for believing to be true, and after the defendant's arrest, by refusing him an opportunity to obtain bail, and confining him in the ——— county prison. If the jury are satisfied, from a fair preponderance of the evidence, that both or either of these allegations are true, then the plaintiff is entitled to recover. In other words, if the jury believe, from a fair preponderance of the evidence, that the defendant instituted this prosecution, knowing it to be baseless, or having no reasonable ground for believing it to be true, or if the jury be-

[1] Sanders v. Davis, 44 So. 979, 153 Ala. 375.

[2] Petit v. Colmary, 55 A. 344, 4 Pennewill, 266.

lieve, from a fair preponderance of the evidence, that the defendant, when the plaintiff was arrested and brought before him, refused, or threw obstacles in the way of his obtaining, bail, and committed him to the prison without the opportunity of obtaining bail, in either of these cases, and in both of these cases, the verdict of the jury will have to be in favor of the plaintiff.[3]

§ 2420. What constitutes imprisonment

See, also, post, § 2444.

§ 2420(1). Illinois

The court instructs the jury that, in order to sustain a charge of false imprisonment, it is not necessary for the plaintiff to show that the defendant used violence, or laid hands upon her, or shut her up in jail or prison; but it is sufficient to show that the defendant, at any time or place, in any manner restrained the plaintiff of her liberty, or detained her in any manner from going where she wished or doing what she wished, provided this was done without legal authority, as explained in these instructions.[4]

§ 2420(2). Michigan

You are instructed that a man may be imprisoned without being taken hold of by persons that imprison him. Suppose, for instance, an officer comes to one of you with a warrant, and says, "I want you to go along with me," and you go along without his taking hold of you, that would be an arrest. It is not necessary that he should lay his hands upon you. So, if a man comes to you and says, "If you don't go with me I shall shoot you!" and if you go with him through fear, although he does not touch you, it would be an imprisonment. And if a man comes to you in any other way and uses words, or accompanies them with such an appearance, that would lead you to be in fear of him, or make you comply with his demand, that would be an imprisonment. So, in this case, if the defendants came to this plaintiff and told him they wanted to take him to the station house, and he complied, seeing the two together with clubs in their hands, and went with them through fear, that would be imprisonment.[5]

§ 2420(3). North Carolina

You are instructed that, in order to constitute an arrest it is not necessary that plaintiff be actually imprisoned, that is, put in jail, but if he be placed in custody, restrained of his liberty for any though the least period of time, then he is imprisoned, and, if such restraint is without authority or warrant of law, then he is falsely imprisoned and illegally restrained.[6]

[3] Grohmann v. Kirschman, 32 A. 32, 168 Pa. 189.

[4] Coolahan v. Marshall Field & Co., 159 Ill. App. 466.

[5] Brushaber v. Stegemann, 22 Mich. 266.

[6] Lovick v. Atlantic Coast Line R. Co., 40 S. E. 191, 129 N. C. 427.

§ 2421. Reasonable grounds for belief in guilt of plaintiff

You are instructed that, if you shall believe from the evidence that previous to said arrest plaintiff's child had been shot, or killed, and that defendant C., as chief of police of the city of ——— had received such information as would induce a person of ordinary prudence and discretion to believe that plaintiff had committed a felony by shooting, or aiding or abetting in the shooting, of said child, and that said C., relying on said information, had reasonable grounds to believe, and did believe, that a felony had been committed by plaintiff in the shooting of said child, and, acting upon said information and upon reasonable grounds he ordered defendant S. to arrest plaintiff, although you may believe from the evidence that in fact no public offense had been committed by the plaintiff, and that said defendants C. and S., or either of them, carried plaintiff, after she was arrested, before ———, judge of the ——— police court, for an examination of said charge, and that said ———, after evidence was heard on said charge, ordered plaintiff into the custody of defendant E., and plaintiff was then and thereafter confined in said jail under said order from said judge, then the law is for each of defendants, and you will so find.[7]

§ 2422. What constitutes malice

The court instructs the jury that an improper motive may be inferred from a wrongful act based upon no reasonable ground, and that such improper motive constitutes malice in law; and to constitute such malice it is not necessary that such wrongful act should be prompted by anger, malevolence or vindictiveness, but such inference of malice may be removed by the evidence in the case.[8]

§ 2423. Necessity of showing malice or want of probable cause

You are instructed that, if the plaintiff was restrained of his liberty at the instance of the defendant, without authority or process of law then in arriving at a verdict the jury should disregard the evidence offered by defendant tending to prove probable cause and want of malice.[9]

You are instructed that, if the plaintiff was restrained of his liberty at the instance of defendant, as charged in the petition, then it was not necessary for the plaintiff to prove malice or want of probable cause.[10]

[7] Johnson v. Collins (Ky.) 89 S. W. 253.

[8] Sands & Co. v. Norvell, 101 S. E. 569, 126 Va. 384.

[9] Pandjiris v. Hartman, 94 S. W. 270, 196 Mo. 539.

[10] Pandjiris v. Hartman, 94 S. W. 270, 196 Mo. 539.

§ 2424. Detaining one in custody for purpose of eliciting information to be used against others

The court instructs the jury that if they believe from the evidence that the defendants, or either of them, caused the plaintiff to be taken to ——— in order to extract from him evidence as to the guilt of another person, or of himself, or other persons, that then under the evidence in this case such detention in ——— constituted false imprisonment, and they must find a verdict against the defendants, or the one who caused, or aided, abetted, counseled, advised, or ratified, such imprisonment, in favor of the plaintiff for such sums as may be proper.[11]

The court instructs the jury that when a public officer holds a warrant for the arrest of any person charged with an offense that it is the duty of such officer as speedily as may be to carry such person before some justice of the peace for examination by the said justice, and that the officer has no right to retain the prisoner in his custody for the purpose of eliciting from him evidence to be used in the prosecution of some other person, or of himself; and if they believe from the evidence that R., undertaking to act as an officer, did hold the plaintiff and confined him to jail, or station house, of the city of ——— with that view, then such conduct on the part of the said R. was a wrongful act, and constituted false imprisonment; and if they further believe from the evidence that H., agent of the defendant ———, came to the town of ——— for the purpose of aiding in the investigation of the alleged robbery of the store of defendant, and of recovering the stolen goods and prosecuting the guilty parties, and in furtherance of said object the said H. approved the action of the said R. in detaining the plaintiff for the purposes aforesaid, and accompanied the said R. to the city of ———, and aided him in the effort to elicit information from the plaintiff while so detained in ———, then the said defendant is responsible for the acts of said agent, and the jury must so find.[12]

§ 2425. Justification under warrant or order of court

§ 2425(1). Arkansas

You are instructed that the mayor had jurisdiction to issue the warrant in question, and further instructed that an officer is fully protected in serving a warrant that is fair on its face.[13]

§ 2425(2). Kentucky

You are instructed that, although you may believe from the evidence in this case that the plaintiff was arrested by defendants C.

[11] Sands & Co. v. Norvell, 101 S. E. 569, 126 Va. 384.

[12] Sands & Co. v. Norvell, 101 S. E. 569, 126 Va. 384.

[13] Campbell v. Hyde, 122 S. W. 99, 92 Ark. 128.

and S., respectively chief of police and policeman, unlawfully and wrongfully, or without having any reasonable grounds for believing that plaintiff had committed a felony before she was arrested, yet if you shall further believe from the evidence that the plaintiff was ordered into defendant E.'s custody, and to be confined in the jail of the city of ———, and that defendant E. received and confined the plaintiff in jail under an order from said judge ———, then the law is for the defendant E., and you will so find.[14]

§ 2426. Same—Warrant based on affidavit of officer serving warrant

You are instructed that, if the defendant, upon information received from credible persons of such a nature a person would ordinarily believe to be true, made an affidavit charging the offense of disturbing the peace, and believing in good faith and without any carelessness on his part that the plaintiff H. had committed such offense, and a warrant fair upon its face was thereupon issued by the mayor, then the defendant would be protected in acting under such warrant as if the affidavit upon which the warrant was issued had been made by some other person in good faith.[15]

§ 2427. Legality of arrest under search warrant

You are instructed that, if you find that the plaintiff was arrested under what is commonly know as a "search warrant," then we say to you that it is incumbent upon the plaintiff to satisfy you by a preponderance of the evidence that the arrest so made was unlawful. The statute in this state in relation to a search warrant contains this provision: "A search warrant shall not authorize the person executing it to search any dwelling house in the nighttime, unless the magistrate, or justice, shall be satisfied that it is necessary in order to prevent an escape or removal of the person, or things, to be searched for; and then the authority shall be expressly given in the warrant." If you find from the search warrant in evidence before you that it authorized the defendant to enter the house of the plaintiff in the daytime only, and not in the nighttime, as it is alleged by the plaintiff, then it will be your duty to determine from the evidence whether the arrest of the plaintiff was made before or after entering his house, if made in the nighttime. For if the arrest was effected before entering the plaintiff's house, and it was not otherwise made unlawfully, it matters not that it may have been made in the nighttime. And to aid you in determining as to the place of arrest (that is, whether it was made in or out of the plaintiff's house), it may be well again to inform you as to what constitutes an arrest. This court has said that, "to consti-

[14] Johnson v. Collins, 89 S. W. 253.

[15] Campbell v. Hyde, 122 S. W. 99, 92 Ark. 128.

tute a legal arrest, the officer must lay his hand on the defendant, or otherwise take possession of his person. He must make him his prisoner in an unequivocal form.[16]

You are instructed that, if you find that the arrest was made in the plaintiff's house, then it will remain for you to determine whether the arrest was made in the nighttime. By "nighttime," under the statute authorizing the execution of a search warrant, is meant that space of time during which the sun is below the horizon of the earth, except that space which precedes its rising and follows its setting, during which, by its light, the countenance of a man may be discerned. If you find the arrest was made in the house of the plaintiff, and during that space of time which follows the setting of the sun, during which, by its light, out of the house, the countenance of a man might be discerned, and that no unnecessary force was used in executing the warrant, then such an arrest would not be unlawful; and if you find that the arrest was made in the house, in the nighttime, and that the officer had gone into the house at the instance of the plaintiff, and the arrest was not made with unnecessary violence, then such an arrest was not unlawful.[17]

§ 2428. Arrest under void process

You are instructed that, if the jury believe from the evidence that the act of defendant in signing the warrant caused the plaintiff to be arrested under a void process, then they must find for the plaintiff.[18]

You are instructed that, although you may believe that the fact that defendant signed the warrant did not cause the magistrate to omit signing it, yet, if you further believe that defendant continued to prosecute the plaintiff with full knowledge of the void condition of the warrant, the plaintiff is entitled to recover.[19]

§ 2429. Liability of officer making arrest under John Doe warrant

The court instructs the jury that the arrest was made on what is known as a John Doe warrant, upon which kind of a warrant an officer is authorized to arrest the person guilty of the offense charged in the information upon which such warrant is issued. If, however, by virtue of such warrant, he arrests a person who did not commit the felony, he will be liable to the person so arrested in damages, unless he had reasonable grounds for believing, and does believe, that the person whom he arrests is the person who committed the felony. It is admitted in this case that the plaintiff did not commit the felony charged in the information, upon which

[16] Petit v. Colmary (Del.) 55 A. 344, 4 Pennewill, 266.

[17] Petit v. Colmary (Del.) 55 A. 344, 4 Pennewill, 266.

[18] Oates v. McGlaun, 39 So. 607, 145 Ala. 656.

[19] Oates v. McGlaun, 39 So. 607, 145 Ala. 656.

the warrant in question was issued. Therefore the sole question for you to determine is whether or not, in arresting the plaintiff, the defendant had reasonable grounds for believing, and did believe, that the plaintiff had committed the felony charged in the information. If he did have such reasonable grounds for so believing that the plaintiff committed the felony charged in the information upon which the warrant was issued, and did so believe, he is not liable in this action. If on the other hand, he did not have reasonable grounds for believing that the plaintiff was the man who committed the felony charged in the information upon which the warrant was issued, or if he did not believe the plaintiff was such man, then he is liable in damage to plaintiff. What would be reasonable grounds for believing that plaintiff was the man who committed the felony charged in the information in question is to be determined by you, and in determining that question you should determine whether or not the defendant exercised reasonable care and prudence in ascertaining whether the plaintiff had committed the crime charged or not, and whether he used such methods of investigating the same as a reasonably prudent officer would use under the same circumstances in ascertaining that fact, and whether, under the facts so ascertained, a reasonably prudent officer would make the arrest; and if you find from the evidence that a reasonably prudent officer, having the knowledge at hand and the means of knowledge at hand that the defendant had, would not, before making such arrest, have made any further investigation to ascertain whether or not the plaintiff committed the crime charged, and would have arrested the plaintiff under the same circumstances as did the defendant, then your verdict should be for the defendant. On the other hand, if you find that a reasonably prudent officer would not have arrested the plaintiff under the circumstances as disclosed by the evidence, without making further investigation as to whether or not the plaintiff was the individual who committed the crime charged, then your verdict should be for the plaintiff.[20]

§ 2430. Liability for arrest without warrant

§ 2430(1). Iowa

You are instructed that in this case it is admitted by the defendant that he had no warrant for the arrest of the plaintiff. The laws of the state permit an arrest without a warrant, or "on view," as it is sometimes termed, either (1) when a public offense is committed or attempted in the presence of the officer; or (2) when a public offense has been in fact committed, and he has reasonable

[20] White v. Jansen, 142 P. 1140, 81 Wash. 435.

ground for believing that the person to be arrested has committed it. It is claimed by the defendant in his answer that he arrested plaintiff for the first cause, that is, for a public offense committed or attempted in his presence; and, unless this fact has been proven by him by a fair preponderance of the evidence, his plea of justification has failed, and justification at your hands cannot be made out upon any other ground than that set up by the defendant in his plea of justification.[21]

§ 2430(2). Michigan

The court instructs the jury that, if they shall find that the plaintiff, at the time she was arrested by the defendant, was conducting herself in an orderly manner, and not committing any breach of the peace, then the defendant had no right or authority to arrest her.[22]

You are instructed that no officer is justified in making an arrest without a warrant, when the person whom he arrests is peaceable, and not engaged in open violence; as, for example, by fighting, engaging in a riot, or about to escape after committing a felony.[23]

You are instructed that the law does not look with favor on arrests made without a warrant, and an arrest without a warrant cannot be justified if the person arrested was not engaged in a breach of the peace; as, for an example, in fighting, or in a riot, or about to escape after having committed a felony.[24]

The court instructs the jury that, if the jury shall find that the plaintiff was, at the time she was arrested, walking on the street, without molesting any one, then she was not committing any act that would justify the defendant in arresting her without a warrant, and his act in arresting her was unjustifiable, and the burden is on him to justify the act.[25]

§ 2430(3). Missouri

The court instructs the jury that if they believe from the evidence in the case that on or about the ——— day of ———, in the city of ———, ——— county, state of ———, the defendant requested Police Officers ——— and ——— to arrest plaintiff and take him to jail, and in pursuance of said request said police officers did arrest plaintiff and take him to the city jail in said city,

[21] Stewart v. Feeley, 92 N. W. 670, 118 Iowa, 524.

[22] Pinkerton v. Verberg, 44 N. W. 579, 78 Mich. 573, 7 L. R. A. 507, 18 Am. St. Rep. 473.

[23] Pinkerton v. Verberg, 44 N. W. 579, 78 Mich. 573, 7 L. R. A. 507, 18 Am. St. Rep. 473.

[24] Pinkerton v. Verberg, 44 N. W. 579, 78 Mich. 573, 7 L. R. A. 507, 18 Am. St. Rep. 473.

[25] Pinkerton v. Verberg, 44 N. W. 579, 78 Mich. 573, 7 L. R. A. 507, 18 Am. St. Rep. 473.

and therein imprisoned plaintiff for ——— hours, or any number of hours, and that defendant was discharged from said imprisonment before this suit was brought, then plaintiff is entitled to recover in this action such damages as the jury may believe from the evidence will compensate plaintiff for said wrongful arrest and imprisonment, including compensation for any pain or mental anguish that the jury may believe from the evidence plaintiff sustained by reason of said imprisonment, if any.[26]

§ 2430(4). Texas

You are instructed that this is an action by plaintiff against defendant, for the illegal arrest by defendant of plaintiff, under circumstances of aggravation, as alleged by plaintiff. Under the laws of ———, no civil officer has the right to arrest a citizen of ——— unless he has a warrant, and, if demanded, unless he exhibits same, or unless some offense against the criminal law is committed, by the person arrested, in the presence of the officer.[27]

You are instructed that if defendant, being then the sheriff of ——— county, without having in his hand any capias for the arrest of plaintiff, arrested him and put him in the custody of his jailer, with instructions to take him to jail, and if afterwards, and after said jailer had released the prisoner, under a suggestion that there was no capias, nor offense committed in the sheriff's presence, defendant, in an insulting and unlawful manner, again, without any capias, arrested plaintiff and maltreated him, then find for plaintiff, and assess such a sum, by way of and for damages, as you deem adequate and proper, considering the nature of the facts proved.[28]

You are instructed that it is no defense that the sheriff supposed he had a capias; nor had he any right to know if there was an indictment for a misdemeanor, or any other indictment, against ———. Until a capias was issued and placed in his hands, he had no right to arrest ———, nor in any manner to molest him, because there had been an indictment, if there was any.[29]

You are instructed that drunkenness of the officer is not an excuse, but may be received by the jury as an aggravation: but the jury will consider the whole facts, and from them find such damages as you deem adequate and proper.[30]

§ 2431. Same—Liability of carrier for causing arrest of riotous passenger

You are instructed that, if the plaintiff was riotous and disorderly, the conductor had the right to eject him; that, if the con-

[26] Thompson v. Bucholz, 81 S. W. 490, 107 Mo. App. 121. The answer of the defendant was a general denial.

[27] Hall v. O'Malley, 49 Tex. 70.

[28] Hall v. O'Malley, 49 Tex. 70.

[29] Hall v. O'Malley, 49 Tex. 70.

[30] Hall v. O'Malley, 49 Tex. 70.

ductor was unable to do this by reason of the threat of resistance, then the conductor was justified in requesting the first police officer whom he could find to arrest the plaintiff, and if the jury further find that the police officer at the ——— depot was the first police officer the conductor saw, and that the conductor used due diligence in procuring a police officer, and that the conductor directed the police officer to arrest the plaintiff for said disorderly conduct, then the defendant is not liable for this arrest, and the verdict of the jury must be for the defendant.[31]

The court instructs the jury that, if the jury find that the plaintiff, when he was on the train coming from ——— to ———, and when he arrived in the ——— station, was acting in an intoxicated and disorderly manner, then the conduct of the plaintiff justified the conductor in requesting the police officer, who was present, to arrest him at once, without a warrant, on the charge of disorderly conduct, and for this arrest the defendant is not liable, and the verdict of the jury must be for the defendant.[32]

The court instructs the jury that there is no evidence in this case legally sufficient to show that the defendant violated any of the plaintiff's rights as a passenger until the conductor directed the arrest of the plaintiff in the ——— depot, and if the jury find that the plaintiff, at the time he was arrested in the ——— depot, was intoxicated and disorderly, then his arrest at the direction of the conductor was warranted by the condition and conduct of the plaintiff at that time, and the verdict of the jury must be for the defendant.[33]

The court instructs the jury that it was the duty of the plaintiff to behave in a quiet and orderly manner while a passenger on the train of the defendant, and that it was the duty of the conductor to maintain order on said train, and, if the plaintiff was acting in a disorderly manner on said train, the conductor could eject him from said train; and if the jury find that the plaintiff, while a passenger on said train, was acting in a disorderly manner, and was threatened with expulsion from said train by the conductor, and that, on account of the companionship of the plaintiff with other persons, who were also disorderly and riotous, the conductor could not properly make the attempt to expel the plaintiff from the train, as the plaintiff and his companions stated that they would resist any attempt to expel them from the train, then the conductor was justified in requesting the first police officer whom he could find to arrest the plaintiff; and if the jury further find

[31] Baltimore & O. R. Co. v. Cain, 31 A. 801, 81 Md. 87, 28 L. R. A. 688.

[32] Baltimore & O. R. Co. v. Cain, 81 Md. 87, 31 A. 801, 28 L. R. A. 688.

[33] Baltimore & O. R. Co. v. Cain, 81 Md. 87, 31 A. 801, 28 L. R. A. 688.

that the police officer at the ——— depot was the first police officer the conductor saw, and that the conductor used due diligence in procuring a police officer, and that the conductor directed the police officer to arrest the plaintiff for said disorderly conduct, the defendant is not liable for this arrest, and the verdict of the jury must be for the defendant.[34]

The court instructs the jury that it was the duty of the plaintiff to behave in a quiet and orderly manner while a passenger on the train of the defendant, and that it was the duty of the conductor to maintain order on the said train and if the plaintiff was acting in a disorderly manner on said train the conductor could eject him from the train; and if the jury find that the plaintiff, while a passenger on said train, was acting in a disorderly manner, and was threatened with expulsion from the train by the said conductor, and that on account of the companionship of the plaintiff with other persons, who were also disorderly and riotous, the conductor could not properly make the attempt to expel the plaintiff from the train, as the plaintiff and his companions stated that they would resist any attempt to expel them from the train, and that the disorderly conduct of the plaintiff continued up to the time he left the cars in the depot of the defendant at ———, then the conductor was justified in pointing out said plaintiff to any police officer who might be present when said plaintiff left the cars, and requesting his arrest upon the charge of disorderly conduct, and for this arrest the defendant would not be liable; and if the jury further find that, upon the arrival of the train in the ——— depot, the conductor did point out the plaintiff to a police officer and request his arrest upon the charge of disorderly conduct, the verdict of the jury must be for the defendant.[35]

§ 2432. Manner of effecting arrest by bail—Necessity of certified copy of undertaking

The court charges the jury that, if they believe the evidence in this case, the detention of the plaintiff from the time he was taken from ———'s store and brought to ——— and placed in jail until he was carried back to the point on the railroad where ———'s store is situated was in violation of the law.[36]

The court charges the jury that the defendant had no authority under the law to place plaintiff, or cause him to be placed, in the jail of ——— county; and the court charges the jury that the incarceration of the plaintiff in the jail at ——— was an unlawful act.[37]

[34] Baltimore & O. R. Co. v. Cain, 81 Md. 87, 31 A. 801, 28 L. R. A. 688.

[35] Baltimore & O. R. Co. v. Cain, 81 Md. 87, 31 A. 801, 28 L. R. A. 688.

[36] Gray v. Strickland, 50 So. 152, 163 Ala. 344.

[37] Gray v. Strickland, 50 So. 152, 163 Ala. 344.

§ 2433. Liability of police commissioners for causing arrest for wearing police uniform

The court instructs the jury that the defendants, acting as a board of police commissioners, or a majority thereof, had no right to order the arrest of the plaintiff for publicly wearing the uniform and badge prescribed by said board for the police force.[38]

The court further instructs the jury that the defendants had no right, in their capacities as individuals, to give such order.[39]

The court further instructs the jury that, if they shall believe from the evidence that the defendants, whether acting as the board of police commissioners or as individuals, did issue an order for the arrest of the plaintiff for so wearing such uniform, and that because of such order so issued the said plaintiff was arrested and imprisoned, then they must find for the plaintiff.[40]

§ 2434. Use of unnecessary force in making arrest

You are instructed that, if you find that the defendant was not authorized to make the arrest of the plaintiff when and where it was made, or that the arrest was unlawful, in that the constable used unnecessary force in making the arrest, then your verdict should be for the plaintiff. For if the officer was resisted, and he, in retaliation, used more force or greater violence than was reasonably necessary to effect the arrest, then he would be without justification, and the arrest so made would be unlawful.[41]

§ 2435. Joint liability

The jury are instructed that if the jury believe, from the evidence, that the plaintiff had not committed any offense alleged in the defendants' pleas, and that both of the defendants concurred in laying hands on him and arresting him, then the jury are instructed that they should find both the defendants guilty, and assess the plaintiff's damages.[42]

The jury are instructed that if the jury believe, from the evidence and under the instructions herewith given, that the defendants, H. and M. were both engaged in the common purpose of unlawfully arresting the plaintiff, and that H. had laid hold of the plaintiff, and that M. immediately afterwards, in pursuance of said common purpose of unlawfully arresting said plaintiff, struck said plaintiff with a club, and that said striking was done in the presence of H., and that H. did not try to prevent the same, but, on the contrary thereof, adopted and approved said act of said

[38] Bolton v. Vellines, 26 S. E. 847, 94 Va. 393, 64 Am. St. Rep. 737.

[39] Bolton v. Vellines, 26 S. E. 847, 94 Va. 393, 64 Am. St. Rep. 737.

[40] Bolton v. Vellines, 26 S. E. 847, 94 Va. 393, 64 Am. St. Rep. 737.

[41] Petit v. Colmary (Del.) 55 A. 344, 4 Pennewill, 266.

[42] Mullin v. Spangenberg, 112 Ill. 140.

M. in striking said plaintiff, then the jury are instructed that said H. is as responsible in this action for said striking as is M.[43]

§ 2436. Liability for aiding and abetting wrongful detention by others

The court instructs the jury that even though they may believe from the evidence that the defendants had the plaintiff arrested, and that they had reasonable grounds for procuring a warrant of arrest, and were justified under the law in doing so, yet the defendants were bound under the law, after procuring the arrest of the plaintiff, to deal with the plaintiff in a legal and proper manner; and if they further believe from the evidence that after the arrest of the said plaintiff by ———, a constable of the county of ———, R., who was aiding in the investigation of the robbery of the store of the defendant, objected to having the plaintiff's case dealt with promptly by a justice, or objected to granting him bail, but took possession of the plaintiff, either with or without the consent of the said constable, and in connection with H., agent of defendant, sought to hold the plaintiff in custody, in order to elicit from him evidence tending either to the conviction of the plaintiff or any other person, and with that view carried him from the county of ——— to the city of ———, and placed or detained him in the jail, or station house, of the said city, where he was confined during the night, and the next morning took the plaintiff to the ——— Hotel, and there sought to extract from him a confession of guilt, or evidence tending to show the guilt of some other person, and then conveyed him back to ———, where the plaintiff was released from custody, then the custody of the plaintiff by the said R. was illegal, and constituted a false imprisonment; and if the jury further believe from the evidence that H., as agent of defendant counseled and advised, or aided and abetted, or assisted in or encouraged, or ratified the detention of the plaintiff for the purposes aforesaid, then the said defendants are responsible for the false imprisonment of the plaintiff, and the jury must find the said defendants liable in this action.[44]

§ 2437. Liability for giving information to police leading to arrest of plaintiff

You are instructed that, when a person in good faith, acting as a reasonable and cautious man under the circumstances, upon information which he has received believes that property of his own or of another in which he is interested has been stolen, he has a right to inform the police of the fact, and of his belief so formed, and if in doing so he acts without any malice or sinister motive

[43] Mullin v. Spangenberg, 112 Ill. 140.

[44] Sands & Co. v. Norvell, 101 S. E. 569, 126 Va. 384.

he is not responsible for any arrest which may follow made by the police authorities acting upon their own volition, although based in whole or in part upon the information that he may have given such police authorities.[45]

§ 2438. Responsibility of master for acts of servant—Scope of employment

You are told that the law does not authorize a conductor or special agent of a railroad company to make arrests for murder; and, if they do so, the company can be held liable for wrongful arrests only upon proof that they were authorized by the company to make such arrests, and were acting within the scope of their employment and in the furtherance of the business of the company in making the same. There is no presumption that they were so acting; but it devolves upon the plaintiff to show by the greater weight of the evidence that the servant alleged to have made or caused the arrest was authorized to make the same, or that the same was subsequently ratified, and, if in this case the plaintiff has failed to show these facts by a preponderance of the evidence, your verdict should be for the defendant.[46]

§ 2439. Liability of corporation for ultra vires acts of agent

You are instructed that it is no defense to the corporation that the acts complained of were ultra vires, for it matters not how much in excess of its authority the wrongful act may be if such act has been done by the agent or attorney while acting within the scope of his authority either express or implied.[47]

§ 2440. Effect of failure to prove allegation of malicious and reckless disregard of plaintiff's rights

The court instructs the jury that the burden of proof is upon the plaintiff to satisfy your minds by a preponderance of evidence that the defendants wrongfully conspired and colluded with each other to have the plaintiff incarcerated in the lunatic asylum unlawfully and against her will, each defendant acting his part maliciously, wantonly, and out of a spirit of reckless disregard for the rights and liberties of the plaintiff, and with intent to injure the plaintiff in her reputation and character and standing before the people, and that she was in fact thereby damaged; and that, if the evidence fails to so satisfy your minds, you should find for the defendants upon this allegation in the declaration, but that should not of itself bar recovery for actual damages, if the jury

[45] Van Dorn v. Kimball, 160 N. W. 953, 100 Neb. 590.

[46] St. Louis, I. M. & S. Ry. Co. v. Sims, 152 S. W. 985, 106 Ark. 109, 44 L. R. A. (N. S.) 1156.

[47] Lovick v. Atlantic Coast Line R. Co., 40 S. E. 191, 129 N. C. 427.

should believe from the evidence that the plaintiff is entitled to recover actual damages.[48]

§ 2441. Damages

§ 2441(1). Arkansas

You are instructed if you find for the plaintiff that it will be your duty to assess his damages, and that in doing so you may take into consideration any injuries inflicted upon the plaintiff, the pain and suffering incident thereto, his humiliation and mortification, and assess his damages at such a sum as in your judgment you may find from the testimony would compensate him for the injuries done, pain, suffering, and humiliation.[49]

§ 2441(2). Delaware

You are instructed that the plaintiff claims in this case both compensatory and exemplary or punitive damages; and, if you find that the defendant made an unlawful arrest of the plaintiff, you should find a verdict in his favor for such expenses, if any, as were reasonably incurred in procuring his discharge, for his loss of time, for his physical and mental suffering, and for the humiliation which the arrest and incarceration may have occasioned him.[50]

§ 2441(3). Kansas

You are instructed that, in awarding such damages, you may consider the character of plaintiff's injuries, what physical injury, if any, he sustained, also the mental suffering, if any, also any sense of shame or humiliation suffered on account of his imprisonment, if any, and award him such damages as will be fair compensation in the premises.[51]

§ 2441(4). Kentucky

You are instructed that, if you shall believe from the evidence in this case that at the time complained of by plaintiff the defendants ———, ———, and ———, or either of them, unlawfully, wrongfully, or without having any reasonable grounds to believe plaintiff had committed a felony, arrested plaintiff and placed her in the jail house of the city of ———, and deprived her of her liberty for any time, then the law is for the plaintiff, and you will find for her such sum as damages as you may believe from the evidence will fairly compensate her for being deprived of her liberty, or for any impairment of her health, or for any physical and mental suffering, or for all of them, which you may

[48] Bacon v. Bacon, 24 So. 968, 76 Miss. 458.

[49] St. Louis, I. M. & S. Ry. Co. v. Hudson, 130 S. W. 534, 95 Ark. 506.

[50] Petit v. Colmary, 55 A. 344, 4 Pennewill, 266.

[51] Lemmon v. King, 148 P. 750, 95 Kan. 524, L. R. A. 1915E, 882, Ann. Cas. 1917E, 401.

believe from the evidence was the direct or proximate result of said imprisonment, but not exceeding the amount claimed in the petition, to wit, $———. But, unless you shall so believe from the evidence, you will find for the defendants.[52]

§ 2441(5). Michigan

The court instructs the jury that, if the jury shall find from the evidence that the plaintiff at the time of her arrest, was walking on the street in a lawful manner, then the jury would be warranted in going beyond actual damages, and giving the plaintiff a further sum as exemplary damages.[53]

§ 2441(6). Missouri

You are instructed that, if the defendant caused the plaintiff to be arrested and imprisoned, without process of law, and against plaintiff's will, and so held for a period of ——— hours, the jury should find for the plaintiff, and assess his damages in such sum as they believe from the evidence he ought to recover, not exceeding the sum of $———, the amount sued for in the petition.[54]

§ 2441(7). Virginia

The court instructs the jury that, if they believe from the evidence that the defendants were guilty of the wrongful act or acts alleged in the declaration, they must award to the plaintiff such compensation in damages as he may prove for the loss of time, for suffering, bodily and mentally, the humiliation and damage, if any, to his reputation, sustained by reason of such wrongful act or acts And if the jury believe, from the evidence, the said wrongful act or acts to have been committed by the defendants with malice, they may also award to the plaintiff punitive damages.[55]

The jury are instructed that, if they believe from the evidence that the defendants were guilty of the wrongful act or acts alleged in the declaration, they must award to the plaintiff such compensation in damages as he may prove for the loss of time, for the suffering, bodily and mental, sustained by reason of such wrongful act or acts, and for expenses incurred in procuring discharge from restraint, including a reasonable attorney's fee. And if the jury believe from the evidence the said wrongful act or acts to have been committed by the defendants with malice, they may also award to the plaintiff punitive damages.[56]

[52] Johnson v. Collins, 89 S. W. 253.

[53] Pinkerton v. Verberg, 44 N. W. 579, 78 Mich. 573, 7 L. R. A. 507, 18 Am. St. Rep. 473.

[54] Pandjiris v. Hartman, 94 S. W. 270, 196 Mo. 539.

[55] Sands & Co. v. Norvell, 101 S. E. 569, 126 Va. 384.

[56] Bolton v. Vellines, 26 S. E. 847, 94 Va. 393, 64 Am. St. Rep. 737.

§ 2442. Exemplary damages

See, also, ante, § 2441(5), (7).

§ 2442(1). Delaware

You are instructed that, in actions for false imprisonment, when exemplary damages are claimed, the defendant may, in mitigation of these, show to the jury that he was resisted by the plaintiff in his effort to effect the arrest of the latter, and any relevant circumstances showing a reasonable provocation for a resort to force on the part of the officer in making the arrest. The general rule as to exemplary damages is that, when an injury has been inflicted maliciously and wantonly, the jury are not restricted to actual or compensatory damages, but may give such damages in addition thereto as the circumstances of the case seem to warrant, to deter others from like offenses. You will now take this case, gentlemen, and render your verdict for that party in whose favor the evidence preponderates.[57]

§ 2442(2). Pennsylvania

You are instructed that if you believe, from the evidence, that defendant instigated this prosecution, or refused bail, because of a personal ill will, or because of any sinister motive towards this plaintiff, then you may find for the latter not only such damages as will compensate him for the injuries he has sustained, but such damages as will punish the defendant for an act so grossly in violation of his duties.[58]

§ 2443. Right to exemplary damages as affected by malice or absence of malice

§ 2443(1). Missouri

The court instructs the jury that malice in law is a wrongful act done intentionally against a person and will not justify an allowance of punitive or exemplary damages unless the wrongful act was done vexatiously, wantonly, or in reckless disregard and in contempt of the rights of the person toward whom it was directed. If you believe and find from the evidence that the arrest and detention in question were done with malice in law—that is to say, in a spirit of wanton, reckless disregard of plaintiff and contempt for his rights—then you may at your discretion allow him, in addition to actual or compensatory damages, punitive or exemplary damages, and you are further instructed that, if you find and believe from the evidence that the defendants or any one of them had an honest claim or probable cause to believe that plaintiff was the person charged with the offense of embezzlement, and

[57] Petit v. Colmary, 55 A. 344, 4 Pennewill, 266.

[58] Grohmann v. Kirschman, 32 A. 32, 168 Pa. 189.

that such person was guilty of such charge, you may take such facts into consideration in mitigation of punitive damages.[59]

§ 2443(2). Virginia

The court further instructs the jury that an improper motive may be inferred from a wrongful act based upon no reasonable ground, and that such improper motive constitutes malice in law. And to constitute such malice it is not necessary that such wrongful act should be prompted by anger, malevolence, or vindictiveness, but such inference of malice may be removed by the evidence in the case.[60]

B. Criminal Liability

§ 2444. What constitutes imprisonment

The jury are instructed that the threat must be such as is calculated to operate upon the person threatened, and inspire a just fear of some injury to his person, reputation, or property, or to the person, reputation, or property of another; and the jury are to consider the age, sex, condition, disposition, or health of the person threatened in determining whether the threat was sufficient to have intimidated and prevented such person from moving beyond the bounds in which he was detained.[61]

[59] Hutchinson v. Sunshine Oil Co. (App.) 218 S. W. 951.

[60] Bolton v. Vellines, 26 S. E. 847, 94 Va. 393, 64 Am. St. Rep. 737.

[61] Meyer v. State (Tex. Cr. App.) 49 S. W. 600.

CHAPTER CXXXVII

FALSE PERSONATION

§ 2445. Elements of offense.

§ 2445. Elements of offense

You are instructed that if you believe from the evidence, beyond a reasonable doubt, that the defendant in ———, did on or about the ———, and within ——— years next before the filing of the information herein, unlawfully and falsely assume and pretend to be a deputy sheriff of ——— county, and did then and there take upon himself to act as such officer, and as such officer did try to arrest, and did demand the arrest of, ——— and, while pretending to be such deputy sheriff, did demand that ——— submit to arrest by him (the said ———), while falsely pretending to be such deputy sheriff, and that in truth and in fact the said ———, at the time alleged, was not a deputy sheriff, and that he was not authorized to do and perform and do said acts and things, and that the said ——— knew that he was not such deputy sheriff as he pretended to be, you will find the defendant guilty and assess his punishment at any term in the county jail not exceeding ——— months, or you may, in your discretion, assess his punishment by a fine in any sum not exceeding $———.[1]

[1] Brown v. State, 170 S. W. 714, 75 Tex. Cr. R. 322.

CHAPTER CXXXVIII

FALSE PRETENSES

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C. OBTAINING SIGNATURE TO ANY WRITTEN INSTRUMENT BY ANY FALSE PRETENSE OR TOKEN

§ 2467. Making of false statement.
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See, also, Larceny.

A. IN GENERAL

§ 2446. Definition and elements of offense

§ 2446(1). Arkansas

You are instructed that the obtaining of the satisfaction of a debt by a false pretense would not sustain the charge in the indictment. But if the evidence showed beyond a reasonable doubt that the defendant, for the purpose of cheating and defrauding the said ———, a firm composed of ——— and ———, as aforesaid, out of their money, out of this check for $———, falsely represented to them that he owned three acres of land in ———, that the title was clear and unincumbered, that he owed nothing on it, and if, by that means, he obtained from said firm a check of the value of $———, as alleged in the indictment, and that it occurred in this county within ——— years before the finding of this indictment, then you may find him guilty. If you entertain a reasonable doubt as to whether he made these pretenses to ———, or as to whether or not he obtained the check under these pretenses, or if you entertain a reasonable doubt as to whether or not he owned that land, and these pretenses were false, you will give him the benefit of the doubt and acquit him.[1]

You are instructed that there was another allegation in the indictment charged against the defendant—that he represented to these parties that he did not owe one cent on the land at ———. If you find that the state has shown that is false from the evidence in this case, and that by means of that and other false pretense charged he obtained the check, why, he would still be guilty.[2]

§ 2446(2). Delaware

You are instructed that a false pretense has been defined to be such a fraudulent representation of a fact, past or existing, by a person who knows it to be untrue, as is adapted to induce the person to whom it is made to part with something of value; and it may consist in any act, word, symbol, or token calculated to deceive another, and knowingly and designedly employed by any per-

[1] Shelton v. State, 131 S. W. 871, 96 Ark. 237.

[2] Shelton v. State, 131 S. W. 871, 96 Ark. 237.

son with intent to defraud another of money or other personal property.[3]

§ 2446(3). Illinois

You are instructed that the defendant is on trial, charged with intent to defraud the ——— Commission Company by designedly obtaining from said company the sum of $———, by, on the ——— day of ———, unlawfully, knowingly, and falsely pretending and representing to ———, the president of the said company, that he, the said defendant, had purchased ——— head of cattle from the firm of ——— in ———, in the state of ———, and that he, the said defendant, was then and there the owner of said cattle, and that the same were then and there ——— miles north and west of ———, in the state of ———. If the jury believe from the evidence, beyond a reasonable doubt, that the defendant did on said day so represent to said ———, and that such representations were false and then known to be so by the defendant, and made by him for the purpose of obtaining said sum of money, and that the said ——— believed such representations, and that said ——— Commission Company, relying thereon and induced thereby, paid out the sum of $——— upon the draft of the said defendant, and at his request, then the jury should find the defendant guilty.[4]

§ 2446(4). Massachusetts:

You are instructed that, in order to convict the defendant, you must believe from the evidence: (1) That some of the pretenses of an existing fact alleged in the indictment were made by the defendant. (2) That they were made designedly, and with an intent to defraud. (3) That such pretense or pretenses were false. (4) That the property was obtained by means of such false pretenses; that is, that but for such false pretense the owner would not have parted with his property.[5]

§ 2446(5). Missouri

You are instructed that if you believe and find from the evidence, under these instructions, that at the city of ——— and the state of ———, on or about the ———, or at any time within ——— years next before the filing of the information herein, the defendant, with intent to cheat and defraud one P., knowingly, designedly, and falsely, did state, pretend, and represent to the said P. that a certain corporation known and named the ——— Manufacturing Company, and incorporated and existing under the laws of the state of ———, then and there had a capital stock of $——— fully paid up; that said corporation was then and there in good and solvent con-

[3] State v. Holden, 79 A. 215, 2 Boyce, 429; State v. Briscoe, 67 A. 154, 6 Pennewill, 401.

[4] Moore v. People, 92 Ill. App. 137.

[5] Commonwealth v. Devlin, 6 N. E. 64, 141 Mass. 423.

dition and circumstances and doing a good business; that said corporation, the ——— Manufacturing Company, had a brick manufacturing plant, at which plant said corporation was then and there manufacturing ——— brick per day by steam power; that the said defendant was then and there the owner of ——— shares of the capital stock of said corporation, and that the said ——— shares of stock were then and there of the value of $———, or either one or all of said representations; and you further find from the evidence that such false statements, pretenses, and representations, or either of them, so made by the defendant aforesaid, were relied on and believed to be true by the said P. and he was deceived thereby, and then and there and thereby unlawfully and fraudulently induced to pay, deliver, and transfer to the said defendant two certificates of deposit, dated ———, issued to the said P. by the ——— Bank of ———, for the sum of $——— each, and of the value of $———, and one certain promissory note made by the said P. dated at ——— on the ——— day of ———, payable ——— months after date, for the sum of $———, and of the value of $———, as and for part purchase price of said shares of stock of the said ——— Manufacturing Company, and that the said money so paid over and delivered to the defendant was of the value of $——— or more, and was the money and property of the said P.; and you further find from the evidence that the defendant, by means of said false statements, pretenses, and representations so made as aforesaid, or any one of them, and with the unlawful and fraudulent intent to cheat and defraud the said P. and for that purpose, did then and there obtain said money and note, or any part thereof, of the value of $——— or more; and you further find from the evidence that said statements, pretenses, and representations, or any one of them, were untrue, and so known by the defendant at the time to be untrue and false, and that the said ——— Manufacturing Company then and there did not have a capital stock of $——— fully paid up, and that said corporation was not then and there in good and solvent condition and circumstances and doing a good business, and that said corporation, the ——— Manufacturing Company, did not have a brick manufacturing plant at which plant said corporation was then and there manufacturing ——— brick per day by steam power, or that the said defendant was not then and there the owner of ——— shares of the capital stock of said corporation, or that the said ——— shares of stock were not then and there of the value of $———, as stated in the information herein, and that defendant unlawfully and fraudulently made said false statements, pretenses, and representations, or any one of them, for the purpose and with the intent unlawfully and fraudulently to cheat and defraud the said P.—then you should find the defendant

guilty as charged in the information; and, unless you so find the facts, you should acquit the defendant. If you find the defendant guilty as charged, you will assess his punishment at imprisonment in the penitentiary for a term of not less than ——— years nor more than ——— years.[6]

§ 2447. Falsity of representations

You are further instructed that the law requires the capital stock of all business and manufacturing corporations shall be paid up in lawful money of the United States, or in property or services at their fair market value before it can be fully paid up; then, if you believe and find from the evidence in this case that the capital stock of the ——— Manufacturing Company was fully paid up either in money or in property and services at their fair market value, or partly in each, on ———, you will find that said capital stock was fully paid up at that time.[7]

§ 2448. Falsity of representations as to ownership

§ 2448(1). Arkansas

You are instructed that the defendant represented himself as the owner of this land in fee simple, that there were no incumbrances against it, not a scratch of a pen against it, as some of the witnesses testify, if that is true, he is not guilty of anything, or, if the state has failed to show that that is not true, he is not guilty of anything.[8]

§ 2448(2). Texas

The jury are instructed that if you believe from the evidence that the defendant bought the mules in question from one ———, and that their minds met on the terms of the trade and the terms of the payment, and that said ——— accepted $——— in part payment therefor, and then delivered the possession of said mules to defendant, relying on his promise for the subsequent payment of the balance, then the title to said mules passed to defendant, and, if you find the facts so to be or if you have a reasonable doubt thereof, you must acquit the defendant.[9]

§ 2449. Necessity that pretense should be calculated to deceive

§ 2449(1). Delaware

The court instructs the jury that the alleged pretense must be not only false, but also of such a nature as is calculated to de-

[6] State v. Keyes, 93 S. W. 801, 196 Mo. 136, 6 L. R. A. (N. S.) 369, 7 Ann. Cas. 23.

[7] State v. Keyes, 93 S. W. 801, 196 Mo. 136, 6 L. R. A. (N. S.) 369, 7 Ann. Cas. 23.

[8] Shelton v. State, 131 S. W. 871, 96 Ark. 237.

[9] Melton v. State, 140 S. W. 781, 63 Tex. Cr. R. 573.

ceive. It must have enabled the defendant to obtain the property and have influenced or induced the prosecuting witness to part with the same.[10]

§ 2449(2). District of Columbia

The jury are instructed that it is not necessary, to constitute the crime of obtaining money by false pretenses, that the false representations, willfully made by the defendant, and in fact relied upon by his victim, should be direct, definite, and positive statements of fact; it is enough if the said false statements and representations are artfully and indirectly drawn, so that they are sufficient to deceive a person of ordinary intelligence, and in fact did deceive in the case at bar.[11]

§ 2450. Necessity that pretenses shall be calculated to deceive persons of ordinary prudence

The court instructs the jury that, in order to constitute a false pretense within the meaning of the statute, the pretense need not be such as will impose upon a person of ordinary prudence, or such as cannot be guarded against but by that caution or common prudence; but any pretense which deceives the person designed to be deceived thereby is sufficient, although it would not deceive a person of ordinary prudence, or would not deceive some other person or persons under the like circumstances.[12]

§ 2451. Intent to cheat and defraud

§ 2451(1). Delaware

The court instructs the jury that, if you believe that the bill, when presented to the levy court, was false and fraudulent, known to the defendant to be so, and was intended by the defendant to deceive and defraud the said treasurer, an offer by the defendant to change or correct the bill after it was presented would be immaterial to this case. The gist of the charge in this case is the intent to deceive the treasurer of ——— county by means of the alleged false bill presented to the levy court on ———. The intent, therefore, is the important and material element of the case. It is not a presumption of law, but the material fact, and must be proved by the state to your satisfaction. But it is not essential that such intent should be proved by direct testimony. It may be proved by circumstantial testimony, and the jury may therefore consider any statements and acts of the defendant, and any other facts and circumstances disclosed by the evidence, which in their judgment show the existence of such intent.[13]

[10] State v. Holden, 79 A. 215, 2 Boyce, 429.

[11] Partridge v. United States, 39 App. D. C. 571, Ann. Cas. 1917D, 622.

[12] Clarke v. People, 171 P. 69, 64 Colo. 164.

[13] State v. Hartnett, 74 A. 82, 7 Pennewill, 204.

You are instructed that the intent to cheat and defraud is an essential element of the offense charged, and must be proved, like any other material element of the charge, in order to convict the prisoner; but such proof may be made either by direct or circumstantial evidence, and it is your province and duty to carefully consider all the facts and circumstances disclosed by the evidence in determining whether such intent existed or not.[14]

§ 2451(2). Colorado

The court further instructs the jury that, if you believe from the evidence that the defendant and one B. owned practically all of the stock of the R. Company, and that the said B. owned practically all of the stock of the E. Company, and made a verbal agreement to consolidate them, and cease selling stock in the E. Company, and represent all of the property of both companies under the name of the R. Company, and that all of the representations of defendant as to said ditches, reservoirs, and other property being the property of the R. Company were made under a belief that he had a legal right to so represent them, then he should be acquitted, though he may have been in error as to such right; or, if the evidence raises a reasonable doubt in your minds as to the honesty of his intentions in making such representations, then you should give him the benefit of such doubt and acquit him.[15]

§ 2451(3). Texas

The jury are instructed that, if you believe from the evidence that the piece of iron in question fell from the wagon of the defendant without the knowledge of defendant, or that he did not know that the weight of said iron was included in the weight given in the certificate furnished by the weigher, and that same was included by mistake, if you believe same was so included by mistake, and that such mistake, if a mistake, was an honest one on the part of defendant, you will acquit the defendant, or if you have a reasonable doubt as to either of those questions, you will acquit him.[16]

§ 2452. Knowledge by defendant of falsity of representations

The court instructs the jury that the representation or pretense must be shown by the state not only to have been false, but it must also be shown that the defendant knew at the time that it was false.[17]

The court instructs the jury that a false pretense has been defined to be "such a fraudulent representation of a fact, past or existing, by a person who knew it to be untrue, as is adapted to

[14] State v. Briscoe, 67 A. 154, 6 Pennewill, 401.

[15] Stoltz v. People, 148 P. 865, 59 Colo. 342.

[16] Speer v. State, 97 S. W. 469, 50 Tex. Cr. R. 273.

[17] State v. Holden (Del.) 79 A. 215, 2 Boyce, 429.

induce the person to whom it is made to part with something of value." In order to find the defendant guilty under this indictment, you must be satisfied from the evidence beyond a reasonable doubt (1) that the defendant knowingly made a false pretense; that is, that he presented, or authorized to be presented, to the levy court of this county on the ——— day of ———, a false bill, he himself actually knowing at the time that such bill was false.[18]

§ 2453. Necessity of showing that false pretenses were effective cause of inducing prosecuting witness to part with property

§ 2453(1). Alabama

The court instructs the jury that, if the jury believe from the evidence that ——— parted with their property upon the faith of the mortgage, and not upon the representations made by defendant, if he did make one, you should find the defendant not guilty.[19]

§ 2453(2). Arkansas

You are instructed that, if the jury believe from the evidence that the power of attorney was drafted by the witness P. at the request of the prosecuting witness, B., or at her request in conjunction with her mother and defendant O., that it was written by P. as he was requested to do so by said B. or her mother, or by O. with their consent, and that he explained it to said B. and that she understood the nature and character of the instrument she was signing, and that she was not deceived by the defendant's representations as to the nature of said instrument, the defendant would not be guilty as charged.[20]

§ 2453(3). Delaware

The court instructs the jury that if ———, at the time he exchanged his oxen for the defendant's horse, was not induced or influenced to make the exchange by the alleged false representation of the defendant, but relied upon his own judgment or upon the judgment of any other than the defendant, your verdict should be not guilty.[21]

§ 2453(4). Massachusetts

You are instructed that, in order to convict the defendant, you must find from the evidence that the property was obtained by means of such false pretenses; that is, that but for such pretense, the owner would not have parted with his property. The defendant claims that he has proved a delivery of the property, according

[18] State v. Hartnett (Del.) 74 A. 82, 7 Pennewill, 204.

[19] Meek v. State, 23 So. 155, 117 Ala. 116.

[20] Parker v. State, 137 S. W. 253, 98 Ark. 575.

[21] State v. Holden, 79 A. 215, 5 Boyce, 429.

to a custom, before the pretenses were made which are relied on, and that, therefore, the property was not obtained by the defendant through such pretenses. His contention that such custom may be established by a preponderance of evidence is correct in law, and, if established as he claims, would affect the owner with knowledge of it; but the jury will consider that a delivery may be an absolute or a conditional delivery, and the law is this: that if the sale to the defendant was a sale for cash, then it was a conditional sale, and vested no title in the purchaser until payment. A mere constructive or even a manual delivery would not in such a case deprive the owner of his property. In order to have such an effect, the delivery must be absolute under such circumstances as to show a waiver of such condition of sale.[22]

§ 2453(5). Texas

Gentlemen of the jury, in this cause I charge you at the request of defendant's counsel that if you find and believe that the prosecuting witness, ———, before accepting the note set out and described in the indictment herein, advised with ———, ———, and ———, or either of them, about selling the property described in said indictment to the defendant, and accepting their unsecured note for the price of same, and that she acted on said advice, if any, at the time she accepted said note, if she did, or if you have a reasonable doubt as to whether she did so act on said advice, if any, you will acquit the defendant, and say by your verdict not guilty.[23]

§ 2453(6). Washington

You are instructed that it is not sufficient that there be merely a false representation, but the prosecuting witness must have relied upon it. In other words, the false representation must have been the effective cause in inducing the prosecuting witness to part with her money. Therefore, if the prosecuting witness had knowledge of the truth, or did not believe the representation, or, believing it, yet parted with the money on some other inducement, or if the prosecuting witness investigated for herself and parted with the money, relying entirely on the results of her own independent investigation, no crime has been committed, even though the representation was false, if, as a matter of fact, it was false. Neither can the defendants be convicted if the representation was made after the money was obtained. On the other hand, I instruct you that the law does not require that a false representation should have been the sole means, or the principal means, of inducing the

[22] Commonwealth v. Devlin, 6 N. E. 64, 141 Mass. 423.

[23] Whitehead v. State, 196 S. W. 851, 81 Tex. Cr. R. 278.

defrauded person, if any, to part with the money, but it is sufficient if such representation was believed and relied upon by such person, and in some measure operated to induce her to part with her property.[24]

§ 2454. Effect of mere promise

The court instructs the jury that, if you find and believe from the evidence that at or about the time that the defendant delivered to ——— the check mentioned in evidence he told or represented to the said ——— that he did not, at that time, have sufficient money in the Bank of ——— to take up or pay such check, and further represented to said ——— that the money would be in said bank to meet said check within a few days, and that the said ———, acting upon said representations and promises, parted with the mules mentioned in evidence, then the court instructs the jury that you cannot convict, but must return a verdict of not guilty.[25]

§ 2455. Necessity of intent to defraud particular person

The court instructs the jury that you must be also satisfied beyond a reasonable doubt that the bill was presented by the defendant, or by his directions, with intent to cheat and defraud ———, treasurer of this county.[26]

§ 2456. Necessity of intent to defraud at time of making false representation

The court instructs the jury that it is not requisite that the person charged should have intended and designed by such pretense at the time of making the same to obtain the money from the person from whom it is afterward obtained by reason thereof, provided that the person so making such pretense upon the subsequent occasion of obtaining the money from the person to whom it had so before been made, designed or intended at the time of the obtaining of the money to take advantage of the previously made and manifested false pretense, knowing that the same was adapted or likely to induce the other to part with the money, and failing to make known the truth in relation to such pretenses.[27]

§ 2457. Corporation as "person" defrauded within statute

You are instructed that the offense charged against the defendant is that which is commonly known as obtaining money by false pretenses, and is based upon a statute of this state which provides "that if any person shall, by any false pretense, obtain from any other person any chattel, money or other valuable security, with

[24] State v. Kulbe, 120 P. 510, 67 Wash. 21.

[25] State v. Young (Mo.) 195 S. W. 998.

[26] State v. Hartnett (Del.) 74 A. 82, 7 Pennewill. 204.

[27] Clarke v. People, 171 P. 69, 61 Colo. 164.

intent to cheat or defraud any person of the same, every such offender shall be guilty of a misdemeanor," etc. The ——— Railway Company is a corporation of this state, created by a public act of the Legislature, and the state is not, therefore, required to prove that it is a corporation; and, although in the statute above mentioned the word "corporation" is not used, it is nevertheless a person within the contemplation and meaning of said act, and is to be so regarded by you.[28]

§ 2458. Necessity that allegations concerning prosecuting witness should be proven

The court will further tell you that the indictment charged that ——— was a firm composed of two members, ——— and ———. It devolves on the state to show that that firm consisted of two members, and if you should find from the evidence, or if you should not believe from the evidence that ——— was a member of that firm at the time, then there is a variance between the allegation of the indictment and the proof, which will entitle the defendant to an acquittal.[29]

§ 2459. Necessity of proving all of pretenses alleged

You are instructed that the state does not have to prove that defendant made all of these false pretenses, but if it has shown that he made one of them, and has shown it beyond a reasonable doubt, and that he got the money by virtue of such false pretenses, he is guilty, as charged in the indictment.[30]

§ 2460. Effect of evidence of similar transactions

§ 2460(1). Massachusetts

The court instructs the jury that the evidence as to other transactions, whether from witnesses or from the letters of the defendant, are not evidence of the commission of this offense, and they are not directly evidence of the fraudulent purpose of the representations made to A. They are only competent upon the question of fraudulent intent in this way; so far as they tend to show that there was one scheme of fraud, of which this transaction with A. formed a part, they are competent to establish the fraudulent character of the scheme. But to establish the fraudulent character of the scheme, is not conclusive of the fraudulent character of the transaction with A. It would still remain to show that the transaction with A. was a part of that scheme, and shared its fraudulent purpose. The real issue for you is the fraudulent character of the

[28] State v. Briscoe (Del.) 67 A. 154, 6 Pennewill, 401.

[29] Shelton v. State, 131 S. W. 871, 96 Ark. 237.

[30] Shelton v. State, 131 S. W. 871, 96 Ark. 237.

transaction with A., and not the fraudulent character of any other transaction.[31]

§ 2460(2). Missouri

The court instructs you that the defendant is on trial for obtaining money by false pretenses from P., and for that offense, alone, and that the testimony of transactions between defendant and other persons than P. was offered by the state and admitted by the court for the sole purpose of assisting you in determining the intent of the defendant and his good faith or honesty of purpose in any transaction he had with said P., and you should consider it for that purpose, and that alone, and, although you may believe that the defendant behaved dishonestly with such other persons, you cannot convict him in this case, unless you should also further believe and find from the evidence that he obtained money or property from said P. in a manner such as to make him guilty as defined in instruction No. ———.[32]

§ 2461. Sufficiency of evidence

Now, gentlemen, if you believe, under the evidence you have heard from the witnesses, and the law as the court have stated it, that the defendant, intending to cheat and defraud ———, made a false representation respecting the age of his horse for the purpose of obtaining the two oxen belonging to ———, that he made such representation knowing at the time it was false, and that because of such false representation ——— was induced to make the exchange and part with his oxen, your verdict should be guilty. But, on the other hand, if you are not satisfied beyond a reasonable doubt that the defendant made a false pretense or representation respecting the age of the horse for the purpose of obtaining ———'s oxen and with the intent to cheat and defraud him, or if you are not satisfied that the defendant, if he made the alleged false representation, knew it was false, or if you are not satisfied that ——— was induced by reason of such alleged representation to part with the oxen, your verdict should be not guilty.[33]

§ 2462. Sufficiency of proof of intent to defraud

§ 2462(1). Delaware

The court instructs the jury that the intent to cheat and defraud is an essential element of the offense charged, and must be proved like any other material element of the charge in order to convict the prisoner. But such proof may be made either by direct or circumstantial evidence, and it is your province and duty to care-

[31] Commonwealth v. Blood, 6 N. E. 769, 141 Mass. 571.

[32] State v. Keyes, 93 S. W. 801, 196 Mo. 136, 6 L. R. A. (N. S.) 369, 7 Ann. Cas. 23.

[33] State v. Holden (Del.) 79 A. 215, 2 Boyce, 429.

fully consider all the facts and circumstances disclosed by the evidence in determining whether such intent existed or not.[34]

§ 2462(2). Missouri

The court instructs the jury that the question of intent to cheat and defraud is one of fact for the jury to determine from all the evidence before them. This intent need not specially be proven, that is, by direct and positive evidence, but, in the absence of direct and positive evidence, it may be lawfully and properly inferred by the jury from the facts and circumstances in evidence having reference to and bearing upon that question.[35]

You are instructed that the question of intent to cheat and defraud is one of fact for you to determine from all the evidence in the case. This intent need not be proven by direct and positive evidence, but it may be lawfully and properly inferred by you from all the facts and circumstances in evidence having reference to and bearing upon and tending to prove such intent, provided such evidence is sufficient to satisfy you of such intent beyond a reasonable doubt.[36]

B. Particular Forms of Swindling

§ 2463. Procuring false claim to be presented against city by third person

You are instructed that, if you should find from the evidence beyond a reasonable doubt that the defendant procured the possession of certain books in which the official inspectors for the city of ——— entered the dimensions of the patches of repair asphalt work being done by the ——— Company under a contract with said city; that while the defendant had such books in his possession he purposely and intentionally and unlawfully changed the figures showing the dimensions of said repair patches or caused or procured the same to be changed, so as to increase the size and cost thereof in excess of the size and cost of the work actually done; that after making such changes, if he did make them, the defendant either copied or caused to be copied said changed dimensions into the books of the said ——— Company, he at the time knowing that the ——— Company would use said copied dimensions as the basis for stating and making out a claim against said city, and at the time he made said changes and copied or caused the same to be copied into the books of the said ——— Company, if he did so make said changes and copies, he intended that the same should be used by said company as the basis of a claim to be

[34] State v. Holden, 79 A. 215, 2 Boyce, 429.

[35] State v. Loesch, 180 S. W. 875.

[36] State v. Keyes, 98 S. W. 801, 196 Mo. 136, 6 L. R. A. (N. S.) 369, 7 Ann. Cas. 23.

made and presented against said city; and that afterwards the said ——— Company, through and by its proper officer, innocently and without knowledge of any wrong in the matter, did use said changed and copied dimensions as the basis of a claim against the city as charged in the indictment, and which claim was made, presented to, and allowed and paid by the said city to the said ——— Company: and if you should also find from the evidence beyond a reasonable doubt that, after said claim was paid to the ——— Company by said city, the said company paid to the defendant a portion of the proceeds of said claim as his share thereof—then you would be warranted in finding that the said claim so based and made on said changed dimensions was made and presented by the defendant, although he may not have been personally present when the same was done, and although the claim may have been actually written and carried to and delivered to the board of public works of said city by an officer, clerk, or cashier of said ——— Company.[37]

§ 2464. Liability of municipal employee for defrauding city by presenting false claim

You are instructed that the state dismisses the charge as contained in the first count of the indictment, and you will therefore only consider the charge as contained in the second count of the indictment. If you believe and find from the evidence in the case that the defendant, on or about the ——— day of ———, at the city of ———, aforesaid, was an inspector of city lighting, duly appointed and qualified and acting under and by virtue of the laws and ordinances of said city of ———, a municipal corporation, and that he, on or about the said day, at the city of ——— and state of ———, unlawfully, feloniously, knowingly, and designedly, with the intent to cheat and defraud the city of ———, a municipal corporation, did feloniously and fraudulently represent, pretend, and state to the said city of ———, its officers, agents, and servants, that he owned a horse and buggy, and had used the same in the city's service during the month of ———, and that the city of ——— was justly indebted to him in the sum of $——— for furnishing and keeping a horse and buggy, which he used in the said city of ——— in performing his duties during the said month of ———, and that he was entitled to receive and have from the city of ——— the sum of $——— for furnishing and keeping a horse and buggy used by him as inspector in the performance of his duties as such inspector of said city of ——— during the month of ———, and that the city of ———, its officers, agents, and servants, believing such false pretenses and representations, so made

[37] Brunaugh v. State, 90 N. E. 1019, 173 Ind. 483.

by said defendant, to be true, and being deceived thereby, were then and there induced by the said false representations and pretenses to pay over and deliver to the said defendant, inspector as aforesaid, and did pay over and deliver to the said defendant, the sum of $———, lawful money of the United States, in full payment and in discharge of said indebtedness the $———, represented as aforesaid to be due and owing by said city of ——— to said defendant, and that the said defendant by means of said false pretenses and representations so made to the city of ———, aforesaid, unlawfully, feloniously, knowingly, and designedly did then and there obtain of and from the city of ——— said $——— lawful money of the United States, the personal property of said city of ——— and of the value of $———, with the intent then and there the said city of ——— to cheat and defraud of the same, and whereas in truth and in fact the said defendant, inspector as aforesaid, did not on or about the said ——— day of ———, own a horse and buggy and did not use the same in the city's service during the month of ———, and in truth and in fact the said city of ——— was not then and there justly indebted to him in the sum of $——— for furnishing and keeping a horse and buggy which he, the said defendant, as such inspector, used in said city of ——— in performing his duties through said month of ———, and in truth and in fact the said defendant, inspector as aforesaid, was not then and there entitled to receive and take from the said city of ——— the sum of $——— for furnishing and keeping a horse and buggy, used by the said defendant in the performance of his duties as such inspector in said city of ——— during the month of ———, all of which he, the said defendant, then and there well knew, you will find the defendant guilty of obtaining money under false pretenses, as charged in the second count of the indictment, and fix his punishment at imprisonment in the state penitentiary for any length of time not less than ——— nor more than ——— years.[38]

§ 2465. Liability for practicing confidence game—Three card monte

You are instructed that, if the jury find from the evidence in this case that at the county of ——— and state of ———, on or about ———, one calling himself ——— did deal, play, or practice the confidence game or swindle known as "three-card monte," and if the jury further find from the evidence that the defendant was present, intentionally aiding, assisting, encouraging, and abetting the said ——— in the dealing, playing, or practicing of the said confidence game or swindle known as "three-card monte," then they will find him guilty under the first count of the information,

[38] State v. Foley, 153 S. W. 1010, 247 Mo. 607.

and assess his punishment at a fine not to exceed $———, or by confinement in the penitentiary not less than ——— or more than ——— years.[39]

You are instructed that by "three-card monte," as used in the foregoing instruction, is meant a sleight of hand game or trick played with three cards, one of which is usually a court card; the performer throws the cards face down upon a table or cloth in such a manner as to deceive the eye of the onlooker, who is induced to bet that he can pick out the court card.[40]

§ 2466. Elements of offense of attempt to obtain money by confidence game

The court instructs the jury that an attempt to obtain money by means of the confidence game consists of the following three elements: First, an intention to obtain money by means of the confidence game; second, the doing of some act toward the obtaining of money by means of the confidence game; third, the failure so to obtain the money. Unless said three elements have been each and all established by the evidence beyond a reasonable doubt, there has been a failure to prove the commission of the crime charged in the indictment.[41]

C. Obtaining Signature to Any Written Instrument by Any False Pretense or Token

§ 2467. Making of false statement

The first count of this indictment, gentlemen, I charge you, you cannot convict upon, because of its failure to set forth an instrument which on its face would be capable of forgery. There is a defect in the instrument as set out; that is, in the acknowledgment. The instrument does not appear in that count to be acknowledged, as it is in the second count of the indictment; the second count of the indictment, therefore, will be the only count or charge made before you against the defendant at bar. Now that count, gentlemen, does not charge forgery, but it charges an offense under section ——— of the Code, under the general heading of fraud. That section reads as follows: "Any person who, by any false pretense or token, and with intent to injure or defraud, obtains from another his signature to any written instrument, the false making of which is forgery, must, on conviction, be punished as if he had forged the instrument." It is under the general statutes known as obtaining money or other goods by false pretenses, but charges not the obtaining of money or goods, but the obtaining

[39] State v. Edgen, 80 S. W. 942, 181 Mo. 582.

[40] State v. Edgen, 80 S. W. 942, 181 Mo. 582.

[41] Graham v. People, 55 N. E. 179, 181 Ill. 477, 47 L. R. A. 731.

of the signature of another to any written instrument, the false making of which is forgery. Now you will observe, gentlemen, from the very reading of such section, that there are certain essential elements—that is, certain essential things—that must exist before the offense can be made out. The indictment charges an offense under that section, and it is necessary to prove beyond a reasonable doubt, in the first place, that there was a false pretense made by the accused to the party alleged to have been injured; that is, a statement of facts, either an existing fact or a past fact, which is false or untrue. That is the first essential element of the offense which we have to consider. Was there a false statement made by the accused, as charged in the second count of the indictment? In other words, did the accused, as stated in the second count falsely pretend to the prosecuting witness, "with the intent to injure or defraud, that he, the said ———, was a lawyer"? You are to determine, in the first place, whether the defendant made such statement to the prosecuting witness, and, if so, whether it is false or true.[42]

§ 2468. Intent of defendant

The court instructs the jury that the second element of this offense charged in the second count of the indictment is that there must have been an intent on the part of the defendant to injure or defraud, either to injure the party to whom the false statement was alleged to have been made or defraud her. Now you, gentlemen, have heard the evidence in this case, and from that evidence as introduced you must determine whether or not there was an intent, on the part of the party accused of the alleged false statement, to injure or defraud. Now how does a jury arrive at a conclusion as to what a man's intent was? The only way you can decide what a man's intent was, intent being what was in the heart of a man, is from all the surrounding circumstances, from the evidence in the case, and after applying to it your own judgment, your own experience, and your common sense, to draw your reasonable conclusion whether or not there was an intent to defraud.[43]

§ 2469. Whether signature obtained by false pretense

The court instructs the jury that the third essential element of obtaining a signature by false pretense is that the signature was obtained by means of such false pretense.[44]

§ 2470. Character of instrument signed

The court instructs the jury that you have to believe beyond a reasonable doubt that there was such an instrument signed, as is

[42] Addington v. State, 74 So. 846, 16 Ala. App. 10.

[43] Addington v. State, 74 So. 846, 16 Ala. App. 10.

[44] Addington v. State, 74 So. 846, 16 Ala. App. 10.

set forth in the second count of the indictment, that the prosecuting witness signed that, and under the charge of the court, that it was such an instrument as would be capable of forgery. Now the court charges you that the instrument set out in this second count of the indictment is a mortgage, and being acknowledged, and signed and acknowledged and witnessed, that this is such an instrument as would be capable of forgery.[45]

§ 2471. Necessity of proving every false pretense alleged

The court instructs the jury that it is not necessary that all the alleged false pretenses should be proven as charged. In other words, it would be sufficient to sustain the false pretense alleged in this second count of the indictment if you believed, beyond a reasonable doubt, that the defendant, with the intent to injure or defraud, made any one of the alleged false statements set out therein. For example, if it was proven beyond a reasonable doubt that, with the intent to injure or defraud, the defendant said he was a lawyer, that would be sufficient, without proving furthermore that he made the representation that "he could plead the case of ———, charged with vagrancy in court." You would not have to prove all that was alleged, but any one statement set forth, provided it was a material statement, and provided that the party to whom same was made relied upon it, and was induced to sign the alleged instrument by relying on such statement. If the state proves, beyond a reasonable doubt, that any one of these separate alleged false statements, either that he said he was a lawyer, or that he could plead the case of ——— charged with vagrancy, in court, or that he, ———, was an attorney at the ——— bar and was authorized to defend cases in ———; in other words, if the evidence proved any one of those three alleged false statements, it would be sufficient to make out a charge of false pretense, provided you believed beyond a reasonable doubt that the defendant had at the time an intent to injure or defraud, and furthermore that the prosecuting witness signed the instrument described on account of that false statement, and that that statement was the controlling inducement or controlling cause that moved her to sign it, and provided, furthermore, that that occurred in this county, and within ——— years next preceding the finding of the indictment. Of course, it must have occurred within that period in order to be actionable, because, if it did not happen within ——— years before the indictment was found, it would be barred by the statute of limitations, and it must have been in this county. So those are facts you have to find from the evidence in this case, after considering all the evidence on each side.[46]

[45] Addington v. State, 74 So. 846, 16 Ala. App. 10.

[46] Addington v. State, 74 So. 846, 16 Ala. App. 10.

CHAPTER CXXXIX

FENCES

§ 2472. Rights of one building fence on land of another.
2473. Criminal liability for removing or destroying fence.
2473(1). Georgia.
2473(2). Texas.

§ 2472. Rights of one building fence on land of another

The court instructs the jury that, although you may find and believe from the evidence that the plaintiff entered upon the real estate belonging to the defendant and erected thereon the fence sought to be recovered in this action, by attaching or nailing a wire fence to wooden posts firmly driven in said real estate, if you further find and believe that he did so in ignorance of the true line, believing that he was on his own land, acting in good faith and with the knowledge and without the objection of the defendant, then and in that case the fencing would not become a part of the real estate, but would remain personal property and be the subject of replevin by the plaintiff, and you should find the issues for the plaintiff.[1]

The court instructs the jury that, although you may find and believe from the evidence that the plaintiff erected his fence on the land of the defendant, yet if you further find and believe that he did so in ignorance of the true line dividing his land and that of the defendant, with permission of the defendant, and at the time believing that he was placing his fence on his own land, and that afterwards a subsequent survey disclosed the fact that the fence was built upon defendant's land, and that plaintiff thereupon moved or attempted to move the fence back on his own land, and defendant objected thereto, you will find the issues for the plaintiff.[2]

The court instructs the jury in this connection that by permission of the defendant is not meant that it was necessary for the plaintiff to have an oral understanding or agreement, or to obtain the oral consent of the defendant; but if you find and believe from the evidence that the plaintiff erected his fence in ignorance of the true line in good faith and with the knowledge and without objection from the defendant, the law implies permission from the defendant, and you will find the issues for the plaintiff.[3]

The court instructs the jury that if you believe and find from the evidence that the plaintiff entered in and upon the lands of

[1] Ousley v. Lambeth (Mo. App.) 199 S. W. 594.
[2] Ousley v. Lambeth (Mo. App.) 199 S. W. 594.
[3] Ousley v. Lambeth (Mo. App.) 199 S. W. 594.

the defendant and erected the fence of posts and wire thereon that is sought to be recovered in this action, without the consent of the defendant and against his will, then and in that case the said fence became and was real estate and not the subject of replevin, and if you so find and believe you will find the issues for the defendant.[4]

The court instructs the jury that if you believe and find from the evidence that prior to the time the plaintiff built the fence on the lands of the defendants, that is sought to be recovered in this action, the defendant notified him (the plaintiff) that he was building said fence on the lands of defendant, and that notwithstanding such notification the plaintiff built said fence on the lands of the defendant, then and in that case the fence was and became a part of the real estate, not the subject of replevin, and you will find the issues for the defendant if you so find and believe.[5]

§ 2473. Criminal liability for removing or destroying fence

§ 2473(1). Georgia

The court charges you further that, should you find that the defendant did injure or destroy the fence in question of ———, you would be authorized to presume that such injury and destruction was done maliciously and willfully, and you should so find, unless this presumption has been rebutted to your satisfaction.[6]

§ 2473(2). Texas

You are instructed that, if W. told the defendant, J., to move his fence back off of his (W.'s) land, and in so moving the fence it became necessary to withdraw his fence from the fence of said W., such a tearing loose and withdrawing would not be unlawful, and for so doing defendant would be guilty of no offense.[7]

You are also instructed that every entry upon the land of another without lawful authority is a trespass. If you should find that W. constructed any part of his fence upon the land of defendant without his consent, he would be a trespasser upon defendant's land, and defendant would have the right to remove so much of said W.'s fence as was constructed upon the land of defendant, provided he, in doing so, provoked no breach of the peace.[8]

[4] Ousley v. Lambeth (Mo. App.) 199 S. W. 594.

[5] Ousley v. Lambeth (Mo. App.) 199 S. W. 594.

[6] Woods v. State, 73 S. E. 608, 10 Ga. App. 476.

[7] Jones v. State (Cr. App.) 20 S. W. 926.

[8] Jones v. State (Cr. App.) 20 S. W. 926.

CHAPTER CXL

FERRIES

§ 2474. Degree of care required as to passengers.

§ 2474. Degree of care required as to passengers

The jury are instructed that it was the duty of the defendant to use the highest degree of care that is ordinarily observed by prudent people engaged in like business and under like circumstances, to avoid injury to the plaintiff, and if the jury believe from the evidence that plaintiff was on the pier and was about to go upon, or was in the act of going upon the said boat, and that at that time and place the defendants failed to observe the highest degree of care towards plaintiff that is usually observed by prudent people engaged in a like business under like circumstances, and because of such failure the gangplank was caused to fall or to be thrown upon plaintiff's foot, the law is for the plaintiff.[1]

[1] Reasor v. Paducah & Illinois Ferry Co., 175 S. W. 682, 164 Ky. 411.

CHAPTER CXLI

FIDELITY BONDS

§ 2475. What constitutes fraud within policy.
2476. Meaning of larceny as used in bond.
2477. Duty of obligee in bond to notify surety of delinquences of principal.
2477(1). United States.
2477(2). Oklahoma.

§ 2475. What constitutes fraud within policy

You are instructed that there is a provision in the policy to the effect that a written statement of loss, certified by the duly-authorized officer or representative of the employer (receiver of the bank, in this case), and based upon the accounts of the employer, shall be prima facie evidence thereof. In view of that condition of the policy, I instruct you that the plaintiff has established a prima facie case against the defendant, because he gave the written statement of loss, and subsequently transmitted to the defendant a copy of the account upon which it was based. Nevertheless, the plaintiff has offered additional evidence. He might have rested his case upon the proof that he had complied with this condition of the policy which I have read to you, and insisted then that it was incumbent upon the defendant to show that the bank had not sustained a loss, within the terms of the policy. But the plaintiff has seen fit to produce further evidence. I am not going to call your attention to that evidence in any detail. Suffice it to say that it tends to prove that on or about the ——— the president of the bank procured a discount of certain notes of the bank, with the customers' notes belonging to the bank as collateral, to the amount altogether of about $———; that about that time he sent telegrams in cipher to the cashier of the bank at ———, that about that time the cashier caused a credit to be given in the president's personal account for items amounting to about $———; that when the bank failed the apparent balance to the credit of the president in his private account was about $———, showing that he had drawn out about $——— of the $——— which had been placed to his credit on the ———. It is insisted that this evidence authorizes and requires you to find that the president obtained an improper credit, and by means thereof appropriated more than $——— of the funds of the bank.

I shall not allude to the evidence which has been given of other improper credits which it is alleged were given to the president in his personal account with the bank. They are only important as tending to characterize the nature of the transactions of ———,

and as tending to show the total loss sustained by the bank through its president. But the question for you to determine is whether by reason of these improper credits of the ——— the defendant became liable for a loss, within the meaning of the terms of the policy. Was that a fraudulent or dishonest transaction on the part of the president? If it was not, the plaintiff is not entitled to recover. If it was a mere irregularity on his part—an honest irregularity—or if he was not aware of the fact that these credit items were passed to his account, the plaintiff is not entitled to recover. You must find that when he drew this money out he knew, or had reason to believe, that these items had been credited to his account, and you must find that in drawing out the money on those credits he was actuated by a fraudulent or dishonest mind. If, upon the evidence in this case, you can come to the conclusion that he believed that, if the directors of the bank had known of these transactions, they would have acquiesced, and regarded them as entirely satisfactory, why, then it is your duty to find that he was not actuated by a dishonest motive, and therefore his acts in appropriating this money were not fraudulent and dishonest. The burden is upon the plaintiff to satisfy you by a fair preponderance of evidence of the truth of this issue. Fraud is not to be legally presumed, and the law presumes that every man acts honestly until the contrary is shown. On the other hand, fraud or dishonesty is a condition of the mind. It is incapable of direct evidence. It must always be found from circumstance. There is no way in which the plaintiff could show in what state of mind ——— was while these transactions were taking place, unless he could produce him as a witness on the stand, and elicit the truth. Well, as I have said before, the plaintiff has made a prima facie case upon this issue, because he has complied with that condition of the policy which prescribes that the written statement of claim shall be prima facie evidence of a loss, within the terms of the policy. Now, it is for you to say, upon the other evidence in the case, which has been elicited principally upon the cross-examination of the plaintiff's witnesses, whether the defendant has overcome that case. If you conclude that the defendant has overcome that presumption, and, upon all the evidence before you, that the transactions in controversy are as consistent with the theory of honesty on the part of the president as of his dishonesty or fraud, then the defendant will be entitled to your verdict.[1]

[1] American Surety Co. of New York v. Pauly, 18 S. Ct. 563, 170 U. S. 160, 42 L. Ed. 987.

§ 2476. Meaning of larceny as used in bond

Larceny is ordinarily defined to be the taking and carrying away of the property of another with intent to convert it to your own use. But the statute of the state has a further definition of larceny. Section ——— provides: "If any person shall receive any money whatever for this state, or for any county, town or other municipal or public corporation therein, or shall have in his possession any money whatever belonging to such state, county, town or corporation, or in which such state, county, town or corporation is interested, and shall in any way convert to his own use any portion thereof, or shall loan, with or without interest, all or any portion thereof, or shall neglect or refuse to pay over any portion thereof as by law directed and required, or when lawfully demanded so to do, such person shall be deemed guilty of larceny." The word "larceny," as used in this bond, means, not only its ordinary acceptation of taking and carrying away, what we commonly call stealing, but it also includes the meaning given by this statute.[2]

§ 2477. Duty of obligee in bond to notify surety of delinquencies of principal

§ 2477(1). United States

You are instructed that it was not incumbent upon the plaintiff to give notice as soon as practicable after he may have had suspicions of dishonest conduct on the part of the president, but it was his duty, when he became satisfied that the president had committed some specific act of fraud or dishonesty, which was likely to involve the defendant in loss, to give notice in writing. This provision does not require that the notice shall be given immediately, but it requires that it shall be given with reasonable promptness after the discovery, and it is a question of fact, for the jury to say, upon the evidence, in view of the particular circumstances of the case, whether such a notice has been given with reasonable promptness. The notice in this case was given on the ———; and it will become necessary for you to inquire and determine when it was that knowledge came to the plaintiff—when he became chargeable with knowledge that the president had committed some specific act of fraud or dishonesty, likely to render the defendant liable upon its bond.[3]

§ 2477(2). Oklahoma

You are instructed to find in favor of the plaintiff and against the defendant M. for the amount sued for, and you are further in-

[2] City of Seaside v. Oregon Surety & Casualty Co., 171 P. 396, 87 Or. 624.

[3] American Surety Co. of New York v. Pauly, 18 S. Ct. 563, 170 U. S. 160, 42 L. Ed. 987.

structed to find for the plaintiff and against the defendants H. and S. for the amount you find the defendant M. owed the plaintiff, unless you find that it became known to the plaintiff company that default was being made by its agent, M. When the agent of the company is appointed for an indefinite time and under bond to account and pay over money at stated periods of time, and he fails to perform at some of those times his duties relative to this matter, whether he can be afterward trusted with additional funds at the risk of the sureties upon his bond consistently with good faith and fair dealing, without first giving notice to the sureties, depends upon the apparent cause of his failure. If the corporation or supervising officer knows that the failure of an agent to pay over moneys results from dishonest practices or intentions, such as a conversion of money committed to his custody, it is the duty of the corporation or its agent to notify the sureties; if, on the other hand, the circumstances do not point to moral turpitude, but to lax habits of business, mere negligence, procrastination, want of diligence or punctuality, rather than a want of honesty, the principal may continue the agent in its employ, treating his successive failures in promptness as breaches of contract only. and relying on the bond for protection should ultimate loss occur; and, if you believe that the plaintiff in this case knew that the defendant M. was not acting honestly, and that the plaintiff acquiesced in his dishonest practices, and that he was guilty of moral turpitude in the handling of the funds which came into his hands, and that it was not indolence, carelessness, inattention to business, and a disposition of procrastination, you will find for the defendants H. and S. and against the plaintiff.[4]

[4] Phœnix Ins. Co. of Hartford v. Newell, 159 P. 1127, 60 Okl. 207.

CHAPTER CXLII

FIRE INSURANCE

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A. REQUISITES OF CONTRACT

§ 2478. In general

As I see the law, gentlemen of the jury, under the laws of ———, Mr. ——— was the general agent of this insurance company, and had authority to make contracts of insurance. Then the proposition presents itself to you: Was there a contract made in the first place between Mr. ——— and the plaintiff? This is the controverted question of fact which you must determine from the evidence in this case. A contract of insurance is an agreement, express or implied, and in this connection it would not make any difference whether this was in writing or not; a contract of insurance may be made verbally as well as in writing.[1]

§ 2479. Intent to issue policy

The court instructs the jury that, before they can find a verdict for the plaintiff, they must believe from the evidence that ———,

[1] Sun Ins. Office of London v. Mitchell, 65 So. 143, 186 Ala. 420.

the agent of the defendant, at the time of the application for the insurance covered by the policy in the suit, intended to issue a policy in one of the insurance companies represented by him which would be effective until canceled by the company whose policy should be so issued.[2]

§ 2480. Power of officers or agents to bind corporation

You are instructed that, if you find from the evidence that the act of the General Assembly of ——— incorporating the ——— Insurance Company of ———, the defendant company, provides "that all policies of insurance, notes, or other contracts that shall be made or entered into by said corporation may be either with or without the seal thereof, and shall be subscribed by the president, and attested by the secretary, and, being so signed, executed, and attested, shall be binding and obligatory, upon said corporation, according to their true intent and meaning," and if you shall further find, from the evidence, that the policy in suit is so signed, executed, and attested, and is furthermore sealed with the common seal of the corporation, the plaintiff is entitled to recover, in case of loss or damage by fire, if the jury furthermore find the facts as stated in the plaintiff's ——— point.[3]

§ 2481. Prepayment of premium

You are instructed that, if the jury find from the evidence that there is nothing contained in the terms and conditions of the policy in suit making an actual payment of the premium to the said defendant company, its officers or agents, a condition precedent to the defendant's liability, or that a default in payment of the premium shall cause a forfeiture; and that it is agreed in said policy, under seal, that the defendant will indemnify the plaintiff against loss or damage by fire in the sum of $——— on the merchandise described in said policy, for the term of one year, to wit, from ——— to———, and furthermore that, without the prepayment of the premium, the defendant delivered said policy to T. for the plaintiff's use, with that intent and understanding, and also that said merchandise was destroyed or damaged by fire within the time specified, and that the defendant was served with due notice and proof thereof, the plaintiff is entitled to recover.[4]

You are instructed that, if the jury find from the evidence that the defendant gave the policy in suit to T. with the understanding that he should cause it to be delivered to the plaintiff, and have the premium collected, and that T. accepted the undertaking, and

[2] Hallauer v. Fire Ass'n of Philadelphia, 98 S. E. 441, 83 W. Va. 401.

[3] Pennsylvania Ins. Co. v. Carter (Pa.) 11 A. 102.

[4] Pennsylvania Ins. Co. v. Carter (Pa.) 11 A. 102.

held himself responsible for the money, or a return of the policy, T. thereby became the agent of defendant for that purpose. And if the jury further find that T. did deliver the policy to plaintiff by hand of his agent, ———, who collected the premium, and on ———, sent T. a bank draft covering this premium, "thenceforth" T. was the depositee of the defendant company, and there could be no rescission of the contract without its consent (together with the consent of plaintiff), for to all legal intents the contract of insurance was consummated, and the premium belonged to the company as fully as though it were in its vaults; therefore the plaintiff is entitled to recover.[5]

§ 2482. Effect of payment of premium to insurance broker

You are instructed that, if the jury find from the evidence that T. through whom this insurance was placed in defendant company, transacted the business in the usual mode adopted by the company and him, and that the usual mode was that, when he procured policies in said company for or in favor of other persons, it was accustomed to regard or treat him as its debtor for the premiums in such cases, and to periodically render to him statements or bills for the same, in accordance with the understanding that he was the company's personal debtor therefor, then the actual payment of the premium to the company before a loss was dispensed with, and the obligation of T. to pay the premium was in effect the payment of it by the insured, and the plaintiff is entitled to recover.[6]

§ 2483. Estoppel of insured to deny issuance of policy

You are instructed that, if you find from the evidence that the plaintiff company issued defendant a receipt at the time his application for insurance was accepted and said receipt recited that his contract of insurance would be sent by mail, and further stated that if the contract was not received within ——— days to write the company, and if the defendant did not notify plaintiff that he had not received his policy, and did not request the issuance of a new policy or the return of the premium note within a reasonable time, and that when plaintiff requested payment on defendant's note he did not ask for the return of his note or the issuance of the policy, you will find the defendant is estopped from denying the issuance of the policy, and you should find for the plaintiff.[7]

[5] Pennsylvania Ins. Co. v. Carter (Pa.) 11 A. 102.

[6] Pennsylvania Ins. Co. v. Carter (Pa.) 11 A. 102.

[7] House v. Davis, 197 S. W. 693, 130 Ark. 387.

B. Insurable Interest

§ 2484. What constitutes

I charge you that any one may insure property against loss by fire in which he has an interest, the insurance of which is not forbidden by law on the ground of public policy. Now, what is this insurable interest? What interest does the law require in order to entitle the party who insures to recover loss upon the policy? In answer to this I charge you that "Whoever may fairly be said to have a reasonable expectation of deriving pecuniary advantage from the preservation of the subject-matter of insurance, whether that advantage inures to him personally, or as the representative of the rights or interests of another, has an insurable interest. * * * Persons charged, either specifically, by law, custom, or contract, with the duty of caring for and protecting property in behalf of others, or having a right so to protect such property, though not bound thereto by law or who will receive benefit from the continued existence of the property, whether they have or have not any title or estate, any lien upon or possession of it, have an insurable interest." Now, the test of what constitutes an insurable interest is: Does the party insuring, at the time he takes out the policy of insurance, and at the time of the loss, bear such a relation to the property insured as would create a liability to pecuniary loss if the property was destroyed? If so, such a person has an insurable interest in the property.[8]

§ 2485. Interest of one by reason of agency for owner of insured property

I charge you that, if you believe from the evidence that ——— put plaintiff in the lawful possession of the property (that is, the property insured), as his agent or superintendent, for the purpose of dealing with the property in the ordinary course of business, and that if plaintiff was under contract with ——— to insure the property and keep the property insured, plaintiff had an insurable interest in the property.[9]

§ 2486. Interest of warehouseman as insurable interest

Does the policy, as stated upon its face, cover and protect the property lost, which was, as the evidence has shown it, the actual property of the plaintiff stored in the warehouse of ——— under a special contract, including storage and insurance? Undoubtedly a warehouseman has an interest in the property intrusted to his keeping. You may term it "qualified,"

[8] Graham v. American Fire Ins. Co. of Philadelphia, 26 S. E. 323, 48 S. C. 195, 59 Am. St. Rep. 707.

[9] Graham v. American Fire Ins. Co. of Philadelphia, 26 S. E. 323, 48 S. C. 195, 59 Am. St. Rep. 707.

or "special," or "limited," or "specific," interest, whichever name, in all respects, would be applicable to it; but that interest, whatever it may be termed, is an insurable interest, because he is responsible in this case, in event of loss by fire, under this contract, and he had the right by contract to insure this cotton against loss to save himself harmless. His liability to the plaintiff was fixed, and certainly, by contract. He had the right to protect himself against the consequences of that contract by insuring the property while it remained in his possession under the contract. That is the usual, and probably the best, test of an insurable interest in property.[10]

C. Modification of Contract and Reformation of Policy

§ 2487. Effect of rider attached after delivery of policy

The court instructs the jury that it is claimed by the defendant that there was attached to said policy on the ——— day of ———, and after the delivery of the policy to the plaintiff, what is known as rider form No. 1, which contained certain provisions for the taking of an itemized inventory by the plaintiff at least once in each calendar year, or, if not taken within 12 months prior to the date of said policy, to be taken in 30 days after said date, and for the keeping of a set of books which would clearly and plainly present a complete record of the business transactions, including all purchases, sales, and shipments, and that said books and invoices should be kept securely locked in a fireproof safe at night, and at all times when said business was open to keep them where they would not be exposed to fire, and to produce them for the inspection of the company, and that in the event of the failure of the assured to do this the policy would become null and void. With regard to this phase of the case the court instructs you that the policy as issued and delivered to the plaintiff on the ——— day of ———, was a valid and binding contract and that if the said contract was afterwards changed by the defendants or its agents in its terms and provisions without the knowledge or consent of the plaintiff, and without acquiescence on her part, that then she would not be bound by the terms of what is known as rider No. 1 to said policy, but she would be bound by all of the conditions and provisions which were contained in said policy at the time the same was executed and delivered to the plaintiff herein.[11]

[10] Pelzer Mfg. Co. v. Sun Fire Office of London, 15 S. E. 562, 36 S. C. 213.

[11] Liverpool & London & Globe Ins. Co. v. McLaughlin (Okl.) 174 P. 248.

§ 2488. Reformation of policy to include matters claimed to have been omitted through mistake

Now, you are instructed that the plaintiffs, as above stated, allege that certain articles not specifically embraced in the description of the property insured attached to the policy, but which were a part of said bathhouse furnishings and fixtures, and which are particularly described in the itemized account attached to plaintiffs' petition, were by the parties to said policy left out of said description by mutual mistake; that at the time of the execution and delivery of the policy sued on and the payment of the premium it was agreed and understood between the insured and the company that said articles left out and not described therein should be and were included in said policy and were insured under said policy with the other items specifically set out; but that same were not specifically mentioned in said description attached to the policy by the mutual mistake of the parties. Now, if you believe from the evidence, as to any of said personal property claimed to have been so left out by mistake, that it was in fact mutually agreed and understood by and between ——— and ——— and the defendant company, at the time said policy was issued and delivered to the insured and the premium paid, that all or any part of the property claimed in plaintiffs' petition to have been so omitted by mutual mistake should be put in said policy and insured thereunder with the other property described therein, but through the mutual mistake of the parties it was omitted—that is to say, that both parties, insurer and insured, intended it should be insured by said policy and embraced therein, but in the writing it was omitted through mutual mistake—then and in that event, you will find the same to have been insured under said policy and covered thereby; and if you find for plaintiffs, and find that any of same was damaged or destroyed by fire as these issues are submitted to you, then you will take the same into consideration in estimating plaintiffs' damage. But unless you do so believe such articles, if any, were omitted by mutual mistake from the policy, you will consider only the property described in the policy as insured; and should you believe from the evidence that any of said articles claimed to have been so omitted were not mutually agreed between the parties to be included at the time of the issuance of the policy, but that the insured believed they were included, then and in that case also you will not consider same as in that case the mistake, if any, would not be a mutual one, and the company would not be responsible for the insured's mistaken belief, if any. And you are instructed that unless, before and at the time of the issuance of the policy and payment of the premium, it was agreed and understood that said property, if any, omitted should be included, the same cannot be taken or considered as included

therein, and no subsequent agreement that the same should be inserted or included would render the company liable, as such agreement would have no consideration to support it; and if you so believe the facts to be you will find for the defendant on this issue, and not in any case include such property, should you find for plaintiffs.[12]

D. Renewal

§ 2489. Requisites

You are instructed that, if you find from the evidence that the parties agreed that the insurance should be renewed without a payment of premium, and their minds met and they fully understood the terms of such renewal in all respects, and nothing remained to be done thereafter except to make out the renewal receipt on the part of the company, and the payment of the premium by the plaintiff, notwithstanding this was a verbal agreement, it was nevertheless a valid contract for the renewal of the policy, and the defendant is liable for the loss to the amount of the insurance.[13]

You are instructed that, if you find that previous to ———, the defendant company had issued a policy of insurance upon the building and stock in question which would expire on that date, and that about the time of its expiration the agent of the company, for and in its behalf, agreed with the plaintiff or his authorized agent to renew said policy, and that he, the agent of the company, would attend to it right away, and that their minds met as to the terms of such agreement; and that there was nothing further to be done between the parties, except that the agent of the defendant should make out and deliver to the plaintiff or his agent the renewal receipt or evidence of renewal, and that the plaintiff or his agent should then, or at some subsequent time, pay the premium, then I instruct you that such an agreement would bind the defendant company to renew the policy, and they could only avoid liability upon such contract by tendering the renewal and demanding the premium, and the failure of the plaintiff to pay the same, or by giving the plaintiff or his agent notice that the defendant company had refused to carry the risk, and such tender of the renewal and demand of the premium or the giving of the notice as before stated, in order to relieve the defendant from liability, must be done before the loss accrued and before they knew of the loss.[14]

[12] Delaware Ins. Co. of Philadelphia v. Hill (Tex. Civ. App.) 127 S. W. 283.

[13] King v. Hekla Fire Ins. Co., 17 N. W. 297, 58 Wis. 508.

[14] King v. Hekla Fire Ins. Co., 17 N. W. 297, 58 Wis. 508.

E. Cancellation of Policy

§ 2490. Notice of cancellation—To whom given

You are instructed that under the terms of the policy sued on herein, the defendant insurance company had the right to cancel the policy at any time by giving to the insured, plaintiff, five 'days' notice of such cancellation; you are further instructed that if the plaintiff had an arrangement or an agreement with the ——— Insurance Agency or with Mr. ——— by which either was to keep the property of plaintiff insured and giving said agency or Mr. ——— the power to select the companies by which said property was to be insured, and to attend to all matters pertaining to his insurance, including the authority to cancel policies, then you will find that plaintiff constituted the said insurance agency or Mr. ——— his agent and that notice from the defendant insurance company to the said agency or Mr. ——— of the cancellation of the said policy was notice to the plaintiff, and if you further find that defendant company notified the said insurance agency or Mr. ——— to cancel this policy sued on, and, in compliance with that notice, the said insurance agency or Mr. ——— did, acting for plaintiff, deliver said policy and cancel same, then you will find for the defendant.[15]

F. Avoidance of Policy for Misrepresentatons or Concealment

§ 2491. Effect of misrepresentation or concealment in general

§ 2491(1). South Carolina

I want to tell you in the outset, gentlemen of the jury, that if you believe from the testimony that this plaintiff has perpetrated or committed a fraud on this insurance company by concealing from them material facts or misleading them fraudulently, then he should not recover anything, because the object of the law in these matters, and it is the law, is that between people who insure and the insurance company there should be nothing more nor less than common honesty or fair dealing, and that is all you want to bear in mind in solving the case here, that you have to decide what is common honesty and fair dealing between these parties. If you find it is on the side of the insurance company, you find for the insurance company, and if it is for the plaintiff, you should find for the plaintiff.[16]

[15] Georgia Home Ins. Co. v. Bennett, 203 S. W. 279, 134 Ark. 52.

[16] Hankinson v. Piedmont Mut. Ins. Co., 61 S. E. 905, 80 S. C. 392.

§ 2491(2). Texas

You are instructed that if, from the testimony, you find that the plaintiff made the application for the insurance herein as alleged in defendant's answer, and you further find from the testimony that the said plaintiff, in said application, stated that the original cost of the building insured was $———, or that the actual cash value of the contents of said building was $———, or you find from the testimony that the said plaintiff represented in said application that the lot or land on which said building was situated was of the value of $———, or that in said application said plaintiff agreed that he had not applied for insurance in excess of three-fourths of the value of the property to be insured, or that he represented said building to be in a completed state, and you further find from the testimony that such statements, or any one of them, were false, and that thereby the defendant was induced to issue the policy of insurance sued on herein, or if you find from the testimony that the plaintiff was not the sole and unconditional owner of the property intended to be insured, and covered by said policy of insurance, or that the same became unoccupied, as hereinafter defined, at any time between the date of said policy and said fire, you will find for the defendant.[17]

§ 2492. Materiality of misrepresentations

§ 2492(1). Missouri

The jury are instructed that, even if the jury shall believe from the evidence that at the time the insurance was applied for by the plaintiffs, or their agent, of the defendant, the plaintiffs, or their agent, represented that a watchman was kept and would be kept upon said premises insured, and that no watchman was then or afterwards kept thereon, yet, unless the jury believe that the said representation was one of the causes why defendant took the risk, and without such watchman being then kept and continuing to be kept the said defendant would not have taken the risk or issued the policy, then the fact that no watchman was kept proves no defense to this action.[18]

§ 2492(2). Virginia

You are instructed that, in order that misrepresentations made in procuring insurance shall have the effect to make the policy void, unless such misrepresentations be warranties, such misrepresentations must be material to the risk, and must have influenced the issuing of the policy, and whether they be material to the risk or in-

[17] Georgia Home Ins. Co. v. Brady, (Civ. App.) 41 S. W. 513.

[18] Bersche v. Globe Mut. Ins. Co., 31 Mo. 546.

fluenced the issuing of the policy or not are questions for the jury to determine from the evidence.[19]

The court instructs the jury that, in order for the defendant company in this suit to be entitled to a verdict in its favor, on the ground that the policy was void because of misrepresentations by the plaintiff in procuring the insurance, the defendant company must prove to the satisfaction of the jury that the plaintiff made such misrepresentations, and that they were as to matters material to the risk.[20]

§ 2493. Avoidance of policy for failure to disclose facts material to risk

§ 2493(1). Arkansas

You are instructed that, where a policy of insurance provides that it shall be void in the event the insurer is not the sole and unconditional owner of the property covered thereby, such sole and unconditional ownership in the assured is a condition precedent to a right of recovery, and unless you believe by a preponderance of the evidence that same was waived by defendant, you should find for defendant.[21]

§ 2493(2). Kentucky

The court instructs the jury that, if they shall believe from the evidence that an attempt was made to burn the house in question before the policy of insurance sued on herein was issued, and that plaintiffs knew thereof, and that the agent of the defendant who solicited the insurance did not know of the said attempt when the policy was issued, and the plaintiffs concealed that fact from him for the purpose of obtaining insurance, then the law is for the defendant, and the jury should so find.[22]

§ 2493(3). Virginia

The court instructs the jury that, as a rule, the insured is only required to disclose what he is interrogated as to, unless the terms of the policy require such disclosure; but, whether interrogated or not, if the jury believe from the evidence that he withheld or omitted to state any fact material to the risk which, in honesty and good faith, he ought to have communicated, with the design and for the purpose of obtaining the issuance of the policy, or for the purpose or with the design of obtaining the same at a lower premium than the one charged, then the policy is thereby vitiated, and the jury must find for the defendant.[23]

[19] Wytheville Ins. & Bkg. Co. v. Stultz, 13 S. E. 77, 87 Va. 629.

[20] Wytheville Ins. & Bkg. Co. v. Stultz, 13 S. E. 77, 87 Va. 629.

[21] Hartford Fire Ins. Co. v. Enoch, 96 S. W. 393, 79 Ark. 475.

[22] German-American Ins. Co. v. Norris, 37 S. W. 267, 100 Ky. 29, 66 Am. St. Rep. 324.

[23] Wytheville Ins. & Bkg. Co. v. Stultz, 13 S. E. 77, 87 Va. 629.

§ 2494. Failure to disclose facts affecting right of subrogation

I further charge you that the right of subrogation is a legal right; that is, when a party insures property with an insurance company, and that property is destroyed by the carelessness, negligence, or unlawful act of another, then the insurance company, upon the payment of the loss, is subrogated to the right of the owner of the property, and is entitled to go against the party or parties who, by their carelessness, negligence, or unlawful conduct, have caused the loss of the property insured. That is a right which they have. They have it under the law, and they have a right also to stipulate this right of subrogation. Is the right of subrogation a fact material to the risk, risks which the insurer takes to insure the property against destruction by fire? Is the further fact that, after a loss occurs by fire, that the insurer has the right to go against the party who caused the loss, a fact material to the risk? This I submit to you as a question of fact, which you must determine according to the evidence in this case.[24]

Now, then, we come to a second defense, so to speak, or a question which arises in this case, to wit, that the right of subrogation, as they allege, was a material question—as the defendants contend, was a material question—and that, ——— having by their lease and release freed the railway company from liability from loss caused by their engines, the policy was thereby voided. Now, gentlemen, when a party goes to an insurance company, the ordinary and usual custom is that he makes application for so much insurance upon certain property, and either by writing or orally he makes certain representations to the company from whom he seeks insurance. That is, in common language, called the "application" for the insurance. In that application it is the duty of the party seeking the insurance to state all facts material to the risk; but if the insurance company or their agents have knowledge of the facts upon which they issue a policy of insurance, no matter whether that knowledge was derived from the party seeking the insurance or how, then, knowing the facts upon which they issue the policy, and if, knowing them, they still issue the policy, then, in law, they have waived their rights. Now, in coming to the consideration of this cause, did ———, in applying for this policy of insurance, make any statements material to the risk which were not true, or did ——— omit to make any statement material to the risk which they should have made because it was material to the risk? The insurance company, after the application has been made, issues what has been called a "policy of insurance." That is the written paper. Now, then, the former—the application—is the

[24] Pelzer Mfg. Co. v. Sun Fire Office of London, 15 S. E. 562, 36 S. C. 213.

tender, the proposal, to make this contract of insurance, and the latter is the acceptance by the insurance company of this proposition from the party to insure his property. Now, the insurance company undoubtedly has the right to accept or make insurance upon property, with the right of subrogation reserved to them They also have the right to insure property when the right of subrogation is taken away from them. I have explained to you the question of materiality. As a question of fact, did they know of this release of the right of subrogation in favor of the railway company? and, if they knew it, did they waive it? Waiver is a question of fact for the jury.[25]

§ 2495. Effect of knowledge by insurer or its agent of facts not disclosed

I charge you that the policy contains the terms of the contract. It is the duty of the court to construe a written contract, and I charge you that ——— had the right to insure cotton held in their warehouse, which they held either as owners, warehousemen, or as warehousemen and insurers, for pay. If nothing disproving this state of facts appear in evidence, and you find that the cotton was destroyed by fire during the currency of the policy, according to the terms of the policy the plaintiffs would be entitled to recover the amount of the loss not exceeding the amount for which the cotton was insured. Did ——— insure the cotton described in the complaint? Was it destroyed by fire, and what was the amount of the loss? Have ——— assigned their policy to plaintiffs?—are, with the other questions of fact raised in this case, questions which you must determine. Defendants allege that the policy of insurance issued by them is void, because ——— did omit to make known to defendants a fact material to the risk, to wit: The fact that the warehouse stood upon land leased by ——— from the ——— Railroad Company for valuable considerations, and upon certain terms and conditions, among which was the following: "That during the continuance of said lease the said ——— Railroad Company, its successors and assigns, shall not be in any wise responsible for any loss or damage to the said building (warehouse) or the contents thereof from fire communicated by the locomotive engines of said company, its successors or assigns, and all such loss or damage shall be borne by the said ———." That the fact of the existence of said lease and release not only pertained to said risk, and was very material thereto, but was unusual and unknown to defendant when said policy was issued and delivered. The policy, according to the allegations of the answer, was to "become void" in the event of "any omission

[25] Pelzer Mfg. Co. v. Sun Fire Office of London, 15 S. E. 562, 36 S. C. 213.

to make known any fact material to the risk." So that a mere omission to make known a fact is not sufficient to avoid the policy. It must go further; it must be the omission of a fact material to the risk. That raises a question or questions of fact: Was the release of the railway company by ——— from any responsibility or loss caused by fire from the locomotives of the railway company to the warehouse, or the contents thereof, a "fact material to the risk"? Did ——— omit to make known to defendants, or their agent, the facts in regard to the lease? Did defendants, or their agent, know of this lease and its terms? If defendants, or their agent, did know of this lease and its terms, they cannot complain of such omission by ———, because if they, the defendant company, had knowledge of these facts, then the omission of ——— was not material. This question of a "fact material to the risk" is a question for you. What is a "fact material to the risk"? A fact material to the risk is one which in any way influences or might influence, the insurer, either in accepting or rejecting such risk, or in estimating the degree and character of the same; or which in any way affects the rate of premium at which the risk is assumed; or which, if known to the insurer, would have prevent his accepting or continuing the risk.[26]

§ 2946. Failure of agent of insurer to state facts given him by insured

§ 2496(1). Iowa

The jury are instructed that if you find that the plaintiff was asked to and did sign the application in blank, and the agent of the defendant filled it up on his own motion without knowledge of plaintiff as to what the answers were; or if you should find that the plaintiff made true and correct answers, but the agent, in writing the answers, for any reason, wrote incorrect answers, the plaintiff will not be responsible for the acts, mistakes or wrongs of such agent.[27]

§ 2496(2). Michigan

You are instructed that one fact for you to determine there is whether the plaintiff correctly informed the agent as to the actual amount of incumbrance, or the amount still due, upon the premises. You will determine that fact. If you find that she did correctly state it, you will determine the fact whether the agent understood it—whether he inserted the amount in the policy understandingly or not. You will also determine whether it was inserted by mistake. Then I say to you, as a matter of law, that if she correctly

[26] Pelzer Mfg. Co. v. Sun Fire Office of London, 15 S. E. 562, 36 S. C. 218.

[27] Hingston v. Ætna Ins. Co., 42 Iowa, 46.

informed him as to the amount, and the statement in the application, that the incumbrance was $———, was inserted by the agent knowing the true amount, or through mistake and the application was presented to her to sign, and she was requested to sign it, and didn't read it through, understanding by the acts and conduct of the agent that the application correctly stated the answer which she had made, and she so signed it, and with that impression, derived from the acts and conduct of the agent, then the claim of fraud could not be maintained here, and the policy would not be void on that account. But if she did understand the amount that was stated in the application herself, and the agent had misunderstood the statement, didn't understand it, or made a mistake in regard to it, as I say, if she understood the amount which was inserted in the application, the agent not having got the answer correctly, through deafness, or any other reason, and she knew the amount stated in the application to be wrong, and signed the application so knowing, then that would avoid the policy. Now, there is a question of fact for you to determine as to how that amount came in the application, and what the parties knew and understood about it. I will say, further, if she had an opportunity to read that application, and neglected to do so of her own motion, of her own will, not misled by the acts or conduct of the agent, nor lulled into silence as to what it contained by his acts and conduct, in preparing the application and all the circumstances surrounding the preparing of it, and if her failure to read the application was a mere act of carelessness or neglect on her own part, then, under those circumstances, the policy would be void, and she could not recover in this case.[28]

§ 2496(3). Virginia

The court instructs the jury that if one applying for insurance state fairly to the company, or its agent, the facts required by the contract of insurance to be stated, or if such facts be known to the company or its agent, and the facts be not truly stated by the company, or its agent writing the policy, the company will not be released from liability by such failure to state truly the facts in the policy.[29]

§ 2496(4). West Virginia

The court instructs the jury that if they believe, from the evidence, that at the time the application was made for the policy in controversy the agent who took said application wholly prepared and wrote the same, and that at the time the plaintiff informed him of the incumbrance upon said property, or that, prior to said time,

[28] Tubbs v. Dwelling House Ins. Co., 48 N. W. 206, 84 Mich. 646.

[29] Wytheville Ins. & Bkg. Co. v. Stultz, 13 S. E. 77, 87 Va. 629.

said agent had full knowledge of said incumbrance, then and in that event the answer incorporated into said application, though incorrect in regard to said incumbrance, will afford no defense to said company to this action, in the absence of fraud on the part of plaintiff.[30]

§ 2497. Effect of misdescription of insured premises

You are instructed that plaintiff claims that the insurance effected by him was applied for on block ——— in the town of ———, and written down by mistake of the agent of the insurance company as block ———. The defendant claims the error to have been made by the plaintiff. If the jury believe, from the evidence, that the plaintiff inaccurately stated the block, either by design or accident, and that such error was material, and that the company would not have made the insurance if the block had been correctly stated, and that the company did not subsequently, during the continuance of the policy and before the fire, know correctly the actual situation of the property on which plaintiff was insured, with reference to other property insured by the company, the jury will find for the defendant. But if the jury believe, from the evidence, that the error in the number of the block was in fact immaterial, or that the mistake was caused by the agent of the company, or that subsequently to the issuance of the policy, and before the fire occurred, the president or agent of the company became aware of the location of plaintiff's property, with reference to other property insured by the company, and took no step to cancel said policy, and if you find that such president or agent had authority equivalent to that of a general agent in making contracts, or represented the company for the purpose of making contracts, the jury must find for the plaintiff. The jury must judge, from the evidence, how far the mistake of the number of the block was material to the insurance company.[31]

§ 2498. Misrepresentations as to value

§ 2498(1). Michigan

You are instructed that it is insisted in this case that there was an overvaluation on the part of the ———. If they have honestly overvalued their property, it will not defeat insurance, because value is a matter largely of opinion; and if they honestly believed, in making their representations in the proof of loss, or at the time of issuing the policy, that the stock was worth—that the stock, fixtures, and soda fountain were worth—the sum for which they were insured, then it will not defeat the recovery. If, however,

[30] Coles v. Jefferson Ins. Co., 23 S. E. 732, 41 W. Va. 261.

[31] Home Insurance & Banking Co. v. Lewis, 48 Tex. 622.

after the loss, they have attempted to claim a larger sum on those items than they actually believe was due, if they have attempted to claim more than they really knew it was worth—in other words, if they had been guilty of fraud in that respect—it will bar their recovery. If you find that they have acted honestly in this regard, they will be entitled to recover on those several items what you think they are entitled to recover. They will be entitled to recover; that is, not exceeding the amount at which they were valued.[32]

§ 2498(2). Virginia

The court instructs the jury that a mere misrepresentation of the value of the property insured does not vitiate the policy, unless the overvaluation be gross and clear, such as must be known to be such by the insured, and not known to the insurer, and therefore false and fraudulent.[33]

§ 2499. Effect of overvaluation placed in policy by agent of insurer

The court instructs the jury that another reason the defendant contends the plaintiff cannot recover is the defendant says there was a misstatement, that in making out the application for insurance the property was overvalued, and that thereby the policy became void when it was issued. If it should transpire that the property was overvalued on account of statements made by the plaintiff, and if the statements made by the plaintiff induced this company to issue a policy for more than the property was worth, if the property was overvalued to a large extent so as to induce the company to issue a policy upon it for any sum, then I say to you that would void the policy. You have heard the testimony in this case in regard to the manner in which this application was procured. You are the exclusive judges of the facts in this case, and, if you find from the testimony that this application was prepared by the person who solicited this insurance on behalf of the defendant company, and that the valuation was placed in the application by him, and if he was present at the property and saw and inspected it, then I say to you that the fact of the property being overvalued would not vitiate the policy or void the loss.[34]

§ 2500. Reliance by insurer on false representations as to value

The jury are instructed that the burden of proving the falsity of the representations as to value was upon defendant, and that a necessary element of the fraud is that defendant was deceived by the representations and relied upon them in issuing the policy. The

[32] Johnston v. Farmers' Fire Ins. Co., 64 N. W. 5, 106 Mich. 96.

[33] Wytheville Ins. & Bkg. Co. v. Stultz, 13 S. E. 77, 87 Va. 629.

[34] Smith v. Mutual Cash Guaranty Fire Ins. Co., 114 N. W. 94, 21 S. D. 433.

defendant would be bound by any knowledge which its agent, ———, gained while soliciting insurance or taking applications for it, even if he failed to communicate such knowledge to the other agents or officers of the defendant company. Therefore, if he learned or knew the value of the property when he received plaintiff's application for insurance, the defendant must be deemed to have known the value thereof when it issued the policy, and in that case it could not be held to have been deceived by, or to have relied upon, the plaintiff's representations.[35]

§ 2501. Misrepresentations as to incumbrances

§ 2501 (1). Virginia

The jury are instructed that, if the plaintiff had paid off and discharged the deed of trust on the property in ———, and that thereafter the policy was regularly continued in force by payment of the premium in ———, and neither since that date nor at the time of the fire was there any lien on the property, the jury are instructed that the existence of the lien at the time of the policy worked no forfeiture thereof.[37]

§ 2501 (2). West Virginia

The court instructs the jury that if they believe, from the evidence, that the property insured, or a material portion thereof, was incumbered at the time the application in writing was made by the plaintiff to the defendant for the policy sued on, and that he denied in said application the fact of said incumbrance, and they further believe that in said application and policy the plaintiff warranted the truth of statements and answers made in said application, that then they shall find for the defendant company.[38]

G. Interpretation and Operation of Policy

§ 2502. Variance between body of policy and rider

The court instructs the jury that if they should reach the conclusion from the evidence that there is a variance between the provisions of the body of the policy in evidence in this case and the slip thereto attached, then in such event the provisions contained in the slip attached thereto will take precedence over those contained in the body of such policy.[39]

[35] Helm v. Anchor Fire Ins. Co., 109 N. W. 605, 132 Iowa, 177.

[37] Mutual Fire Ins. Co. v. Turner, 79 S. E. 1067, 115 Va. 631. Under the charter of defendant payment of each annual assessment constituted a renewal of the policy.

[38] Coles v. Jefferson Ins. Co., 23 S. E. 732, 41 W. Va. 261.

[39] Bond v. National Fire Ins. Co., 88 S. E. 389, 77 W. Va. 736.

§ 2503. Property covered—Disconnected buildings

The court instructs the jury that if they believe from the evidence that the storage house mentioned in the evidence contained saws, wire cable, pulleys, bolter, etc., and that said building was situated at a distance of ——— feet from the mill building, and further believe from the evidence that it was not an addition to said mill building, and that there was no communication between said mill building and the storage house, except over the tracks, switch, or spur of the railroad, and the same was not used by the plaintiff as part of the property insured, then that property, such as saws, wire cable, pulleys, bolter, etc., in said building were not covered by the policy of insurance.[40]

§ 2504. Effect of inaccuracies in description of property—Knowledge of agent

You are instructed that, where it is denied by the defendant insurance company that the property shown by the evidence to have been destroyed by fire was covered by the policy, and the jury find from the evidence that there was no written application for the policy or policies under which the defendant insurance company makes such denial, if you further find from the evidence that the agent of the insurance company has given a description of the property from his own knowledge obtained by personal examination of the property for the purpose of effecting the insurance thereon, which description he, the said agent, inserted in the policy, then said defendant insurance company cannot take advantage of any inaccuracy in the language of the description of the said property so inserted in the policy to avoid payment for the loss of property as aforesaid, unless there is evidence of an attempt on the part of the plaintiff to mislead said defendant or its agents in this respect, or the conduct of the plaintiff was such as to mislead said defendant or agent. And knowledge of the insurance company or agent of inaccuracy or incompleteness in the description of the property at the time when the insurance is effected, if such is shown by the testimony, and you so find, will estop the defendant from setting up any such inaccuracy or incompleteness of description in defense in this case.[41]

§ 2505. Floating policy

You are instructed that if it was definitely understood between them that, while it was to be a floater policy, which meant floating from point to point, the insurance was not to cover every place that these goods might float or be placed, but was only to cover, say, the best hotels, or high-class hotels, and railroad depots; if that is

[40] Bond v. National Fire Ins. Co., 88 S. E. 389, 77 W. Va. 736.

[41] Greenwich Ins. Co. v. State, 84 S. W. 1025, 74 Ark. 72.

all, even if their minds met to that extent, then there could be no recovery in this case, because stores, no matter how good they were, were not part of the arrangement. If the arrangement was generally to cover hotels, depots, and good stores, and if this was a fairly good store, which, perhaps, cannot very well be disputed, then the policy would cover the store. If it did not cover the store, in the sense that the parties agreed, if they agreed at all, but simply covered railroad stations or depots and good hotels, then, of course, the plaintiff cannot recover.[42]

§ 2506. Duration of risk

The jury are instructed as a matter of law that, if they believe from the evidence that as a result of the explosion testified to by witnesses upon the witness stand in this case a portion of the walls of said building was blown down, or a portion of the roof of said building was blown off, and fire immediately ensued, then that such falling of a portion of the said walls or such blowing off of the said roof by the said explosion was not such a falling of the said building, or a part thereof, as would terminate the insurance under the policies sued upon.[43]

§ 2507. Same—Termination of policy by factory insured ceasing to operate

You are instructed that, if you find that the creamery stopped running, and ceased to produce the usual and ordinary product, more than ten days prior to the fire, and so remained more than ten consecutive days prior to said fire, the policy was voided, and plaintiffs cannot recover.[44]

H. Forfeiture for Violation of Promissory Warranties or Conditions Subsequent

§ 2508. Substantial compliance with conditions

The court instructs the jury that if they believe by a preponderance of the evidence that the plaintiff has fairly and reasonably complied with the terms of the policy of insurance, ad if they further believe that the policy was issued to ——— and regularly transferred to the plaintiff, and that the property was afterwards destroyed by fire, then the plaintiff is entitled to recover.[45]

The court instructs the jury that the law only requires from an insured person a substantial, and not necessarily a literal, compliance with the requirements of his policy, and if they believe from

[42] Grossbaum Ceramic Art Syndicate v. German Ins. Co. of Freeport, 62 A. 1107, 213 Pa. 506.

[43] Torpedo Top Co. v. Royal Ins. Co., 162 Ill. App. 338.

[44] Cronin v. Fire Ass'n of Philadelphia, 77 N. W. 648, 119 Mich. 74.

[45] North British & Mercantile Ins. Co. v. Nidiffer, 72 S. E. 130, 112 Va. 591, Ann. Cas. 1916A, 464.

the evidence that the plaintiff in this case substantially complied with the requirements of the policy sued on, then they must find for the plaintiff the amount of his loss as proved by the testimony, not exceeding the sum of $———, with interest from ——— days after the proof of loss; the said sum to be three-fourths the cash value of the stock, not exceeding $———, and three-fourths cash value of office furniture and fixtures and iron safe, not exceeding $———.[46]

§ 2509. Violation of covenant against permitting premises to become vacant

§ 2509(1). Iowa

You are instructed that if you are satisfied, by a preponderance of credible testimony, that, immediately upon the removal of the tenant, the plaintiff took possession of the house in controversy by himself and his employés, for the purpose of making that his home, and commenced cleaning the house, and moving his furniture therein, and so continued to work in cleaning and moving into said house, without any cessation or abandonment of his purpose of making that his home, and had therein at the time of the fire certain of his furniture and household goods, so put there for use in his family, and that nothing was wanting to complete personal occupancy, except that he lodged and took his meals at another house, near by, and that he intended to personally occupy the house the next day with his family, had the house not been destroyed, then the premises were not vacant and unoccupied, within the meaning of the policy.[48]

§ 2509(2). Missouri

You are instructed that the term "occupied as a residence," as used in said policy, does not mean that the plaintiff must have actually remained in person in said house constantly both by day and by night, but if you find that she in good faith had moved her household goods in said house for the purpose of residing therein, and that from the time she had moved said goods into said house until the fire she had been engaged in the daytime in arranging said goods in said house for the purpose of dwelling therein as her home, and that she actually remained in said house for such purpose during the daytime, and was only temporarily absent therefrom at night, then said house was occupied by her within the meaning of said term of said policy.[49]

[46] North British & Mercantile Ins. Co. v. Edmundson, 52 S. E. 350, 104 Va. 486.

[48] Eddy v. Hawkeye Ins. Co., 30 N. W. 808, 70 Iowa, 472, 59 Am. Rep. 444.

[49] Waddle v. Commonwealth Ins. Co., 170 S. W. 682, 184 Mo. App. 571.

§ 2510. Same—Effect of temporary absence

You are instructed that "occupancy" is such an occupancy as the parties must be presumed to have intended—that is, a practical occupancy, consistent with the purposes for which the property was insured; and mere temporary absence from the premises by the plaintiff or the members of his family does not operate as a breach of the obligation to occupy such premises, provided you believe from the testimony that such absence was a contingency, which may fairly be said to have been within the contemplation of the parties.[50]

§ 2511. What constitutes change of possession or occupancy within meaning of policy

The jury are instructed that if they find from the evidence that at the time the policy of insurance sued on was executed the premises insured belonged to ———, and were occupied by him as a residence, and that before the loss complained of the said ——— departed this life, and his wife, ———, rented the property to H., and at the time of the loss the said H. occupied said property as a tenant of the plaintiff, this would constitute a change of possession, under the terms of the policy, and the plaintiff cannot recover, and your verdict should be for the defendant.[51]

The jury are instructed that if they believe from the evidence that the policy of insurance sued on was executed to ———, and that afterwards said ——— departed this life, and the plaintiff was a white woman with only three children, and that she rented the property insured to H., a colored man with a large family, consisting of eleven members, including himself and ten others, consisting of women and small children, then, under the terms of the contract sued on, there was a change of occupancy, and the plaintiff cannot recover.[52]

§ 2512. Increase of hazard by extending uses of building insured

The court instructs the jury that if the jury believe, from the evidence, that the additional use of the store building for storing and vending farm implements and hardware, sash, doors, etc., without the permission of the defendant company, increased the risk to it, then they shall find for the defendant.[53]

§ 2513. Effect of alterations made on insured premises

The jury are instructed that no alteration made on the premises where the property insured by the plaintiff was situate would avoid

[50] Georgia Home Ins. Co. v. Brady (Civ. App.) 41 S. W. 513.

[51] Planters' Mut. Ins. Ass'n v. Dewberry, 62 S. W. 1047, 69 Ark. 295, 86 Am. St. Rep. 195.

[52] Planters' Mut. Ins. Ass'n v. Dewberry, 62 S. W. 1047, 69 Ark. 295, 86 Am. St. Rep. 195.

[53] Coles v. Jefferson Ins. Co., 23 S. E. 732, 41 W. Va. 261.

his policy, nor can his recovery be defeated by means of alterations unless the effect of the same was such as to increase the risk or hazard of loss by fire to the property insured. If the jury find from the evidence that the defendant insurance company made the policy sued upon, and the property insured was destroyed by fire, as stated in the complaint, and plaintiff complied with the agreements and conditions in the policy to be complied with on his part, or that the same were waived by defendants' agents, they will find for the plaintiff.[54]

§ 2514. Keeping gasoline on insured premises

You are instructed that if you find, from the evidence in this case, that gasoline was, during all or any portion of said time between the issuance of said policy and the said fire, an article of merchandise usually kept in country stores, then and in such case the fact that the insured did keep for sale or allow gasoline, if she did, either by herself or agent, allowing or keeping such article on the insured premises—that is, habitually—is no defense to this action.[55]

§ 2515. Precautions to be taken to extinguish fire

The jury are instructed that, if the jury believe from the evidence that buckets could not be kept in the mill filled with water all the time, in accordance with the literal provisions of the policy, because of freezing, then a literal compliance with the said provisions of the policy concerning buckets, was not required and could not have been in the contemplation of the parties when the policy was made, but all that was required by the plaintiff in order to comply with such stipulation was to have the required number of buckets in good and serviceable condition at the proper places ready for instant use.[56]

§ 2516. Condition against other insurance

Waiver of condition, see post, §§ 2525(2), 2526, 2529.

§ 2516(1). Texas

Gentlemen of the jury, you are instructed that notice by the assured to the defendant of an intention to take out additional insurance in the future, uncertain in time, uncertain in amount, and depending upon uncertain conditions, and depending on a future and uncertain improvement and enhancement in the value of the property, will not constitute a notice of the taking of other insurance

[54] Greenwich Ins. Co. v. State, 84 S. W. 1025, 74 Ark. 72.

[55] Yoch v. Home Mut. Ins. Co., 44 P. 189, 111 Cal. 503, 34 L. R. A. 857. A written clause in the policy provided that it should cover such merchandise as is usually kept in country stores. There was a printed clause that the keeping of gasoline should avoid the policy, unless the consent of the insurer thereto should be indorsed on the policy.

[56] Aurora Fire Ins. Co. v. Eddy, 55 Ill. 213.

nor a waiver or an estoppel of the conditions of the policy against additional insurance.[57]

§ 2516(2). Wisconsin

You are instructed that, unless you are satisfied that a preponderance of the evidence establishes that information as to other insurance was given to ———, as claimed by plaintiff, your verdict must be for the defendant.[58]

§ 2517. Iron safe clause

Waiver of condition, see post, § 2530.

§ 2517(1). Arkansas

The court instructs the jury that if they find from the testimony that plaintiff kept a set of books suitable for the business he was carrying on, and which are ordinarily kept for such business, and that he kept an iron safe such as is provided for in the policy sued on, and that he was in the habit of placing said set of books in such safe after closing up his business, but that on the night of the fire he did not close up his store for the night, but did retire to his room with his books for the purpose of posting the same, and did leave a light burning in the store with the intention of returning to the store with his books when he had finished working on the same for the purpose of placing the same in his safe for the night, but that, while the said books were in his manual possession in his private room near the store, the alarm of fire was suddenly given, and plaintiff was unable to replace them in his safe, and the said books were then and there burned, then in that event, if the jury so find, the court instructs you that such acts on the part of the plaintiff were a substantial compliance with the terms of the policy in reference to keeping his books in his safe, and you will find for the plaintiff upon that point.[59]

§ 2517(2). Iowa

The court instructs the jury that the failure on the part of plaintiffs to comply with the provisions of the policy as to keeping books and inventories and keeping the same in a safe place would not defeat the right of recovery, but that the provision in the policy requiring plaintiffs to produce such books and inventories in case of loss made it incumbent upon plaintiffs to reasonably and substantially comply therewith when called upon by defendant to do so, and that a failure of plaintiffs to produce such books and inventories would defeat plaintiffs' recovery unless a waiver of

[57] Reliance Ins. Co. of Philadelphia v. Dalton (Civ. App.) 178 S. W. 966.

[58] Bruger v. Princeton & St. Marie. Mut. Fire Ins. Co., 109 N. W. 95, 129 Wis. 281.

[59] Capital Fire Ins. Co. v. Kaufman, 121 S. W. 289, 91 Ark. 310.

the breach of the condition of the policy in this respect was shown.[60]

§ 2517(3). Texas

With reference to this special defense, you are told that, if you find and believe from the evidence before you, that ——— did not keep a set of books which showed with reasonable certainty a complete record of his business transactions, including purchases, sales both for cash and credit, then, if you so find, such failure on his part would be such a breach of said warranties, as would defeat a recovery in this case, but if you find and believe that the books, inventories, etc., kept and presented by ——— and furnished to defendant's company, and used in evidence in this case, show with reasonable certainty a complete record of his business transactions, including purchases and sales, both for cash and credit, then, if you so find, there would be no breach of said warranties under the first defense set up.[61]

§ 2517(4). Virginia

You are instructed that, if the jury believe from the evidence that an inventory substantially in accordance with the requirements of the policy was made out by the plaintiff within ——— months prior to the date of the policy, then they are instructed that the plaintiff was under no obligation to make any other inventory, or keep any set of books of business transactions or any bills or invoices of any purchases or sales (if any were made), except such business, purchases, or sales as were made since the date of the inventory; and if they believe that the plaintiff did keep such a record of sales or purchases, and did produce it and the original inventory after the fire, then they are instructed that this is a sufficient compliance with the provisions of the policy in this respect.[62]

§ 2517(5). West Virginia

The court instructs the jury that if they believe from the evidence in this case that the plaintiff kept a book or set of books either in an iron safe or in any other safe place other than the premises burned, which book or books contained a correct record of the lumber manufactured and shipped, and that said book or books was presented to the agent of the defendant and no other book or books were asked for by said agent, and that in pursuance of an inspection of said book or books an adjustment was made with the plaintiff, and that said adjustment was effected without fraud knowingly and willfully being practiced upon the de-

[60] Rundell & Hough v. Anchor Fire Ins. Co., 101 N. W. 517.

[61] Phœnix Ins. Co. of Hartford v. Padgitt (Civ. App.) 42 S. W. 800.

[62] North British & Mercantile Ins. Co. v. Edmundson, 52 S. E. 350, 104 Va. 486.

fendant, and the plaintiff had an inventory taken of said lumber either 12 calendar months before said policy of insurance was issued or within 30 days after it was issued, then the iron safe clause or condition of said policy was complied with and a recovery by the plaintiff cannot be defeated on that ground.[63]

§ 2518. Same—Duty of insured as to inventories

§ 2518(1). Arkansas

The court instructs the jury that if they find from the testimony in the case that plaintiff took an inventory such as is contemplated in the policy sued on in ———, and again in ———, and such inventory was so taken and kept, but was destroyed by fire without the fault or negligence of the plaintiff, then in that event the jury will find that plaintiff complied with the terms of the policy in reference to the inventory, and you will find for the plaintiff upon this branch of the case, although a portion of said inventories was destroyed by the fire.[64]

§ 2518(2). Virginia

The court instructs the jury that if they believe from the evidence the plaintiffs in this case adopted the following method of taking an inventory—that is, they took upon a piece of paper an itemized statement of all of each line of goods in their stock, and that they then footed up the value of said items, and that the footings so obtained and compiled they now present as their inventory, and that they did not preserve the pieces of paper on which the items and their values were recorded, but only preserved the general footings of each line of goods in their stock—then the court instructs the jury that this alleged inventory, based upon said footings, is not a complete itemized inventory of the stock of goods on hand and provided for in the policy sued upon.[65]

§ 2519. Same—Sufficiency of method of keeping books

§ 2519(1). Arkansas

The court instructs the jury that they have a right to take into consideration the custom or mode of doing business such as the opening and closing of the store, the time and manner of writing up the books that was incident or prevailing at ———, the place where the goods insured were located.[66]

[63] Bond v. National Fire Ins. Co., 88 S. E. 389, 77 W. Va. 736.

[64] Capital Fire Ins. Co. v. Kaufman, 121 S. W. 289, 91 Ark. 310.

[65] Houff & Holler v. German American Ins. Co., 66 S. E. 831, 110 Va. 585.

[66] Capital Fire Ins. Co. v. Kaufman, 121 S. W. 289, 91 Ark. 310.

§ 2519(2). Virginia

The court instructs the jury that, if they believe from the evidence the plaintiffs adopted the following method of keeping such books, as they claimed to have kept, to show sales made by them for cash or credit—that is, they deposited in the bank to their credit all money collected during the existence of the policy, whether from accounts that were made for goods sold prior to the alleged inventory, or for goods sold for cash thereafter, and also deposited along with said sums to their credit in the same account moneys collected by ———, one of the plaintiffs, from his farm, and also from a separate business in which he was interested, as a butcher, and also moneys collected by him in his business as postmaster, and also deposited in said account moneys that were left with him by individuals who desired the plaintiffs to give them a check for their uses, then said bank book does not constitute a book showing clearly and plainly a complete record of all sales and shipments, both for cash and credit, as is provided for in the policy sued upon in this case, and the production of such book did not constitute a substantial compliance with the terms of the policy.[67]

§ 2520. Employment of watchman

The court instructs the jury that it was the duty of the plaintiff to exercise ordinary care to employ two competent watchmen, one of whom should be kept on board the boat at all times, and it was the duty of the one on board the boat to exercise such care and skill to watch the boat as reasonably prudent and careful men usually exercise in watching similar premises during night hours.[68]

I. Payment of Premiums or Assessments

§ 2521. Notice of assessments

The court instructs the jury that if they believe from the evidence that the plaintiff, at the time of her application for the policy in litigation, either by herself or through her agent, gave as her post office address ———, and that she has not since, by written notice to said company, directed a change to be made in such address, and if they further believe from the evidence that on or before the ——— day of ———, a notice setting forth the rate of assessment fixed by the board of directors to meet the expenses of the company for the year ———, and the time by which the assessment was to be paid, was put in an envelope addressed to the plaintiff at such named address, and deposited in the post of-

[67] Houff & Holler v. German American Ins. Co., 66 S. E. 831, 110 Va. 585.

[68] St. Paul Fire & Marine Ins. Co. of St. Paul, Minn., v. Kendle, 173 S. W. 373, 163 Ky. 146.

fice at ———, the place of the home office of the defendant company, for transmission to the plaintiff, duly stamped, and that the plaintiff did not prior to the occurrence of the fire by which the building insured was destroyed pay to the defendant said assessment, then they shall find for the defendant; the court instructing the jury that it is immaterial whether or not said notice was actually received by the plaintiff or not.[69]

The court instructs the jury that mailing such form of notice of assessment as has been proven to have been used by the defendant company in this case, in giving its members notices of the assessment for the year ———, inclosed in an unsealed envelope with a one-cent postage stamp attached, constitutes a sufficient mailing of such notice, if the jury further believe from the evidence that such notice was addressed to the plaintiff at the post office address furnished to the company in accordance with its by-laws and regulations at least ——— days before the said assessment became payable.[70]

The court instructs the jury that in the application of the assured for membership in the defendant company, which is the foundation of the policy sued on in this case, the post office address of the assured is given by her as ———; and the court further instructs the jury that there is no evidence in this case tending to show that said post office address was subsequently changed by means of notice in writing to the defendant company; and if the jury believe from the evidence that the board of directors of the defendant company fixed the assessment on its members for the year ———, and that the by-laws of the company prescribed that the same should be paid on or before ———, and that more than ——— days prior to such date the defendant company caused printed notice of the rate of said assessment and the time fixed for payment of the same to be deposited in the post office at ———, addressed to the plaintiff at the said address given by her to defendant, with sufficient postage thereon to pay for its transmission to such address, and that the said plaintiff failed to pay the said assessment prior to the date of the destruction of the insured building, they will find for the defendant; the court instructing the jury for the purposes of this case that it is immaterial whether the said plaintiff ever actually received said notice or not.[71]

[69] Mutual Fire Ins. Co. v. Turner, 79 S. E. 1067, 115 Va. 631.

[70] Mutual Fire Ins. Co. v. Turner, 79 S. E. 1067, 115 Va. 631.

[71] Mutual Fire Ins. Co. v. Turner, 79 S. E. 1067, 115 Va. 631.

J. Estoppel to Assert, or Waiver of, Conditions of Policy

§ 2522. Requiring insured, by virtue of policy, to do things involving expense to him

You are instructed that if the company, after it had notice of the repairs or alterations upon which it now relies to defeat the policy, required, by virtue of the policy, any action on the part of the plaintiff by which he was subjected to inconvenience or expense, it has waived this forfeiture.[72]

§ 2523. Waiver of condition of policy at time of delivery thereof

§ 2523(1). Michigan

As to the knowledge of the agent that the ——— Company was operating its factory at night, you have heard the testimony concerning that. The policy itself contains this language: "This entire policy, unless otherwise provided by agreement, shall be void if the insured now is or shall hereafter make or procure any other contract of insurance, or if the subject of insurance be a manufacturing establishment, and it be operated, in whole or in part, at night later than ten o'clock." Now, the testimony in this case shows that the establishment was operated at night, and the loss actually occurred at three or four o'clock in the morning. I charge you, however, as I have already indicated, that if, at the time this policy was delivered by the agent of the insurance company, he knew that the manufactuory was being operated at night, the company is estopped from making this claim; that is to say, the company, under such circumstances as that, must be assumed to have that knowledge, and make the insurance with it. So that, in disposing of that question, the simple thing for you to determine is whether or not the agent had the knowledge at the time he delivered the policy. If he did, then the policy is valid; if he did not, the policy is void.[73]

§ 2523(2). South Carolina

You are instructed that, notwithstanding the policy specifies, that it shall be void unless the insured keeps his books in an iron safe, or in a safe not upon the premises, yet if it be known to the agent of the company that the insured did not have an iron safe and did not keep his books in a place apart from the premises—if those facts be known to the agent and nevertheless the insurance is issued and continued upon the property—the law says that knowledge is imputed to the company, that the company has knowledge of it because it can act only through its agent, and by the knowledge of

[72] Roby v. American Cent. Ins. Co. of St. Louis, 24 N. E. 808, 120 N. Y. 510.

[73] Improved Match Co. v. Michigan Mut. Fire Ins. Co., 80 N. W. 1088, 122 Mich. 256.

that state of facts, knowing that they are facts that he did not keep his books in a safe, and does keep them upon the premises, and they acquiesce in that, it would not be fair and right for them to go on and keep insurance on the man's property, taking his money for it, and, when a loss occurs, they all the time knowing he was not complying with the requirements in the policy, to then say that the policy was void. You see that that would not be fair, and that is what has been denominated in the law from one of the books read to you as perfidy or dishonesty.[74]

§ 2524. Giving notice of election to rebuild with knowledge of violation of conditions of policy by insured

The jury are instructed that, if the jury believe from the evidence that the defendant gave to plaintiffs the notice of their intention to rebuild the premises destroyed by fire, given in evidence by plaintiffs, and at the time of giving said notice the defendant knew that no watchman had been kept upon said premises from the time of the issuing of said policy to the time of the happening of the loss, then the jury may infer that the defendant waived the right to interpose that fact as a defense to the right of plaintiffs to recover under the policy, and the burden of proof is on the defendant to satisfy the jury that at the time of giving such notice the defendant was ignorant of that fact.[75]

The jury are instructed that, although the jury may believe that at the time of making the application for the policy sued upon by plaintiffs, or their agents, it was represented by them, or their agents, that a watchman was and would be kept in charge of the premises insured, and that that matter was regarded by the agents of defendant as material to the risk—that is, without such representations the risk would not have been taken, or a higher rate of premium would have been charged therefor—and that the building was damaged or lost by fire, and at the time there was no watchman in charge of the premises, yet, if the jury further believe from the evidence that the defendant, by its authorized officers and agents, knew these facts, and with such knowledge the defendant, alone, or in conjunction with other companies, agreed to make good the loss by rebuilding the premises, and notified plaintiffs thereof, and failed or refused to rebuild, and made no objections to making good the loss on the ground that no watchman was in charge of the premises at the time of the fire until after the institution of this suit, from these circumstances the jury are author-

[74] Hankinson v. Piedmont Mut. Ins. Co., 61 S. E. 905, 80 S. C. 392.

[75] Bersche v. Globe Mut. Ins. Co., 31 Mo. 546.

ized to infer that defendant waived that matter, and in such case it constitutes no defence to this suit.[76]

§ 2525. Authority of agent to waive conditions of policy

§ 2525(1). Alabama

You are instructed that, if ——— had apparent authority to waive on behalf of this defendant a breach of any conditions of the policy, or if you are reasonably satisfied from the evidence that said ——— was so held out by the defendant, or had apparent authority so to do, then any private limitations upon his authority are as though no such existed as to the issues in this cause, unless you further believe from the evidence that the plaintiff knew of these limitations, or had notice of some fact or facts sufficient to put him on inquiry, which, if followed, would have disclosed to the plaintiff such limitations.[77]

You are instructed that, if you believe from the evidence that ——— was sent here for the purpose of adjusting the loss of this plaintiff, and that he, the said ———, had apparent authority to settle such loss and that in conformity with his authority and apparent power the said ——— entered into the investigation of said loss, and this plaintiff had no knowledge of his limited authority, and no notice of any facts sufficient to put the plaintiff on inquiry by which he could discover such limtiations, then I charge you you must find for the plaintiff on the question of authority of ——— to bind the defendant.[78]

§ 2525(2). Texas

You are instructed that, where it is in evidence that the insured obtained further insurance in other companies contrary to the stipulations of policy sued on, such policy is vitiated. By the terms of the policy sued on, consent in writing on the policy itself is requisite; but if such consent in writing were in fact given by the defendant company, or by some agent who had the authority to give such written consent, and if plaintiffs, after obtaining additional insurance in other companies, they having previously notified the agent, who, according to the terms of his agency, was charged with the duty of receiving such notice, received from such agent written consent to such additional insurance, then such written consent is binding upon the company; but the burden of proof is upon plaintiffs, and plaintiffs must satisfy the jury by proof that ——— did give the written consent, after he was informed of the amount of additional insurance, the company in which such additional insurance was so obtained; and furthermore, plaintiffs must prove

[76] Bersche v. Globe Mut. Ins. Co., 31 Mo. 546.
[77] Georgia Home Ins. Co. v. Allen, 30 So. 537, 128 Ala. 451.
[78] Georgia Home Ins. Co. v. Allen, 30 So. 537, 128 Ala. 451.

that ——— had the authority to give such consent. No presumption of such authority arises, but such an authority must be proved by plaintiffs.[79]

§ 2526. Estoppel by knowledge of agent

§ 2526(1). Missouri

The jury are instructed that notice to the agent is notice to the principal, and if you believe from the evidence that ——— was the agent of the defendant company, with authority to write and deliver policies for the defendant company, and that he was notified by the plaintiff of his intention to take out the additional insurance placed on plaintiff's property, and that he did not object to the same or suggest any breach of the condition of the policy issued by defendant, in consequence thereof, then the jury would be authorized to find from these facts that the defendant waived the provision of the policy relied on as defense in this case.[80]

§ 2526(2). Washington

The court instructs the jury that if they are convinced by a preponderance of the evidence that A. assumed to be a soliciting agent of defendant, or of any undisclosed insurance company, and in that capacity solicited and obtained from plaintiff an application for insurance upon the property in question, either written or oral, and that plaintiff gave him such application, believing him to be such agent, and gave it to him as such agent, and the defendant thereafter, with knowledge or notice that A. had assumed so to act, and had thereby obtained such application, issued the policy, and received the premium from the plaintiff, intending that the policy should be received by the plaintiff in compliance with the application to A., and that the plaintiff did so receive it, then, for the purpose of this suit, the act of A. in soliciting and receiving the application became in legal effect the act of the defendant; and if at the time of making such application the plaintiff informed A. that there was already $——— other insurance on the property, the knowledge thus obtained by A. is in law the knowledge of the defendant, and estops defendant from alleging that the policy is void on account of the other policies existing at the time the policy was issued.[81]

§ 2527. Application of rule that knowledge of agent is knowledge of insurer to mutual companies

You are instructed that the general rule of knowledge of the agent being the knowledge of the insurance company applies as well

[79] Planters' Mutual Ins. Co. v. Lyons, Lindenthal & Co., 38 Tex. 253.

[80] Polk v. Western Assur. Co., 90 S. W. 397, 114 Mo. App. 514.

[81] Staats v. Pioneer Ins. Ass'n, 104 P. 185, 55 Wash. 51.

to mutual companies as it does to other insurance companies. As has been read to you here from the books, the court says: "That the companies carrying on the business on the assessment plan have the same object in view, and there is the same necessity of trusting the conduct of the business to a certain number of persons, and there is no reason why a more favorable rule should prevail in behalf of those conducting business on the assessment plan than those carrying on the business on a different plan." So you see that there is no distinction on the question as between the two sorts of companies.[82]

§ 2528. Waiver of condition as to occupancy of premises

The court instructs the jury that, if they find the defendant's agent did tell the plaintiff, in substance, that the policy would hold good for ——— days, although the premises were vacant, the plaintiff is entitled to recover.[83]

§ 2529. Waiver of conditions against other insurance

See, also, ante, §§ 2525(2), 2526.

§ 2529(1). Minnesota

You are instructed that a waiver may be said to be a voluntary relinquishment of a known right. It need not be by word of mouth, and it need not be in writing. It may be consent expressly or impliedly given. It may consist in the doing of some act which is inconsistent with an intention to insist on a strict performance, or in a course of conduct inconsistent with and in disregard of the terms of the contract. The plaintiff claims that ——— waived such breach if with knowledge of the additional insurance he expressed to the plaintiff his consent thereto; and if with such knowledge he did express his consent thereto to the plaintiff, then as a matter of law he did thereby consent to the additional insurance and waived the breach of the condition involved in procuring it. He waived it, also, if with such knowledge he elected to and did treat and recognize the policy of insurance as a subsisting and valid contract.[84]

§ 2529(2). Missouri

The jury are instructed that although you may believe from the evidence that after receiving the policy from the defendant the plaintiff did procure other insurance on the property in question (without having the consent of the other company written on the policy), still, if you further believe from the evidence that one W.

[82] Hankinson v. Piedmont Mut. Ins. Co., 61 S. E. 905, 80 S. C. 392.

[83] Hotchkiss v. Phœnix Ins. Co. of Brooklyn, 44 N. W. 1106, 76 Wis. 269, 20 Am. St. Rep. 69.

[84] Coppoletti v. Citizens' Ins. Co. of Missouri, 143 N. W. 787, 123 Minn. 325.

was at the time local agent of the company, and had authority to write, issue, sign, and deliver policies of insurance, and receive premiums therefor, and further find that while the said W. was so acting as agent, the plaintiff notified him of his intention to take out other additional insurance on the property in question, and at the time or afterwards, told him he was about to do so, and that neither said agent nor any one else on behalf of the defendant made any objection to the issuance of such other policy, and took no steps to cancel the policy sued on, nor notified the plaintiff that such additional insurance, without being indorsed thereon, would render the policy sued on void, then the defendant may be deemed to have consented to such additional insurance and to have waived the condition in the policy regarding such additional insurance, and the plaintiff's right to recover would not be affected thereby.[85]

§ 2530. Waiver of iron safe clause

§ 2530(1). Missouri

The court instructs the jury that, although you may believe from the evidence that the inventory and books of account presenting a record of the business transaction from the date of the inventory until the time of the fire were not kept by the plaintiffs in accordance with the terms of the policy, or, if they were made and kept in accordance with the terms of the policy, were left in the building and destroyed by the fire, yet, if the state agent of the company visited the locality of the fire after the occurrence of the loss, and if he was the defendant's adjuster and as such was informed and became possessed of the knowledge that said inventory and books were not kept by the plaintiffs in accordance with the terms of the policy or were destroyed by said fire, and, after becoming possessed of such knowledge, directed and instructed the plaintiffs to secure the invoice bills of all the goods which they had purchased from the date of the inventory to the time of the fire, and secure a statement of the deposits of the plaintiffs in the banks and forward the same, with the proofs of loss to the defendant company, and if you further find that said plaintiffs did secure said invoice bills and statement in accordance with the direction and request of the said state agent, and did forward the same to the defendant with the proofs of loss, as directed by said agent, and if plaintiffs incurred any expense or loss of time in securing said invoice bills and statements of deposits from said banks, then the defendant has waived any right to forfeiture of said policy by reason of the failure of the plaintiffs to keep or produce said inventories and books of account.[86]

[85] Polk v. Western Assur. Co., 90 S. W. 397, 114 Mo. App. 514.

[86] Pace v. American Cent. Ins. Co., 158 S. W. 892, 173 Mo. App. 485.

§ 2530(2). South Carolina

You are instructed that if you decide from the testimony that an agent of the company having something more than the mere power of soliciting the insurance knew that plaintiff did not have an iron safe, and that he did not keep his books in that place, and nevertheless issued the policy and let the policy continue in force, why you would realize at once that to permit the company, after the occurrence of a loss, to assert a forfeiture on account of failure to comply with the iron safe clause would not be fair to the man, because the knowledge that the agent had of those facts would be imputed to the company. The company would be held to know that he did not, and it would be estopped. It could not then come in and say the policy was forfeited because the man did not comply with that clause. That would not be fairness, and it is not law.[87]

§ 2531. Effect of waiver

You are instructed that if the jury believe from the evidence that the defendant company waived any of the requirements or conditions of the policy sued on, then they are instructed that such waiver is equivalent to the performance by the plaintiff of such conditions as they believe were so waived.[88]

K. Risks Insured Against and Cause of Loss

§ 2532. Necessity that fire be cause of loss to entitle insured to recovery

You are instructed that, if you believe from the evidence before you that the building described in the policy sued on was not destroyed by fire, you will find for the defendant. In this connection you are instructed that, before the plaintiff can recover, it must appear from the evidence, to your satisfaction, that the fire caused the destruction of the building. If the building fell down before it was burned, and the fire occurred after the building fell down, and if you so believe from the evidence before you, you will find for the defendant. If the evidence satisfies you that the building was on fire before it fell, and that such fire caused the fall of the building, then you should find for plaintiff as previously explained in the first paragraph of these instructions.[89]

[87] Plunkett v. Piedmont Mut. Ins. Co., 61 S. E. 893, 80 S. C. 407.

[88] North British & Mercantile Ins. Co. v. Edmundson, 52 S. E. 350, 104 Va. 486.

[89] Liverpool & London & Globe Ins. Co. v. Ende, 65 Tex. 118.

§ 2533. Loss by fire or explosion

§ 2533(1). United States

The jury are instructed that if the jury believe from the evidence that on ——— the commodities of the plaintiff, mentioned in the policy of insurance offered in evidence, were destroyed or injured or lost in the manner testified to by the plaintiff's witnesses, and if they further find from the evidence that such loss or damage was the result of fire not having its origin or commencement by or with an explosion of any sort, but by the accidental combustion of any nonexplosive substance in the cellar of plaintiff's premises, described in said policy, and that in consequence of such combustion the front building erected on said premises was prostrated, and the loss or damage to the property insured was the immediate result thereof, then the loss was occasioned by fire within the meaning of the policy, and the plaintiff is entitled to recover in this action.[90]

You are instructed that, if the loss was caused solely by an explosion or ignition of explosive matter, not caused by a precedent fire, the plaintiff cannot recover.[91]

You are instructed that, if an explosion occurred from contact of escaping vapor with a match lighted and held by an employee of the plaintiff, and the loss resulted solely from such explosion, the verdict must be for the defendant.[92]

You are instructed that a match lighted and held by an employee of the plaintiff coming in contact with the vapor and causing an explosion is not to be considered as "fire" within the meaning of the policy.[93]

Now, gentlemen of the jury, when the word "explosion" was used in the policy, the company as ordinary men—at least its officers were ordinary men, and not, as I assume, scientific men—and the party insured as an ordinary man, are presumed to have understood the word "explosion" in its ordinary and popular sense. Not what some scientific man would define to be an explosion, but what the ordinary man would understand to be meant by that word. And, after all, the question here, in determining whether there was an explosion or nonexplosion, is: What do you, as ordinary men, understand occurred at that time in the light of all the testimony? Was it an explosion in the ordinary and popular sense of that

[90] Mitchell v. Potomac Ins. Co. of Georgetown (D. C.) 22 S. Ct. 22, 183 U. S. 42, 46 L. Ed. 74.

[91] Mitchell v. Potomac Ins. Co. of Georgetown (D. C.) 22 S. Ct. 22, 183 U. S. 42, 46 L. Ed. 74.

[92] Mitchell v. Potomac Ins. Co. of Georgetown (D. C.) 22 S. Ct. 22, 183 U. S. 42, 46 L. Ed. 74.

[93] Mitchell v. Potomac Ins. Co. of Georgetown (D. C.) 22 S. Ct. 22, 183 U. S. 42, 46 L. Ed. 74.

word, or was it a fire with a subsequent explosion or a subsequent collapse of the building as a sequence to the fire?[94]

§ 2533(2). Illinois

The jury are instructed that, if you believe from the evidence that the fire in question preceded and caused the explosion in question, then the loss, if any, suffered by the plaintiff either by fire or by the explosion, or both, is, within the intent and meaning of the policies in question, a loss resulting from fire.[95]

§ 2534. Whether permission by insurer to keep gasoline renders it liable for loss resulting from explosion of gasoline

You hardly need be told, I think, as ordinary business men, that a privilege to keep something does not bring the privileged article within the articles insured by the policy. Suppose that clause read "privilege to keep not more than 50 pounds of gunpowder," on the premises, and the party insured was keeping a dry goods store or a drug store, would it be contended by any sensible man that the gunpowder was an article insured by the policy? Clearly this privilege to keep was inserted to offset the forfeiture of the policy if the provision contained in this policy were violated without this privilege, and that provision is this: "If gunpowder, phosphorus, naptha, benzine, or crude earth or coal oil are kept on the premises, or if camphene, burning fluid, or refined coal or earth oils are kept for sale, stored, or used on the premises in quantities exceeding one barrel at any one time, without written consent of the company, the policy shall be void." So that if these ——— barrels of gasoline were kept upon those premises without the written consent of the company, the policy would have been absolutely forfeited and the plaintiff would not have been entitled to recover damages for loss if the whole stock had been destroyed by fire. So it must be believed that the plaintiff, when he took his policy, fully understood what its terms and provisions were. That is the reason that he asked for, received, and paid for this privilege of keeping not more than ——— barrels of gasoline on the premises. I suppose that, inasmuch as keeping such inflammable material upon the premises would naturally increase the risk of loss, the insurance company would require the payment of a larger premium than it would have required if such inflammable material were not kept on the premises.[96]

[94] Mitchell v. Potomac Ins. Co. of Georgetown (D. C.) 22 S. Ct. 22, 183 U. S. 42, 46 L. Ed. 74.

[95] Torpedo Top Co. v. Royal Ins. Co., 162 Ill. App. 338.

[96] Mitchell v. Potomac Insurance Co. of Georgetown (D. C.) 22 S. Ct. 22, 183 U. S. 42, 46 L. Ed. 74.

§ 2535. Injuries caused by collapse of building

§ 2535(1). Alabama

The court instructs the jury that this is a suit by plaintiff against defendant for the recovery of damages done to a certain stock of goods by reason of fire; and if the jury are reasonably satisfied from the evidence that the building in which said goods were contained collapsed or fell on account of its inherent weakness, or from any other cause other than fire, then plaintiff could not be entitled to recover against defendant for any damages which may have been caused to said stock of goods by the falling of the building, even though the jury may believe that the building was on fire before it fell.[97]

The court instructs the jury that, if you find from the evidence that the building in question, in which plaintiff's stock of goods were stored, caught fire before it fell to the ground, but that none of the plaintiff's goods were on fire prior to the collapse of the building, and if the jury are further reasonably satisfied from the evidence that the building collapsed and fell by reason of its inherent weakness, or for any other cause other than fire, and that the only damage that accrued to the stock of goods occurred after such collapse, and by reason of the fact that the building fell, and by reason of damages done to the goods by fire after the collapse, then the jury should find for defendant.[98]

§ 2535(2). Kentucky

The court instructs the jury that the defendant in this action is not liable under its policy to the plaintiffs for any loss or damage to their merchandise, if the building described in the petition fell, except the fall was the result of fire.[99]

§ 2536. Fire resulting from explosion and ensuing collapse of building

You are instructed that if you find from the evidence that the plaintiff has established his case by a preponderance of all the evidence, that plaintiff's building or some part thereof fell by reason of some concussion occurring outside his building (for I recall no evidence tending to show an explosion or concussion inside said building), or from fire either outside or inside said building, and that plaintiff has otherwise so proved his contentions, and that, through such explosion or fire, fire in plaintiff's building ensued or was communicated thereto from without, and his said stock was destroyed or damaged, then plaintiff is entitled to recover herein

[97] Ogburn-Griffin Grocery Co. v. Orient Ins. Co., 66 So. 434, 188 Ala. 218.

[98] Ogburn-Griffin Grocery Co. v. Orient Ins. Co., 66 So. 434, 188 Ala. 218.

[99] Transatlantic Fire Ins. Co. v. Bamberger, 11 S. W. 595, 11 Ky. Law Rep. 101.

for such loss as hereinafter stated. If, however, you find that plaintiff's building, or some material part thereof, fell by reason of its own defects, or overloading, or both, plaintiff cannot recover for ensuing fire loss, under the terms of the policy sued on.[1]

§ 2537. Exception from policy of earthquake-caused fire

You are instructed that if you find that the fire was first communicated to those premises by and caught from an earthquake-caused fire in the manner I have indicated, and that after the premises had been ignited therefrom, such fire came in contact with an explosive substance thereon, causing it to explode, and then continued to burn to and consume plaintiff's property, such a fire would not be within this provision of the policy a fire ensuing upon explosion, but would still retain its character of an earthquake-caused fire. In such a case the origin of the fire is not changed by the intervention of the explosion which it has itself caused, although the explosion may, or may not, to some extent, have accelerated its action and spread. It would not be different than if the fire had come in contact with a substance highly combustible and inflammable, though not explosive, which might greatly increase its volume and accentuate its spread, but it would still be the same fire thereafter as before; it would not create a new cause, but the cause would still remain the same. That is to say, it does not change the relation of causes in a legal sense to substitute a substance upon which fire acts, both inflammable and explosive, for one which is merely combustible. The only difference in the elements of the question in such an instance would be that the explosive substance when ignited would consume with more rapidity than the one merely combustible. The active agent is still the fire, though it acts in different ways upon the successive subjects of its action, and, if it was at first an earthquake fire, it still remains so, notwithstanding the explosion. To constitute the explosion a new or independent cause, it must be a fire, as I have stated, originated by and ensuing upon explosion, not one which in its course incidentally causes an explosion. In the latter case explosion is merely an incident, and not the cause. There is some evidence in the case tending to show that an explosion or an explosive sound was heard by some of the witnesses on or near the premises on ——— street at or about the time the fire was discovered on those premises. Should you find that the fire on those premises was caused by and ensued upon an explosion of any kind, then your verdict must be for the plaintiff, since it is admitted that the fire from those premises was the one which burned the plaintiff's property; and, if it was started by and ensued upon an explo-

[1] Orient Ins. Co. v. Leonard (C. C. A. Ill.) 120 F. 808, 57 C. C. A. 176.

sion, it would not be an earthquake-caused fire within the terms of the policy.[2]

§ 2538. Defense of arson

§ 2538(1). United States

You are instructed that if, from the whole evidence, you find that ——— had control, management, and power of disposition of this property the same as if he had the title, or that there was an understanding among them [the stockholders] that he should burn the property in order that they might collect the insurance, and that ——— did, as alleged by the defendant, willfully set fire to his store on the night of ———, then you should find a verdict for the defendant.[3]

§ 2538(2). Wisconsin

You are instructed that the defendant company claims in this case that the plaintiff was actuated by a motive of gain, in that he had purchased this property whereon these buildings were situated for the purpose of speculation—that is, for the purpose of making money by such purchase, and the sale of it again—and that he determined that if he could collect the insurance on those buildings, and then sell the land, that he would then gain by such transaction a considerable sum of money. Whether or not the plaintiff was actuated by any motive of that kind is a disputed fact. He denies it. It is for you to determine whether any such fact existed.[4]

L. Reinsurance

§ 2539. Liability of reinsurer—Effect of judgment against original insurer

The jury are instructed that the contract of ——— did not, in its terms or by its legal import, disable the ——— Insurance Company, the original insurer, from defending in good faith the suit of H. & P. against the said insurance company, but should be considered by the jury as one of the circumstances of the case; that if the judgment was obtained by fraud and collusion, then the record of the judgment was no evidence of plaintiffs' claim; that fraud or collusion cannot be presumed, but must be proved, and that the burden to show fraud is on the defendant; and that, if the jury believe from the evidence that the said insurance company, and the attorneys employed by it, did in good faith use all the honest means in their power to defeat the action, and that defendant

[2] German Savings & Loan Society v. Commercial Union Assur. Co., Limited, of London, Eng. (C. C. A. Cal.) 187 F. 758, 109 C. C. A. 506.

[3] Melly Co. v. London & L. Fire Ins. Co. (C. C. Pa.) 142 F. 873.

[4] Agnew v. Farmers' Mutual Protective Fire Ins. Co. of Town of Medina, 70 N. W. 554, 95 Wis. 445.

had notice of suit, the judgment was conclusive against defendant, and the jury should find for plaintiffs in this action.[5]

M. Notice and Proofs of Loss

§ 2540. Effect of failure of insured to submit proofs of loss

§ 2540(1). Kentucky

The court instructs the jury that they should find for the plaintiffs in the sum of $———, with interest from ———, unless they shall believe from the evidence that the defendant did not, within ——— days after the loss complained of in the petition, deny liability under the policy sued on, and that the plaintiffs failed, within sixty days after the loss, to furnish to the defendant or its agents sufficient proofs of said loss, or that an attempt had been made to burn the house in question before the policy sued on was issued, and that this fact was unknown to the agent of the defendant when he solicited plaintiffs to insure, and that plaintiffs, or either of them, concealed that fact from said agent for the purpose of obtaining insurance.[6]

The court instructs the jury that, if they shall believe from the evidence that within ——— days after the loss complained of the defendant denied that it was liable under the policy sued on, then it was not necessary for the plaintiffs to furnish the defendants with proofs of loss.[7]

You are instructed that if the plaintiffs did not, within ——— days after the said loss, furnish to the defendant sufficient proof thereof, then the law is for the defendant, and so the jury should find, unless the defendants demanded other and further proof that it was within the power of plaintiffs to furnish, and plaintiffs did furnish the further proof demanded within a reasonable time after the same was demanded.[8]

§ 2540(2). West Virginia

The court instructs the jury that, if they find from the evidence that the plaintiff has not made and rendered to the defendant a statement in writing, signed and sworn to by her, stating all other insurance, whether valid or not, covering any of the property insured by the defendant, the cash value of each item of property insured and the amount of loss thereon, then the plaintiff cannot recover, unless the jury shall further find that the defendant waived the furnishing of such statement by such conduct of the defendant

[5] Strong v. American Central Life Ins. Co., 4 Mo. App. 7.

[6] German-American Ins. Co. v. Norris, 37 S. W. 267, 100 Ky. 29, 66 Am. St. Rep. 324, 18 Ky. Law Rep. 537.

[7] German-American Ins. Co. v. Norris, 37 S. W. 267, 100 Ky. 29, 66 Am. St. Rep. 324, 18 Ky. Law Rep. 537.

[8] German-American Ins. Co. v. Norris, 37 S. W. 267, 100 Ky. 29, 66 Am. St. Rep. 324, 18 Ky. Law Rep. 537.

as would reasonably cause the plaintiff to fairly conclude that such requirements or statements had been dispensed with and excused.[9]

§ 2541. Sufficiency of notice of loss

The court instructs the jury that if they believe from the evidence that a fire occurred on the premises of assured at ——— on the ——— day of ———, and that on the next day the plaintiff notified the defendant insurance company through its local agent at ———, of the loss or damage, and further believe from the evidence that within a day or two after such fire another fire occurred, which destroyed the entire plant, and that the plaintiff notified the defendant insurance company the same day by letter through its local agent at ———, and further believe from the evidence that the said local agent notified the said defendant insurance company through its local agent of the total destruction of said insured sawmill and lumber, and that said local agent transmitted the notice to the state agents of the said defendant insurance company, and that in pursuance of said notice of loss the defendant sent or caused to be sent its adjuster, to adjust such loss if any, and that an adjustment was made, then you are instructed that such notice of loss is sufficient, as required by the policy of insurance.[10]

§ 2542. Time of giving notice of loss

The jury are instructed that if the jury believe, from the evidence, that there was such a loss of the property described in the declaration herein as is therein set out, then they are authorized in determining for themselves, from all the facts and circumstances of this case, as developed by the evidence, whether or not, after said loss, the plaintiffs gave immediate notice thereof in writing to defendant.[11]

§ 2543. Time of proving loss

You are instructed that, if the jury believe from the evidence that the plaintiff offered to the defendant a proper proof of loss within a reasonable time, under all the circumstances of the case, after the fire and not later than ——— days prior to the end of ——— months from the date of the fire, then they are instructed that such offer was in full time, even though it was made more than ——— days after the date of the fire.[12]

[9] Levy v. Scottish Union & National Ins. Co., 52 S. E. 449, 58 W. Va. 546.

[10] Bond v. National Fire Ins. Co., 88 S. E. 389, 77 W. Va. 736.

[11] Knickerbocker Ins. Co. v. Gould, 80 Ill. 388.

[12] North British & Mercantile Ins. Co. v. Edmundson, 52 S. E. 350, 104 Va. 486.

§ 2544. Sufficiency of proofs of loss

You are instructed that the proof of loss states that they placed in the schedule the barn at $———, and the house at $———. The plaintiff says that was a fair value and a sound value of the house and the sound value of the barn, as so set forth in the application. The evidence tends to show it was of that value; that the house was of that value and the barn was of that value. If it was, then the proof of loss was sufficient, and was filed in time, on the ——— day of ———, and so far as the proof of loss is concerned, the plaintiff would be entitled to recover.[13]

§ 2545. Making of proofs by agent of insured

The court instructs the jury, that if you believe, from the evidence, that ———, the insured, was, at the time of the fire, ———, absent from his home in ———, and could not be found, so as to make proofs of the loss within the time specified by the policy, then, in that case, such proofs of loss could be made by the agent of the said ———.[14]

§ 2546. Effect of false statements in proofs of loss

§ 2546(1). Michigan

You are instructed that it appears from this policy that it contains this provision: "This entire policy shall be void if the insured has concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning this insurance or the subject thereof; or if the interest of the insured in the property be not truly stated herein; in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after a loss." Mark the language. The clause concerning the insurance or the property insured, or the loss of the value of the property, required the insured to make truthful representations of the fact concerning the entire subject of insurance before and at the time of the fire, and required statements as to the property and its value at any time since the fire, and by means of her written and sworn proofs of loss, and the evidence here upon the witness stand to be truthfully made. By the terms of the policy any false or fraudulent statements affecting this insurance renders the policy void.[15]

I charge you that if you find any of the values specified in the proofs of loss furnished to the defendant company were too high, and that the plaintiff caused or permitted the furnishing of such proofs of a greater amount for any such article than she knew it

[13] Brown v. Vermont Mut. Fire Ins. Co., 102 A. 1042, 92 Vt. 272.

[14] German Fire Ins. Co. of Peoria v. Grunert, 112 Ill. 68, 1 N. E. 113.

[15] Barrett v. Connecticut Fire Ins. Co., 161 N. W. 916, 195 Mich. 209.

to be worth with the intention or expectation of getting a greater amount for the article than she knew she ought to have in fairness to the defendant, then she was guilty of such fraudulent conduct as would make void the policy, and result in the forfeiture of any claim that she might otherwise have had. I further charge you in this connection that any statement concerning the subject of insurance or concerning the amount or value of the property insured or destroyed, or any statement as to its condition or value in her written proof of loss, or here on the witness stand, that were made by her fraudulently and with the intention of fraud would render the policy void.[16]

You are instructed that there are two important questions for you to decide; that is, first, was there a fraud committed in the making of these proofs or in the representations made by her in those proofs as to the value of this piano or any article? Did she intentionally, mark you the language, gentlemen, did she misrepresent the value of any piece of property included within this insurance? Did she make these misrepresentations with intent to defraud the company of any amount? Now, gentlemen, there is this fact for you to find. If you find she did, you will go no further, and your verdict should be no cause of action. If you find there was no intention to perpetrate a fraud, then you will consider the proofs as to the value of loss; in other words, the amount of the loss she suffered by virtue of this fire, and assess her damages fairly and reasonably, finding it alone from the proofs and the evidence in this case, and from no other source.[17]

§ 2546(2). Oklahoma

Gentlemen of the jury, the court instructs you that the defendant in his second defense alleges that plaintiff, after the fire, committed an act of fraud and false swearing in violation of that provision of the insurance contract which is as follows, to wit: "This entire policy shall be void in case of any fraud or false swearing by the insured, touching any matter relating to this insurance or the subject thereof, whether it be before or after loss." In this connection the court instructs you that, if you believe from the evidence that the plaintiff included in his proof of loss which he furnished to the defendant articles of property which did not belong to him, or if he reported to the company in his proof of loss an extremely large amount of cotton to be in the cotton house which, in fact, was not in the house at the time of said fire, and he made such false and fraudulent report knowingly and with intent to defraud the company, this would avoid the policy, and the plaintiff could not re-

[16] Barrett v. Connecticut Fire Ins. Co., 161 N. W. 916, 195 Mich. 209.

[17] Barrett v. Connecticut Fire Ins. Co., 161 N. W. 916, 195 Mich. 209.

cover in this suit, and it would be your duty to find for the defendant.[18]

§ 2547. Same—False statements by agent of insured

The court instructs the jury that if, from the evidence, you find that the insured delegated to any one as his agent the duty of complying with the company's demand for copies of bills, and such agent, with or without the knowledge of the insured, designed, invented or procured and filed fraudulent bills for goods never purchased or owned by the insured, such action would be connected with the service and within the scope of the employment, and the verdict should be for the defendant.[19]

The court instructs the jury that if you find, from the evidence, that his son was the general agent of the insured for the purpose of carrying on his business and was well acquainted with such business, and that the duties of such agent included that of complying with the company's demand for bills of purchases, and that said agent in pretended compliance with such demand furnished to or caused to be filed with the defendant company bills for goods never purchased or owned by the insured, the verdict should be for the defendant.[20]

§ 2548. Same—Misstatements made by adjuster

You are instructed that, if you find from the evidence that the proofs of loss signed and sworn to on the ——— day of ———, and introduced in evidence, were made out and prepared by ——— in the capacity of adjuster, duly appointed and authorized by defendant insurance company to ascertain and adjust the loss occasioned by the fire alleged in the complaint, and you further find that, at the time plaintiff ——— signed and swore to said proofs of loss and delivered them to said insurance company, he had not read or heard read the contents of said proofs of loss, and did not know the contents thereof, then I instruct you that any misstatements therein contained, of which said plaintiff was ignorant, do not work a forfeiture of said policy of insurance or deprive the plaintiffs of the right of recovery thereunder.[21]

§ 2549. Waiver of proofs of loss or defects therein

§ 2549(1). Arkansas

The jury are instructed that, as deficiencies in the preliminary proof may be supplied whenever objection to pay the loss is put

[18] Royal Ins. Co. v. Scritchfield, 152 P. 97, 51 Okl. 523.

[19] Mick v. Royal Exch. Assur., 91 A. 102, 87 N. J. Law, 607, 52 L. R. A. (N. S.) 1074.

[20] Mick v. Royal Exch. Assur., 91 A. 102, 87 N. J. Law, 607, 52 L. R. A. (N. S.) 1074.

[21] Miller v. Fireman's Fund Ins. Co. of San Francisco, 92 P. 332, 6 Cal. App. 395.

upon that ground, good faith on the part of the insurers requires that, if they mean to insist upon such defects, they should apprise the assured of the deficiencies, or put their refusal upon that ground, as well as others, so as to give the assured an opportunity to supply the defect; so, if you find from the evidence that the defendant insurance company was notified of the loss by fire, and through its agents repudiated all liability, and informed the plaintiff that the policy sued on would not be paid, and said nothing to plaintiff of any failure on his part to furnish the proof of loss provided under the policy, then no proof of loss was required of the plaintiff, and the failure to file it in the manner and form provided by the policy cannot alter the case.[22]

The jury are instructed that, although the notice of loss must be given by plaintiff to defendant insurance companies as required, yet the defendant insurance company may waive any delinquency on the part of the insured as to the form of notice in this respect, and such a waiver may be inferred from any conduct on the part of the insurers clearly inconsistent with any intention to insist upon the failure by the insured to give such notice in the form provided in the policy.[23]

§ 2549(2). Delaware

You are instructed that, if you find that the defendant company through its adjusting agent so conducted itself as to induce the plaintiff, as a reasonable, fair-minded person, to believe that the company would not require formal proofs of loss, and that the plaintiff, relying upon the acts and declarations of such agent of the company, did not make proofs of loss, as required by the condition of the policy, then we say to you that the defendant is precluded from insisting that such proofs should have been made within ——— days after the fire, and your verdict should be for the plaintiff.[24]

You are instructed that if you should find that the conduct of the adjuster, as shown by the evidence, was not such as to induce a reasonable person to believe that formal proofs of loss would not be required under the conditions of the policy, or if you should find that the plaintiff, knowing that such proofs were necessary, or being so informed by the adjuster, refused or neglected to make such proofs, your verdict should be for the defendant.[25]

You are instructed that the main question for your determination is whether there has been a waiver of proofs of loss by the

[22] Greenwich Ins. Co. v. State, 84 S. W. 1025, 74 Ark. 72.

[23] Greenwich Ins. Co. v. State, 84 S. W. 1025, 74 Ark. 72.

[24] Emory v. Glens Falls Ins. Co., 76 A. 230, 7 Pennewill, 101.

[25] Emory v. Glens Falls Ins. Co., 76 A. 230, 7 Pennewill, 101.

defendant company in this case. It was competent for the defendant to waive such proofs of loss. It is not in all cases necessary that such waiver should be in writing and indorsed upon or attached to the policy. Such waiver may be proved by, or inferred from, the acts and conduct of the insurer or its duly authorized agents.[26]

You are instructed that, if you find from the evidence that ——— was the adjuster, and that he was clothed by the defendant company with the authority to adjust and settle claims, and that he used the language so attributed to him by the plaintiff, and so spoke and acted as to induce in the mind of an ordinarily reasonable person the belief that no further steps were necessary to be taken in the matter of proofs of loss, and if you should further find that the plaintiff as a reasonable person had a right to rely upon such statements of the adjuster, and did rely upon them, and for that reason did not furnish proofs of loss, such conditions would amount to a waiver on the part of the defendant company of proofs of loss. If, on the other hand, however, the plaintiff, knowing that such proofs were necessary, or being so informed by ——— or ———, refused to make such proofs, there could be no waiver.[27]

§ 2549(3). Virginia

The court instructs the jury that a substantial compliance with the requirements of the policy is all that is required in a proof of loss, and if the jury believe that the plaintiff in a reasonable time, and more than ——— days prior to the end of ——— months after the fire, offered to the defendant such proof of loss and that the defendant refused to accept the same, but failed to point out any alleged defects in the said proof of loss, then the defendant is to be taken to have waived the defects not so pointed out, and the right to require any further proof of loss.[28]

§ 2549(4). West Virginia

The court instructs the jury that if they believe from the evidence that a proof of loss was furnished the defendant insurance company on the ——— day of ———, and that said proof of loss was retained by the defendant insurance company, and no defects were pointed out to the insured after such proof of loss, then such failure to point out is a waiver of such defects, if any there are, as the law requires that defects in a proof of loss shall be specified.[29]

[26] Reed v. Continental Ins. Co., 65 A. 569, 6 Pennewill, 204.

[27] Reed v. Continental Ins. Co., 65 A. 569, 6 Pennewill, 204.

[28] North British & Mercantile Ins. Co. v. Edmundson, 52 S. E. 350, 104 Va. 486.

[29] Bond v. National Fire Ins. Co., 88 S. E. 389, 77 W. Va. 736.

§ 2550. Waiver of condition as to time of furnishing proof of loss

§ 2550(1). Delaware

You are instructed that the weight of authority is to the effect that the condition of the policy requiring proofs of loss within a certain time may be waived by the acts and declarations of an agent of the company authorized to adjust a loss, notwithstanding the provision in the policy requiring a waiver to be in writing.[30]

§ 2550(2). Illinois

The jury are instructed that if you find, from the evidence, that the defendant insurance company issued to the plaintiff the policy mentioned in the declaration in this case, and that while said policy of insurance was in full force and effect a portion of the property mentioned in and insured by said policy was, on ———, destroyed by fire, while the same was the property of the plaintiff, and without the fault of the plaintiff, and that the plaintiff was absent at the time of such loss, and unable to make proof of the same, and that the agent of the plaintiff, who in the plaintiff's absence had full charge, management, and control of plaintiff's business, and who had possession of the property insured by said policy, as such agent, in the absence of the plaintiff, made out and delivered to the defendant insurance company, on or before ———, a written notice and proofs of loss, and that on ———, the defendant returned such notice and proofs of loss, with objections thereto, and that the same agent of the plaintiff made out an amended notice and proofs of loss, and delivered the same to the defendant insurance company, and that said defendant insurance company, on ———, returned such amended notice and proofs of loss, with objections thereto, and that such notice and proofs of loss were again amended by the same agent of the plaintiff, and again delivered to said defendant, and that the defendant returned the same on the ——— day of ———, and that said notice and proofs of loss were again amended by the same agent of the plaintiff, so that the same substantially complied with the conditions of said policy, and delivered the same to said defendant insurance company, and that on ———, said defendant again returned said notice and proofs of loss, with objections thereto, and that said defendant, at none of the times it returned said notice and proofs of loss, objected that the plaintiff had not made out and delivered such notice and proofs of loss within the time mentioned and provided in said policy, then said defendant insurance company thereby waived all objections that said notice and proofs of loss were not delivered to said defendant within the time provided for in said policy; and if you further find, from the evidence, that

[30] Emory v. Glens Falls Ins. Co., 76 A. 230, 7 Pennewill, 101.

plaintiff complied with all the other conditions of said policy, then you should find for the plaintiff.[31]

§ 2550(3). Michigan

The jury are instructed that the proof of loss required by the terms of this policy is to be furnished within a certain time. This time having been fixed, and the parties agreeing to it, they were bound by it, and if the party fails to abide by the terms of his agreement, then he forfeits his right under the contract. He must be bound by the terms of the contract, as he made it. But notwithstanding this obligation on the part of a party to furnish the proofs within the proper time, and the right of the company to insist upon it in case of insurance, there may be a waiver. This is a right adopted for the benefit of the insurance company, and, if the company chooses to waive it, it can do so.[32]

The jury are instructed that mere silence is not to be taken as a waiver of the right of the insurance company to insist upon a strict compliance with the contract. But where there are other acts done, as acts have been done here, either by the company or its agents, you may take these acts into consideration, in order to discover whether there has been any waiver. In this case two acts are mainly relied upon by counsel for the plaintiff. Those two acts are what was said by D., as the agent of the company, and the act of the company in the letters written to the attorneys, when communicating with the home office as to this matter. The act with which D. is most immediately connected is simply a statement on his part, when informed of the loss here, that the company would not pay, because the premises were not occupied. In other words, as they claim, the statement was substantially this: "You have not carried out the terms of the contract providing for the occupancy of the premises, and we shall rely upon that as our defense." If that was the effect of it, and if that was intended to be the effect of the statement, then you may consider that as a waiver, or take the fact into consideration as a waiver, of the right to insist upon proof at the proper time. On the other hand, if such is not, in your view, the fair inference to be derived from the statement—I say, if the facts as they actually occurred do not lead to that inference—then there was no waiver of this right, and they had a right to insist upon the terms of the policy being carried out as to the proofs.[33]

[31] German Fire Ins. Co. of Peoria v. Grunert, 112 Ill. 68, 1 N. E. 113.

[32] Aurora Fire & Marine Ins. Co. v. Kranich, 36 Mich. 289.

[33] Aurora Fire & Marine Ins. Co. v. Kranich, 36 Mich. 289.

§ 2551. Authority of agent to waive proofs of loss

You are instructed that if you believe from the evidence in this case that the defendant company, through its agent, ———, issued a fire insurance policy to the plaintiff in this case, and that they received a premium for that policy from the plaintiff, and that during the life of that policy the house was burned down and totally destroyed, and if you believe from the evidence in this case that the plaintiff sought to recover his loss from the agent that issued the policy, to wit, ———, and that the defendant, through its agent, ———, repudiated the policy and absolutely denied the liability of the defendant for that loss, or words amounting to that same thing, then you should find that the company had waived the requirement of this proof, because the law is that, where a local agent of an insurance company has authority to represent the company in making contracts of insurance, in collecting premiums and in signing policies, he also has authority to waive proof of loss, either in writing, or by parol, or by matters in pais, which amounts to an estoppel. An insurance company cannot make its local agent a medium through which all the benefits of a policy flow from the insured to it, and then deny he has authority to represent it when the benefits of the insured are involved. The acts of an agent, performed within the scope of his real or apparent authority, are binding upon his principal. The public have a right to rely upon an agent's apparent authority, and are not bound to inquire as to his special power, unless the circumstances are such as to put them upon inquiry. The court charges you that the plaintiff in this case is not called upon to inquire as to ———'s authority to waive the requirements of notification in writing of the loss he sustained, and would not be bound by the lack of authority upon the part of ———, unless he had been put upon notice.[24]

N. METHOD OF SETTLING DISPUTES AS TO AMOUNT OF LOSS

§ 2552. Duty of insured to submit question of amount of loss to arbitration

The court instructs the jury that, if after the appraisement made by ———, ———, and ———, the plaintiff repudiated said appraisement and refused to accept the amount thereof claimed to be chargeable to the defendant, then the defendant had the right afterwards to insist upon an appraisement to be made by two competent and disinterested appraisers, the plaintiff to select one and the defendant one, and the two so selected to name an umpire, as provided in lines 86 to 91, both inclusive, of the policy, and

[24] Ætna Ins. Co. v. Holmes, 52 So. 801, 59 Fla. 116.

if the jury find that the plaintiff for any cause refused to accept the result of said appraisal, and that after the knowledge of such refusal the defendant called upon the plaintiff by letter dated ———, to submit to such an appraisal as is provided to be made by lines 86 to 91, both inclusive, of the policy, and if the jury further find that the plaintiff has failed or refused to enter into such an appraisal as demanded by said letter, then the plaintiff cannot recover.[35]

§ 2553. Same—Where loss total

The jury are instructed that plaintiff admits that she consented to such arbitration, but seeks to avoid liability thereunder, because she contends that the building insured was totally destroyed, and there was nothing which, under the law, should have been submitted by her to arbitration. It is a question for you to decide, under the evidence, whether or not the plaintiff's building was wholly destroyed. If the building was wholly destroyed, then the agreement to arbitrate the amount of damages, and the arbitration by the arbitrators, is not binding on the plaintiff, and she is entitled to recover in this action the full face of the policy. In this connection you are instructed that the building was totally or wholly destroyed as a building, although there is not an absolute extinction of all its parts. It matters not that some part of the building or some of its material yet remains which may be useful or valuable for some purpose. By a "total loss" is meant that the building has lost its identity and specific character as a building and become so far disintegrated that it cannot be properly designated as a building, although some part of it may remain standing.[36]

§ 2554. Effect of bad faith of insurer in failing to agree on an umpire

The jury are instructed as a matter of law that it was the duty of the appraiser selected by the insurance company to endeavor honestly and fairly to agree with the appraiser selected by the plaintiff in the selection of a competent and disinterested umpire to act in the appraisal of the loss in this case, and if you believe from the evidence in this case that the appraiser selected by the defendant company did not endeavor honestly and fairly to agree with the appraiser selected by plaintiff in the selection of an umpire, and by reason thereof no umpire was selected and no appraisal made of the loss, then the fact of the absence of such appraisal is no defense to this action.[37]

[35] Levy v. Scottish Union & National Ins. Co., 52 S. E. 449, 58 W. Va. 546.

[36] Prather v. Connecticut Fire Ins. Co., 176 S. W. 527, 188 Mo. App. 653.

[37] Slepski v. German Fire Ins. Co. of Peoria, 141 Ill. App. 614.

§ 2555. Attack on award of arbitrators for fraud bias or prejudice

You are instructed that if you find that in the making of this award there was fraud on the part of one or more referees, or bias or prejudice, or that there was misconduct on the part of plaintiff or some one else that influenced one or more of the referees in the making of the award, then the award would not be valid. But if you find that these referees acted honestly and with a desire to arrive at a just and correct result, then the award would be valid. That is to say gentlemen, if you find that the referees were free from bias, prejudice or fraud in the making of the award and that there was no misconduct on the part of the plaintiff or anybody else that influenced them in the making of the award, then you will be justified in finding the award was valid.[38]

You are instructed that one of the grounds on which the defendants base their claims is that as they allege the award was grossly excessive. The plaintiffs deny that the award was excessive. The plaintiffs claim that the actual value of the insured property at the time of the fire was in excess of the amount of the award, so it becomes necessary for you to ascertain whether the amount of the award was excessive.[39]

You are instructed that, even if you should find that the award was excessive that would not be sufficient to warrant you in finding that because of that circumstance alone there was fraud, bias or prejudice on the part of any of the referees. It is only when the award is so grossly and palpably above the actual loss as to afford intrinsic evidence of fraud, bias or prejudice on the part of one or more of the referees that you would be warranted in finding that there was fraud, bias or prejudice on the part of one or more of the referees because the award was in excess of the actual value of the insured property.[40]

O. Evidence and Matters Pertaining to Remedy of Insured

§ 2556. Presumptions and burden of proof—Fraud

§ 2556(1). Michigan

Now, gentlemen, I charge you that the burden of establishing fraud rests upon the defendant company. Such fraud on the part of the plaintiff must be established by a preponderance of the evidence in determining whether the plaintiff has been guilty of fraud as charged. You are to consider all the proofs and circumstances relating to the making and presenting the said proofs of loss and to

[38] Doherty v. Phœnix Ins. Co., 112 N. E. 940, 224 Mass. 310.

[39] Doherty v. Phœnix Ins. Co., 112 N. E. 940, 224 Mass. 310.

[40] Doherty v. Phœnix Ins. Co., 112 N. E. 940, 224 Mass. 310.

all other circumstances surrounding the condition of the property as appears from the evidence. I further charge you that fraud need not be established by direct proof. In a great majority of cases where fraud exists, it becomes impossible to bring witnesses that can give direct proof that fraud exists. For this reason it may be established by circumstances that convince you that fraud was actually intended and committed by the plaintiff.[41]

§ 2556(2). Virginia

You are instructed that the burden of proving fraud or false swearing, by which the defendant seeks to avoid all liability for the alleged loss, is upon the defendant.[42]

§ 2556(3). West Virginia

The court instructs the jury that in this case where the defendant seeks to avoid liability on its policy issued to the plaintiff on the grounds of fraud or misrepresentation on the part of the plaintiff, the duty rests upon the defendant to show by a preponderance of the evidence that such fraud was practiced upon it by the plaintiff, knowingly and willfully, and that such fraud or misrepresentation, if any, was as to a material fact or matter and was relied upon by the defendant and was the cause that moved it to make the adjustment pleaded, and unless this has been proved the defendant cannot defeat a recovery of the plaintiff on such grounds.[43]

§ 2557. Same—Presumption of innocence where defense of arson set up

§ 2557(1). Oregon

The jury are instructed that it is proper to say in this case that a natural presumption of innocence, where an act is charged of this nature, exists; and you have a right to consider the improbability that one will commit an act of criminal nature as an element necessarily involved. This you may consider as you should every material circumstance involved in the case; but, after viewing the whole case with such care as it demands, your verdict should be in accordance with the testimony and the proof.[44]

§ 2557(2). Wisconsin

You are instructed, with reference to the defense of arson set up by the defendant, that fraud is never presumed, but must be clearly proved.[45]

[41] Barrett v. Connecticut Fire Ins. Co., 161 N. W. 916, 195 Mich. 209.

[42] Virginia Fire & Marine Ins. Co. v. Hogue, 54 S. E. 8, 105 Va. 355.

[43] Bond v. National Fire Ins. Co., 88 S. E. 389, 77 W. Va. 736.

[44] First Nat. Bank of Portland v. Commercial Union Assur. Co., 52 P. 1050, 33 Or. 43.

[45] Bannon v. Insurance Co. of North America, 91 N. W. 666, 115 Wis. 250.

§ 2558. Same—As to authority of agent

You are instructed that the burden of proof on the plaintiff as to the authority or power of ——— to waive breaches of the contract of insurance is discharged upon the plaintiff showing to your reasonable satisfaction that the said ——— had apparent authority so to do.[46]

§ 2559. Same—Cause of loss

§ 2559(1). United States

You are instructed that the burden upon the whole case is upon the plaintiff to establish by a preponderance of evidence that the damage sustained was caused by fire, for this is the only risk the property was insured against under the policy; and, if all the evidence, when considered together, leaves the jury in doubt as to whether the damage was caused by fire or not, their verdict must be for the defendant.[47]

§ 2559(2). Kentucky

The court further instructs that in this case the burden is upon the defendant to show by the evidence that the building, or such part thereof as fell in the petition mentioned, did not fall as the result of fire; and unless the jury believe from the evidence that the said building, or such part thereof as fell, did not fall as the result of fire, they should find for the plaintiffs; but if the jury believe from the evidence that the said building, or such part thereof as fell, did not fall as the result of fire, they should find for the defendant.[48]

§ 2560. Matters considered on question of incendiarism

You are instructed that you will take into consideration what has been said as to the fire starting in three different places in that store. If the fire was seen to break out at two or more places at the same time, at points distant from each other, it is for you to say whether or not those fires were started by human agency or whether it was accident or misfortune that started them. That is a question for you. The fact that they broke out at three different places at once, if such is the fact and you find such to be the fact, is a matter for you to take into consideration in examining whether or not those fires were caused by human agency.[49]

[46] Georgia Home Ins. Co. v. Allen, 30 So. 536, 128 Ala. 451.

[47] Western Assur. Co. of Toronto v. J. H. Mohlman Co. (C. C. A. N. Y.) 83 F. 811, 28 C. C. A. 157, 40 L. R. A. 561.

[48] Transatlantic Fire Ins. Co. v. Bamberger, 11 S. W. 595, 11 Ky. Law Rep. 101.

[49] Meily Co. v. London & L. Fire Ins. Co. (C. C. Pa.) 142 F. 873.

§ 2561. Right of jurors to use their general knowledge of values in weighing testimony of witnesses

You are instructed that you are not obliged to rely wholly on the opinions of the witnesses as to the value of the property in question. You may use, and be guided by, your own judgment, and general knowledge of such values in connection with the opinions of the witnesses.[50]

§ 2562. Sufficiency of evidence of fraud

You are instructed that the law never presumes fraud, but the presumption is always in favor of fair dealing. He who alleges fraud must establish it, and by clear and satisfactory proof. It is not necessary that fraud shall be proved by direct and positive proof, but it may be shown by circumstances. If the facts and circumstances shown in evidence are such as will lead a reasonable man to the conclusion that fraud exists, this is all the proof thereof that the law requires.[51]

§ 2563. Necessity of evidence of value of goods destroyed

The jury are instructed that, if the jury believe from the evidence that any wine, whisky, brandy, beer, tobacco, cigars, or other merchandise was destroyed, then it will be for the jury to find from the evidence how much of such liquors or other merchandise was destroyed, and the market value thereof; and if the jury cannot find from the evidence the market value of the liquors or merchandise destroyed, then they cannot find for the plaintiff as to such liquors or merchandise.[52]

§ 2564. Sufficiency of evidence of arson

The jury are instructed that one of the questions submitted to them is whether the fire originated by any act, design, or procurement on the part of the plaintiff, or through any evil practice done or suffered by his privity or with his consent. In deciding this question, the jury must take into account every fact and incident connected with the fire and subsequent transactions, as detailed in evidence before them, and decide according to what they consider the most probable conclusion. The rule in civil cases, like the present, is different from what it is in criminal cases. In criminal cases the question is as to guilt or innocence of a crime, and there the jury must be satisfied that the offense was committed, beyond a reasonable doubt, by the person accused. In criminal cases, if any reasonable doubt remains in the minds of the jury, they are bound to give the accused the benefit of such doubt. But in civil ques-

[50] Helm v. Anchor Fire Ins. Co., 109 N. W. 605, 132 Iowa, 177.

[51] Virginia Fire & Marine Ins. Co. v. Hogue, 54 S. E. 8, 105 Va. 355.

[52] Manchester Fire Assur. Co. v. Feibelman, 23 So. 759, 118 Ala. 308.

tions, like the present, there is no question whether any crime has been committed. The question in this case is merely a question of greater or less probability, and the jury, in order to find a verdict for the defendant, need not be satisfied of the complicity of the plaintiff in the burning in any other way, or with any different degree of satisfaction, than if the question were an ordinary question in a civil case.[53]

§ 2565. Damages for vexatious refusal to pay

You are instructed that damages and attorney's fees cannot be recovered, unless you find from the evidence that the insurance company has acted in bad faith. "Bad faith" means a frivolous or unfounded refusal in law or in fact to comply with the requisites of the policy, to pay according to the terms of the policy and the conditions imposed by the statutes.[54]

P. Amount of Recovery and Right of Insurer to Rebuild

§ 2566. Recovery as for total loss

§ 2566(1). Alabama

The jury are instructed that, if the property or any part of it was so damaged by fire as to render it useless for the purposes for which it had been used, then that is a destruction within the meaning of the law.[55]

§ 2566(2). Texas

You are charged that a building is not considered a total loss by fire so long as its identity as a building is left, and so long as the remnant may be reasonably adapted to use as a basis upon which to restore the building to the condition in which it was before the injury. But it is a total loss unless the remnant after the fire is of that substantial character that, if the same was restored or repaired, it would be considered the old structure and not a new building.[56]

§ 2566(3). West Virginia

The court instructs the jury that if they believe from the evidence that the engine, boiler, stacks, saws, pulleys, belting and other property or any part of it was so damaged by fire as to render it useless for the purpose for which the property had been used, then that is a destruction in the meaning of the law.[57]

[53] Rothschild v. American Central Ins. Co., 62 Mo. 356.

[54] American Ins. Co. v. Bailey & Musgrove, 65 S. E. 160, 6 Ga. App. 424.

[55] Manchester Fire Assur. Co. v. Feibelman, 23 So. 759, 118 Ala. 308.

[56] Fire Ass'n of Philadelphia v. Strayhorn (Civ. App.) 165 S. W. 901.

[57] Bond v. National Fire Ins. Co., 88 S. E. 389, 77 W. Va. 736.

§ 2567. Limitation of recovery to certain percentage of value of property insured

You are instructed that, in case plaintiff recovers he is entitled to recover twelve-nineteenths of the value of the house destroyed, but not to exceed $———; three-eighths of the value of the household furniture destroyed, but not to exceed $———; two-thirds of the value of the family wearing apparel destroyed, but not to exceed $———; and the value of the provisions destroyed, but not to exceed $———.[58]

§ 2568. Limitation of recovery to actual cash value or cost of repair or replacement

§ 2568(1). Kentucky

The court instructs the jury that if they believe from the evidence that the fire which occurred in the ——— building on ———, damaged by fire the building of plaintiffs, you will find for the plaintiffs the damage, if any was sustained by them, to the said building, not exceeding the sum claimed, $———. And in estimating such damage you will estimate the difference in value, if anything, between said building just before the fire occurred and the same building immediately thereafter that you may believe was approximately caused by the fire; such difference, if any, in value to be determined by the reasonable cost of repairing or restoring any damage or injury caused solely by the fire.[59]

§ 2568(2). Missouri

The court instructs the jury that the policy of insurance read in evidence contains the following clauses in relation to the loss or damage to the insured property, viz.: "This company shall not be liable beyond the actual cash value of the property at the time any loss or damage occurs, and the loss or damage shall be ascertained or estimated according to such actual cash value, with proper deduction for depreciation, however caused, and shall in no event exceed what it would then cost the insured to repair or replace the same with material of like kind and quality." The court further instructs the jury that such clauses are legal and valid and the plaintiff is bound by the method prescribed by such clauses, in relation to the loss or damage to the property covered by such policy.[60]

You are instructed that, if you find for the plaintiff on the first count of the petition on account of the loss of personal property by

[58] Bruger v. Princeton & St. Marie Mut. Fire Ins. Co., 109 N. W. 95, 129 Wis. 281.

[59] Citizens' Fire Ins. Co. of Missouri v. Lockridge & Ridgeway, 116 S. W. 303, 132 Ky. 1, 20 L. R. A. (N. S.) 226.

[60] Non-Royalty Shoe Co. v. Phœnix Assur. Co., Limited, of London, England (App.) 178 S. W. 246.

fire, you shall assess her damage therefor at the actual cash value of the personal property destroyed by fire, not exceeding $———. In ascertaining the value of the personal property destroyed by fire, if any, you should deduct, from the fixed value, the value of any property covered by said policy which was removed from the building or saved from the fire, and also deduct the amount of depreciation in the value of the property so destroyed, if any, between the date of the issue of the policy and the date of the fire, and in any event you cannot assess her damages, on account of or damage to personal property at a sum to exceed $———. If you find for the plaintiff on account of damage to her house by fire, the aggregate amount which she is entitled to recover for such damage is the amount of expenditure necessary to repair and rebuild said house, so as to put it in the same condition it was in immediately before the fire, and the amount of her recovery on account of damage to her said house by fire, if any, is further limited in this, that she cannot recover for such damage, if any, on the first count of her petition in a sum exceeding $———, nor on the second count in a sum exceeding $———.[61]

§ 2568(3). Tennessee

You are instructed that you will find in the policies the provision that the actual cash value of the property damaged at the time of the fire is to be the test. Now actual cash value means the value of a thing upon the market—what it would cost to produce it in like condition, as it was before the fire. If you find that the press and machinery were a total loss under issue No. ———, you will ascertain at what figure another press, machinery, boilers, etc., similar in all respects to that destroyed, could have been purchased, and that figure will and should be your answer to issue No. ———.[62]

You are instructed, with respect to proof of another press that could have been purchased at ———, that if that was a purchase that could have been made only at a particular time, and not one that could have been made on the open market at any time, and if that was meant merely as a matter of compromise, why you may consider that—you may look to that in determining the value of a new press; and, assuming this to be a total loss, the test is what another press—what it would cost to procure another press—just as good as the one in question before the fire.[63]

[61] Fager v. Commercial Union Assur. Co., 176 S. W. 1064, 189 Mo. App. 464.

[62] Gulf Compress Co. v. Insurance Co. of Pennsylvania, 167 S. W. 859, 129 Tenn. 586.

[63] Gulf Compress Co. v. Insurance Co. of Pennsylvania, 167 S. W. 859, 129 Tenn. 586.

§ 2569. Injury to party walls

The court instructs the jury that the west wall of the plaintiffs' building is a party wall, and one-half of same belongs to plaintiffs to the second story, and all the balance belonged to the plaintiffs, but plaintiffs had the use of all the said wall, and the jury are instructed in this case, in estimating the plaintiffs' damages, to consider the difference in value of this wall to their building as the same exists as the result of the fire afterwards.[64]

§ 2570. Loss of rents

You are instructed that the alleged action or nonaction of the ——— city authorities with regard to establishing grades and building lines on ——— street, between ——— and ——— streets, and the alleged refusal of the building inspector to issue permits for the erection of buildings at the place in question, are not, under the terms of the policies offered in evidence in these cases, to be considered by the jury in arriving at their verdict, and the delays, if any, that are caused by the same or any of them do not entitle the plaintiff to recover, under the pleadings and evidence in these cases, the amount, if any, of rents for the time covered by such delays.[65]

You are instructed that under the terms of the policies offered in evidence the plaintiff is not entitled to recover for any loss or damage by fire, other than direct loss or damage by fire to the property in said policies described; and therefore, under the pleadings and evidence in these cases, the plaintiff is not entitled to recover the amount of alleged rents of the plaintiff's premises in question for the time of alleged delays in rebuilding caused by other reasons than the destruction by fire of the buildings on her said premises, even though the jury shall find that such delays, if any, were due to the obstruction of the neighboring streets, alleys, and ground as a result of the destruction by fire of buildings and property belonging to persons other than plaintiff, and that the fire that destroyed such buildings on the property of others, as well as those of the plaintiff, was part of a general conflagration that swept over a large portion of the city of ———.[66]

§ 2571. Loss in excess of insurance

The court instructs the jury that, if their verdict is for the plaintiff, they must in estimating the damages find from the evidence the actual cash value of the whole property destroyed by the fire as given in evidence, and, if the jury shall find that the whole loss

[64] Citizens' Fire Ins. Co. of Missouri v. Lockridge & Ridgeway, 116 S. W. 303, 132 Ky. 1, 20 L. R. A. (N. S.) 226.

[65] Palatine Ins. Co. v. O'Brien, 71 A. 775, 109 Md. 100.

[66] Palatine Ins. Co. v. O'Brien, 71 A. 775, 109 Md. 100.

of the plaintiff exceeded in amount the whole amount of insurance as shown by the evidence on the property destroyed by the fire, then their verdict should be for the full amount insured under the policy in suit, together with interest thereon in the discretion of the jury.[67]

§ 2572. **Amount of recovery where there are several insurers**

The jury are instructed that if they find that the property of the plaintiff, described in the policy of insurance, contained in plaintiff's said building, was destroyed or damaged by fire to an amount exceeding all the insurance plaintiff had upon it at the time of the loss, if any, then plaintiff is entitled to recover herein from the defendant the sum of $——— (the face of the policy), with interest at the rate of ——— per cent. per annum from ———. If the jury find the damage by fire to be less than the total insurance, their verdict should be for such proportion of the loss by fire as the company's policy bears to the total insurance.[68]

§ 2573. **Duty of insured to save and preserve property**

§ 2573(1). West Virginia

The court instructs the jury that, if they believe from the evidence that the plaintiff failed to perform the duty to save and preserve property covered by the policy of insurance, such failure, while not of itself cause for a forfeiture of the policy, has the consequence that the insured cannot recover to the extent of the loss or damage caused by his neglect to use all reasonable means to save and preserve it, but in establishing such a defense the burden rests upon the insurance company; and the court further instructs the jury that such duty to preserve and save does not exist, unless in the power of insured to act in saving or preserving.[69]

§ 2573(2). Wisconsin

You are instructed that the policy under which this property was insured provides that the company shall not be liable for loss caused, directly or indirectly, by the neglect of the insured to use all reasonable means to save and preserve the property at and after the fire. If the plaintiff prevented or obstructed the saving of the personal property, so that, in consequence thereof, said property was destroyed or damaged by fire, the insurance company is not liable for such loss; nor is it liable for the loss of any property caused, directly or indirectly, by the neglect of the plaintiff to use all reasonable means to save and preserve the property at the fire and after the fire. Was any of this personal property de-

[67] Citizens' Mut. Fire Ins. Co. of Cecil County v. Conowingo Bridge Co., 77 A. 378, 113 Md. 430.

[68] Orient Ins. Co. v. Leonard (C. C. A. Ill.) 120 F. 808, 57 C. C. A. 176.

[69] Bond v. National Fire Ins. Co., 88 S. E. 389, 77 W. Va. 736.

stroyed or damaged by such neglect of the plaintiff to use all reasonable means to save and preserve the same? If so, what was the value of the property lost by such neglect of the plaintiff? If all the personal property was lost in consequence of such neglect, then the defendant is not liable for the value of any of the personal property whatever. If, however, only a part of the personal property was lost in consequence of such neglect, then what was the value of the property so lost by the negligence of the plaintiff, provided you find the plaintiff did not set fire to his building?[70]

§ 2574. Right of insurer to rebuild—Time of election to rebuild

The jury are instructed that, by the terms of the policy sued on, defendant had the right to repair, rebuild, or replace the property insured, and you are further instructed that, in order to do so, defendant was required to repair, rebuild, or replace said property within a reasonable time after giving notice of its intention so to do, and if you believe, from the facts and circumstances in this case, that notice was given as required by the policy, and that a reasonable time for said repairs or rebuilding or replacing had elapsed before ———, the day the plaintiff brought suit, then you will find for plaintiff, unless you further believe from the evidence that defendant was prevented from so doing by the plaintiff.[71]

§ 2575. Sufficiency of notice of election to rebuild

The court instructs the jury that, under the pleadings and evidence in this case, it devolves upon the jury to determine from the evidence whether or not the defendant neglected to repair, rebuild, or replace the property insured, and also to determine when, if at all, said defendant so elected to repair, replace, or rebuild, and if they find that defendant did not give notice of its intention to replace and repair before suit brought, then your verdict as to this issue will be for plaintiff; and the notice required by the policy must be an unconditional notice of its intention to repair or replace the property damaged or destroyed by fire and embraced within the policy.[72]

[70] Wolters v. Western Assur. Co., 70 N. W. 62, 95 Wis. 265.

[71] Rieger v. Mechanics' Ins. Co. of Philadelphia, 69 Mo. App. 674.

[72] Rieger v. Mechanics' Ins. Co. of Philadelphia, 69 Mo. App. 674.

CHAPTER CXLIII

FIRES

§ 2576. Liability for willfully setting fire.
2577. Liability for negligence in causing fire.
2577(1). Arkansas.
2577(2). Delaware.
2578. Liability for negligently setting out fire or for permitting it to escape on to lands of others.
2578(1). California.
2578(2). Oregon.
2578(3). Washington.
2578(4). West Virginia.
2579. Damage from fire started in violation of ordinance.
2580. Care required in operating traction engine or steam threshing machine to avoid setting fire.
2581. Proximate cause.
2582. Contributory negligence of owner of property destroyed.
2583. Unavoidable fire.
2584. Limiting recovery to negligence alleged in pleadings.

Liability of railroad company for setting fire, see post, §§ 4480–4502.

§ 2576. Liability for willfully setting fire

The court instructs the jury that if you find and believe from the evidence that the defendant set out fire to burn the leaves and grass on his own premises in order to protect his own property from forest fires, and used ordinary care to keep the fire from spreading to land of others, and such fire escaped by accident to lands of another, defendant cannot be held to have willfully set fire to the woods within the meaning of section ———, and cannot be held liable for any damages caused by such fire.[1]

§ 2577. Liability for negligence in causing fire

§ 2577(1). Arkansas

The jury are instructed that, if you find from the evidence that defendant had equipped its smokestacks or chimneys with a wire netting over the top or opening, and you further find that the wire netting, when in place did prevent the escape of sparks or fire, and you further find that when said netting was not in place over the top of said smokestack the sparks and fire did escape, and further find that at the time the house of plaintiff was burned, or set on fire, said wire netting was not in place over the top of said smokestack, and defendant's plant was in operation, and you believe sparks or fire from its smokestack did start the fire which destroyed plaintiff's building, then your verdict will be for the plaintiff in such amount as you may find from the evidence to have been the

[1] Belk v. Stewart, 142 S. W. 485, 160 Mo. App. 706.

value of her house so destroyed, with ——— per cent. interest from the date of the fire.[2]

§ 2577(2). Delaware

You are instructed that this is an action by F. against N. to recover damages to property alleged to have been occasioned by the negligence of the defendant. The plaintiff claims that his furniture and household goods were seriously damaged or destroyed by a fire on ———, at his then place of residence in this city. It is conceded that the defendant had previously purchased the house in which the plaintiff was residing; and also that the defendant, by and with the consent of the plaintiff, was having old paint burnt off the outside of the house by his employés, who, for the purpose of removing the paint, used gasoline torches. It is the claim of the plaintiff that these workmen negligently set fire to the cornice of the third story of the house and negligently failed to put the fire out, and that in consequence of their negligence, the third story of the house and the furniture therein were destroyed by fire, and that the furniture in the lower stories was very greatly damaged by falling embers, soot and water. There are five counts in the declaration averring in substance the facts thus stated.[3]

You are instructed that if you should find that the damage to the plaintiff's property was not in fact caused by the defendant or his servants, or that it was not caused by the negligent act of the defendant or his servants, or that the plaintiff suffered no damage as a result of the fire, then, of course, your verdict should be for the defendant. If, on the other hand, you are satisfied by a preponderance of the evidence that the plaintiff has sustained injury by reason of the damage or destruction of his property such as he claims, and that it was due to the negligence of the defendant or his servants as alleged, then your verdict should be for the plaintiff, and for such a sum as you find from the evidence the plaintiff has actually sustained by reason of the injury to or loss of his property.[4]

You are instructed that a person using dangerous instrumentalities, such as gasoline torches, for removing paint from a dwelling house, must exercise due and reasonable care to prevent setting the building on fire; and if such care is not used, and injury to property follows in consequence thereof, liability attaches for the results of the negligence.[5]

[2] Marianna Ice & Storage Co. v. Gill, 220 S. W. 463, 143 Ark. 400.

[3] Fahey v. Niles (Super.) 108 A. 135, 7 Boyce, 454.

[4] Fahey v. Niles (Super.) 108 A. 135, 7 Boyce, 454.

[5] Fahey v. Niles (Super.) 108 A. 135, 7 Boyce, 454.

§ 2578. Liability for negligently setting out fire or for permitting it to escape on to lands of others

Liability of city for negligence in failing to prevent fires, see post, § 3916.

§ 2578(1). California

You are instructed that the plaintiffs in this case may prove negligence on the part of the defendants both in setting out fire and in suffering it to escape, or they may prove negligence in either. In other words, plaintiffs may prove negligence in the act of setting out fire, or negligence in omitting to properly control a fire burning on their premises so that it escaped therefrom; and therefore the court instructs you that if the plaintiffs have proved that the defendants have either negligently set out fire in their own woods, or negligently suffered any fire burning on their lands to extend beyond their own lands, and the plaintiffs thereby suffered damage, then the defendants are liable for such damages, and plaintiffs will be entitled to a verdict in their favor for such damage as you may find plaintiffs have suffered, if any.[6]

The court instructs you that if you believe from the evidence in this case that the plaintiffs suffered injury by any negligent act of the defendants in setting out fire, or by any negligent omission of the defendants in suffering any fire burning on their land to extend beyond their land, then the plaintiffs are entitled to a verdict for damages for the injury so suffered.[7]

§ 2578(2). Oregon

I instruct you that after one discovers fire on his premises (not set by himself) he is bound to exercise ordinary care and diligence to prevent it from spreading so as to endanger his neighbor's property. He is bound to put forth such reasonable effort to prevent the fire injuring his neighbor's property as a man of ordinary prudence, who was actuated by a proper regard for his neighbor's rights and safety, would in like circumstances put forth; and I instruct you that if you find from a preponderance of the evidence that at and prior to the time of the fire, which the plaintiff alleges destroyed the planing mill property of plaintiff, a fire or fires were smoldering or burning upon or in defendant's property, and that said defendant knew, or should have known, that said fires were so smoldering or burning upon its property, and that said defendant carelessly and negligently failed to extinguish the same, or carelessly and negligently failed to guard or control the said fire or fires, or carelessly and negligently failed to take reasonable precautions to prevent the escape and spread of said fire or fires to the mill and property of plaintiff, and you find that by reason of such careless-

[6] Sampson v. Hughes, 81 P. 292, 147 Cal. 62.

[7] Sampson v. Hughes, 81 P. 292, 147 Cal. 62.

ness and negligence in any of the respects mentioned in this instruction, the planing mill property of plaintiff was set on fire and destroyed by fire communicated thereto from sparks, burning cinders, or live coals blown, cast, or scattered by the winds from said fires smoldering or burning on said defendant's said premises to and upon said planing mill property, your verdict should be for plaintiff.[8]

§ 2578(3). Washington

You are instructed that it was the duty of the defendant to exercise that care and diligence which a person of ordinary prudence would exercise to extinguish or control any fire started by it upon its premises and to protect the property of plaintiff against loss on account thereof, in view of the nature and extent of the fire, the material on the ground, the weather conditions prevailing, the means at hand, and all the surrounding circumstances, and the failure of the defendant to exercise such reasonable care would be and constitutes negligence upon its part.[9]

§ 2578(4). West Virginia

The court instructs the jury that the defendant company is liable for failure to exercise such care as the circumstances of a given case would indicate to a prudent man was proper to extinguish the fire caused by sparks from its engine, if so caused, although not guilty of negligence in setting the fire; and, if the jury believe from the evidence that such care was not exercised in this case, they should find for the plaintiff, if they further believe from the evidence that such fire was negligently allowed to escape by the defendant company, and is the same fire which caused damage to the plaintiff's property.[10]

The court instructs the jury that if they believe from the evidence that a fire was started by the defendant or its agent or agents on the ——— acre tract occupied by the defendant, and was negligently allowed to escape therefrom, and passed over other lands and to the property of the plaintiff, and did destroy his property on ———, they should find for the plaintiff.[11]

§ 2579. Damage from fire started in violation of ordinance

You are instructed that, if you find from a preponderance of the evidence that the defendant kindled and lighted fires on its said dock premises, for the purpose of burning débris and waste, as alleged in plaintiff's amended complaint, without first having obtained a written permit so to do, signed by the chief engineer of

[8] Northwest Door Co. v. Lewis Inv. Co., 180 P. 495, 92 Or. 186.

[9] Sandberg v. Cavanaugh Timber Co., 164 P. 200, 95 Wash. 556.

[10] Mahaffey v. J. L. Rumbarger Lumber Co., 56 S. E. 893, 61 W. Va. 571, 8 L. R. A. (N. S.) 1263.

[11] Mahaffey v. J. L. Rumbarger Lumber Co., 56 S. E. 893, 61 W. Va. 571, 8 L. R. A. (N. S.) 1263.

the fire department of the city of ———, as required by the ordinance of said city, and that sparks, burning cinders or coals were carried by the wind from said fire or fires to the property of the plaintiff, thereby igniting and setting the same on fire, and you further find that the kindling and lighting of said fires was the proximate cause of the communication of said sparks, burning cinders or coals to said planing mill property, and the destruction thereof by fire, you should find for plaintiffs.[12]

§ 2580. Care required in operating traction engine or steam threshing machine to avoid setting fire

You are instructed that these are actions for negligence charged against the defendant in failing to equip a traction engine with appliances to prevent sparks or particles of burning fuel from escaping from the smokestack, and in failing to provide a spark catcher as provided by law, and also negligence is charged in operating the engine, so that sparks were emitted. Negligence is the gist of the actions. If you should find there was no negligence on the part of the defendant, the plaintiffs cannot recover. Negligence is never presumed. It must be proved, and the burden of proving it is upon the plaintiffs in the action.[13]

You are instructed that a person engaged in using a traction engine or a steam roller as a traction engine along a public road, is required to use that degree of care and prudence commensurate with the danger to which property along the road is necessarily exposed by him in the use thereof; that is, such care as a reasonably prudent and careful person would use under all the circumstances.[14]

The court instructs the jury that a person engaged in using a steam threshing machine in threshing wheat is required to use that degree of care and prudence commensurate with the danger tc which property is necessarily exposed by him in the use thereof; that is, such care as a reasonably prudent person would use under all the circumstances.[15]

The court instructs the jury that when one engages another to thresh his wheat, using a threshing machine with steam as a power, there is an implied obligation on the part of the latter to use due and reasonable care, commensurate with the situation, to prevent loss or danger to the other.[16]

The court instructs the jury that if you should find from the evidence that the defendant engaged to thresh the plaintiff's wheat,

[12] Northwest Door Co. v. Lewis Inv. Co., 180 P. 495, 92 Or. 186.

[13] Cecil v. Mundy (Del.) 92 A. 850, 5 Boyce, 291.

[14] Cecil v. Mundy (Del.) 92 A. 850, 5 Boyce, 291.

[15] Shockley v. McCullough (Del.) 82 A. 144, 2 Boyce, 504.

[16] Shockley v. McCullough (Del.) 82 A. 144, 2 Boyce, 504.

and that he was guilty of the negligence complained of by the plaintiff, and that his negligence was the proximate cause of the damages complained of, your verdict should be for the plaintiff.[17]

§ 2581. Proximate cause

You are instructed that the proposition that the steam roller used at the time as a traction engine does not come within the provisions of this statute is not contended by the defendant, and if you should believe from the evidence that the defendant permitted the traction engine, or steam roller, in question, to be used and operated without having attached to the smokestack thereof a spark catcher, or spark protector, of such character as to comply with the statute of the state of ———, while such conduct on the part of the defendant would amount to negligence per se, nevertheless, before you can find for the plaintiffs by reason of such negligence, you must be satisfied from the evidence that the loss and damage sustained by the plaintiffs, if any, was proximately caused by the defendant's conduct in so permitting the traction engine or steam roller to be used and operated without such spark protector. If, however, you believe from the evidence that the defendant was guilty of such negligence and it was the proximate cause of the fire, your verdict should be for the plaintiffs.[18]

The court instructs the jury that, if you should believe from the evidence that the defendant permitted the traction engine in question to be used and operated without having attached to the smokestack thereof a spark catcher, or spark protector, of such character as to comply with the statute of the state of ———, while such conduct on the part of the defendant would amount to negligence per se, nevertheless, before the jury can find for the plaintiff by reason of such negligence, they must be satisfied from the evidence that the loss and damage sustained by the plaintiff, if any, was proximately caused by the plaintiff's conduct in so permitting the traction engine to be used and operated without such spark protector.[19]

§ 2582. Contributory negligence of owner of property destroyed

The court instructs the jury that if you should find from the evidence that the defendant was negligent in failing to equip his traction engine with a suitable spark arrester, or was otherwise negligent, yet if the jury should also find from the evidence that the plaintiff was guilty of negligence which proximately contributed to the accident and to the resulting damage and loss, in that event

[17] Shockley v. McCullough (Del.) 82 A. 144, 2 Boyce, 504.

[18] Cecil v. Mundy (Del.) 92 A. 850, 5 Boyce, 291.

[19] Shockley v. McCullough (Del.) 82 A. 144, 2 Boyce, 504.

the plaintiff would be guilty of contributory negligence and cannot recover.[20]

The court instructs the jury that, if you should believe from the evidence that the plaintiff against warning insisted upon the traction engine being placed in a position dangerously near the stack of wheat which was burned, and that the engine was placed as directed by the plaintiff and the fact of its being so placed proximately contributed to the accident and injury, then the plaintiff cannot recover in this action.[21]

§ 2583. Unavoidable fire

The court instructs the jury that an accident may happen and damages result therefrom without any negligence on the part of any one concerned therein, and, if you believe from the evidence that the fire in this case, which destroyed the property of the plaintiffs, resulted accidently or unavoidably, your verdict should be for the defendant.[22]

§ 2584. Limiting recovery to negligence alleged in pleadings

The first point to which we direct your attention is: Was the wood set on fire by sparks emanating from the defendant's engine? If it was not, unquestionably the plaintiff cannot recover in this case. But if, upon a careful consideration of the evidence, you should be satisfied that the fire was communicated to the wood by sparks from that engine, you will further inquire whether the fire was so communicated by reason of a defective or imperfect spark arrester; for in this case the plaintiff can only recover in case the fire or sparks did pass from the engine to the wood by reason of a defective or imperfect spark arrester. If from any other cause the sparks passed from the engine, the plaintiff could not recover in this case. He has so limited his case, and upon that case he must stand. The negligence which he has alleged is the only negligence which the defendant comes here prepared to meet, and upon which the plaintiff may recover. For the plaintiff to recover in this case, therefore, you must be satisfied of two things: First, that the fire did come from the engine, and second, that it came from the engine only by reason of a defective or imperfect spark arrester; and if you are not satisfied from the evidence upon both of those points, the plaintiff cannot recover. If you are satisfied, however, that both of those charges have been proved, the plaintiff is entitled to recover whatever was the value of the wood proved in this case to have been destroyed.[23]

[20] Shockley v. McCullough (Del.) 82 A. 144, 2 Boyce, 504.

[21] Shockley v. McCullough (Del.) 82 A. 144, 2 Boyce, 504.

[22] Johnson v. Jennings-McRae Logging Co., 138 P. 236, 70 Or. 16.

[23] Barker v. Collins (Del.) 63 A. 686, 6 Pennewill, 49.

CHAPTER CXLIV

FISH AND GAME

§ 2585. What are inland lakes within meaning of statute regulating fishing in such lakes.
2586. Requirement that fish traps be closed at certain times—Sufficiency of compliance.
2587. Same—Intent as element of criminal liability.
2588. Sufficiency of evidence in prosecution for illegal use of net.

§ 2585. What are inland lakes within meaning of statute regulating fishing in such lakes

You are instructed that if you should find in this case, from all the evidence in the case, that this lake is so connected with ——— river, or with any other body of water that is public, so that fish can go from public waters into this water or into these waters, if they can go there at any time of the year during freshets, or if the fact is that ——— river fish can get into this lake and out again, no matter if they come out the same day, or the next week, or the next season, if they can go into this lake, and have a free passage in and out again into the public waters, under those circumstances your verdict should be "Guilty" in this case, because, as I instruct you, that would make this one of the inland lakes coming within the description under this statute; that it is not necessary that any particular length of time should exist during the year in which this body of water is connected with ——— river, or any other public body; it is not necessary that any particular time should exist. If you find that the fish can migrate from a public body of water (which it is admitted ——— river would be) into this lake, and can go back again (in other words, if they have free access in and out), the length of time during the year cuts no particular figure, but, of course, unless that should be the fact, they would not be guilty. If fish cannot get into the lake at all from any outside waters, and it has no connection at any time of year with any other body of water, the contention of these respondents would be correct.[1]

§ 2586. Requirement that fish traps be closed at certain times—Sufficiency of compliance

You are instructed that if you find from the evidence in this case that the defendants, or either of them, used and maintained, in the construction and maintenance of the aprons across the entrance to the hearts of the fish traps operated by them, the appliances required by the law of this state, which I have hereinbefore

[1] People v. Horling, 100 N. W. 691, 137 Mich. 406.

read to you, then I instruct you that the use and maintenance of such appliances, if it complies with the method and manner prescribed by law, amounts to a compliance with the law; and, even if you should find that the appliances provided by law do not in fact effectually prevent the entrance of fish into the heart of such trap, such defendant, who has complied with the law, cannot be found guilty of the offense charged in the information. And you are further instructed that if you find from the evidence in this case that the defendants, or either of them, installed and maintained the appliances required by the law of this state, which I have hereinbefore read to you, and that the wire or cable, to which the apron across the entrance of the heart of the trap was attached by rings not more than four feet apart, was drawn as taut or tight as it could reasonably be drawn, consistent with the proper manipulation of such apron in raising and lowering the same, then such defendant cannot be found guilty of the offense charged in the information herein, even though the evidence may show that, notwithstanding the compliance of such defendant with the law of this state, some space or opening was left between the lead and the apron by reason of the action and force of the tide, and that some fish could pass into the heart of the trap through this space or opening.[2]

§ 2587. Same—Intent as element of criminal liability

The court instructs the jury that a specific intent to violate or evade the statute regulating the construction and maintenance of fish traps is not necessary to constitute an offense under the statute; but on the contrary, if you believe from the evidence that the defendants were guilty of the acts of commission or omission charged against them in the informations, they may be found guilty of the offense charged therein, regardless of their purpose or intent in committing the prohibited acts.[3]

§ 2588. Sufficiency of evidence in prosecution for illegal use of net

You are instructed that the defendant is accused by information in this case with violating the fish and game laws of the state of ——— as in said information set forth. I instruct you that if you believe from the evidence beyond a reasonable doubt that the defendant cast, extended, and used a net in the waters of ——— in ——— county as charged in the information, you must render a verdict of guilty, even though the evidence may be circumstantial or partially circumstantial.[4]

[2] State v. Cherry Point Fish Co., 130 P. 499, 72 Wash. 420.

[3] State v. Cherry Point Fish Co., 130 P. 499, 72 Wash. 420.

[4] People v. Anderson, 159 P. 211, 30 Cal. App. 542.

CHAPTER CXLV

FIXTURES

§ 2589. Rights as between vendor and vendee.
2590. Right of purchaser at administrator's sale.
2591. Machinery installed by tenant—Rights of mortgagee as against landlord.

§ 2589. Rights as between vendor and vendee

The jury are instructed that, as between vendor and vendee, when no reservations are made, a clear warranty deed passes all the property attached and necessary, essential and adapted to the use of the property so sold, and the vendor will not be heard to claim it afterwards. So in this case it is undisputed that plaintiff conveyed the hotel property without reservation, and that he owned at the time both the hotel property and the fans, and if you find from the evidence that the fans were adapted to the use of the hotel and were such as are usually used in hotels of the class, and were necessary and essential to its use as a hotel, and you believe that his acts and conduct are inconsistent with a claim that the fans did not pass by his sale, you may find for the defendant, although you might further find that plaintiff claims that he never intended to permit the fans to become part of the hotel property.[1]

§ 2590. Right of purchaser at administrator's sale

The court instructs the jury that, if you find that the advertisement of the administrator's sale of the land shows that the ginnery was to be sold with it, and you find that this property in dispute was a part of that ginnery, then I charge you that the purchaser of the land bought with it the ginnery, and all things therein affixed as a permanent ginnery, whether they were nailed down or not nailed down, whether they were so attached that they could not be readily moved or not.[2]

§ 2591. Machinery installed by tenant—Rights of mortgagee as against landlord

You are instructed that there has been some testimony relative to the location of the boiler and engine in the alley. You are instructed that a tenant cannot deny the landlord's title to premises which he obtains by virtue of his lease. The shed or annex which the lessees, S. & S., built and attached to the defendant landlord's planing mill became a part of said mill, and the ground on which it stood became a part of the defendant's premises, so far as S. &

[1] Stone v. Suckle (Ark.) 224 S. W. 735.

[2] Parks v. Hailey, 83 S. E. 100, 142 Ga. 391.

S. and their mortgagee, the plaintiff, are concerned. You are therefore instructed to disregard all of the testimony about the boiler and engine being in the alley, except so far as it has a bearing, if any at all, upon the question of whether said boiler and engine were trade fixtures or not.[3]

[3] Brownell v. Fuller, 83 N. W. 669, 60 Neb. 558.

CHAPTER CXLVI

FOOD

§ 2592. Liability for selling tainted or spoiled food.
2593. Same—Presumptions and burden of proof.
2594. Same—Sufficiency of evidence.

§ 2592. Liability for selling tainted or spoiled food

The court instructs the jury that the gravamen of this action is the negligence of defendant in serving oysters to plaintiff. The plaintiff has alleged such negligence on the part of defendant, and I charge you, as a matter of law, that he cannot recover without proof of such negligence, and, if from all the evidence such negligence has not been proven to your reasonable satisfaction, your verdict should be for the defendant.[1]

The court instructs the jury that you cannot find for the plaintiff unless the evidence reasonably satisfies you that the injuries complained of were the result of eating tainted, deleterious, or unwholesome oysters, negligently furnished by defendant; and, if you believe from the evidence that said injuries were produced by any other cause, your verdict must be for the defendant.[2]

The court instructs the jury that the defendant is not liable as an insurer of the oysters served to plaintiff, and therefore is not liable if he was made sick by eating them, unless the jury believe from the evidence that defendant was guilty of negligence.[3]

The court instructs the jury that, before you can find a verdict for plaintiff in this case, you must be reasonably satisfied by the evidence that the oysters in this case consumed by plaintiff were tainted, deleterious, or unwholesome, and that they caused the sickness of plaintiff, and that such condition of the oysters was on account of the negligence of defendant, its servants or agents.[4]

The court instructs the jury that, if you believe from the evidence that the oysters served and furnished plaintiff on the occasion mentioned were purchased by defendant in bulk in due course of trade from a reputable dealer in a market house in ——— on the morning of the day the same were served, and that they were fresh so far as defendant could know or ascertain by inspection, and were in such condition at the time the same were served to plaintiff, then your verdict must be for defendant.[5]

[1] Travis v. Louisville & N. R. Co., 62 So. 851, 183 Ala. 415.
[2] Travis v. Louisville & N. R. Co., 62 So. 851, 183 Ala. 415.
[3] Travis v. Louisville & N. R. Co., 62 So. 851, 183 Ala. 415.
[4] Travis v. Louisville & N. R. Co., 62 So. 851, 183 Ala. 415.
[5] Travis v. Louisville & N. R. Co., 62 So. 851, 183 Ala. 415.

The court instructs the jury that it matters not whose duty it was to inspect the oysters before service; if you believe from the evidence that they were fresh, wholesome, and sound, defendant is not liable to plaintiff in this action.[6]

The court instructs the jury that if you believe from the evidence in this case that any oyster served to plaintiff on the occasion mentioned in the complaint was unsound or unwholesome, putrid, or spoiled, and this fact was unknown to defendant, and could not have been discovered by defendant in the exercise of reasonable care, and was not in such condition knowingly served by the defendant to plaintiff, your verdict must be for defendant.[7]

§ 2593. Same—Presumptions and burden of proof

The court instructs the jury that the mere eating of the oysters by plaintiff and the fact that he was sick afterwards does not by itself show any negligence on the part of defendant.[8]

§ 2594. Same—Sufficiency of evidence

The court instructs the jury that plaintiff has alleged, in the only count now before you for consideration, that defendant furnished plaintiff unwholesome, deleterious, or tainted oysters, and if the evidence fails to establish to your reasonable satisfaction the negligence of defendant in this respect, or if said evidence fails to establish to your reasonable satisfaction that the oysters furnished were tainted, deleterious, or unwholesome, and that the injuries complained of were caused by reason thereof, your verdict should be for the defendant.[9]

[6] Travis v. Louisville & N. R. Co., 62 So. 851, 183 Ala. 415.

[7] Travis v. Louisville & N. R. Co., 62 So. 851, 183 Ala. 415.

[8] Travis v. Louisville & N. R. Co., 62 So. 851, 183 Ala. 415.

[9] Travis v. Louisville & N. R. Co., 62 So. 851, 183 Ala. 415.

CHAPTER CXLVII

FORCIBLE ENTRY AND DETAINER

§ 2595. Elements of cause of action.
2595(1). Indian Territory.
2595(2). Missouri.
2596. Character of possession of plaintiff.
2596(1). Arkansas.
2596(2). Missouri.
2596(3). Nebraska.
2597. Forcible taking and holding of possession by defendant as element of cause of action.
2597(1). Arkansas.
2597(2). Missouri.

§ 2595. Elements of cause of action

§ 2595(1). Indian Territory

You are instructed that the only question for the jury to consider is, was the plaintiff in the actual possession of the premises sued for at the time of the entry by the defendant, and whether or not the defendant forcibly obtained possession of the premises within the meaning of the statute above quoted.[1]

§ 2595(2). Missouri

The court instructs the jury that the right of plaintiff to the possession of the premises in controversy at the time of the alleged forcible entry is not an issue in this case. The question is merely, Has there been a forcible entry on plaintiff's possession? The court instructs the jury that if you find and believe that plaintiff had possession of the premises in controversy on the ———, and that this defendant or his agent on said day entered upon said land and took possession thereof and put out of doors or carried away any of the goods of said plaintiff, then your verdict must be for plaintiff, unless you shall find from the evidence that plaintiff had theretofore notified defendant that he abandoned or surrendered the possession of the premises.[2]

§ 2596. Character of possession of plaintiff

§ 2596(1). Arkansas

You are instructed that constructive possession or evidence that plaintiffs are entitled to possession is not enough to justify a recovery by them in this suit. It must appear that the taking of possession or the subsequent holding was with force and strong hand. This force must be actual and not implied.[3]

[1] Hewlett v. Hyden, 69 S. W. 839, 4 Ind. T. 176.

[2] Purcell v. Merrick, 158 S. W. 478, 172 Mo. App. 412.

[3] Miller v. Plummer, 152 S. W. 288, 105 Ark. 630.

§ 2596(2). Missouri

The jury are instructed that, if plaintiff was in possession of the house on said lot by his tenant in the month of ———, and afterwards and while said premises were so occupied by plaintiff's tenant said house was burned down and destroyed, and the tenant, in consequence of such destruction, abandoned the premises, this did not amount to an abandonment of the possession by plaintiff. Plaintiff, under such circumstances, would be presumed to be in the actual possession of the said lot, though only until he had sufficient time to indicate to the world what his intentions were concerning the possession.[4]

§ 2596(3). Nebraska

You are instructed that while it is the law, as stated by the Supreme Court and as you have been instructed by the ——— instruction given you on behalf of the defendant, that the mere cutting of a few brush or the attempt to plow the land in controversy would not, of itself, constitute possession, nor would the attempt to enter upon the prior actual possession of defendant (if he ever had such possession) furnish any grounds for this action, you are instructed that it is also the law that if the plaintiff, under an arrangement with ———, entered into the peaceable possession of the ground in controversy in ———, with the right to occupy and use the same, and you find such to be the fact from the evidence before you; and you also find from such evidence that at such time the said ground was open, vacant, and had been abandoned, and that after plaintiff obtained peaceable possession of said land he built and repaired fences so as to completely inclose the same; and if you find that brush was cut in ———, by plaintiff, wires removed, and the fence maintained until ———, and that during said month, while the fence inclosed said land, he commenced plowing said land, and while the plow was in the furrow the defendant entered upon said land, securing the plow, and preventing, by threats of personal violence, the completion of said plowing, such entry upon the part of defendant would be unlawful and forcible, and it would be your duty to so decide by your verdict.[5]

§ 2597. Forcible taking and holding of possession by defendant as element of cause of action

§ 2597(1). Arkansas

You are instructed that, if you believe from the evidence that the defendant took and held possession peaceably, though unlawfully,

[4] Ford v. Fellows, 34 Mo. App. 630.

[5] Galligher v. Connell, 53 N. W. 383, 35 Neb. 517. This instruction is argumentative, but is not therefore prejudicially erroneous.

claiming to be the owner of the land, then the plaintiff cannot recover in this suit.[6]

You are instructed that if you believe from the evidence in this case that defendant took peaceable possession of the land and not by force or violence, and that she thereafter held it, claiming to be the owner of the land, then the plaintiff cannot recover in this action.[7]

§ 2597(2). Missouri

The court instructs the jury that if they believe and find from the evidence in this case that the plaintiff rented the premises in suit from the grantor of the defendant for a term expiring on the ———, and that the defendant, on or before said date, took peaceable possession of said premises, then your verdict must be for the defendant.[8]

The court instructs the jury that if they believe from the evidence in this cause that the plaintiff, some time in the fall or winter of the year ———, told the defendant that he had left the premises in suit and moved to ———, and that defendant could take possession thereof and rent said premises to any one he wished, and if the jury further believe from the evidence that some time after ———, the defendant took peaceable possession of said premises, then your verdict must be for the defendant.[9]

The court instructs the jury that before the plaintiff can recover in this cause he must show to your satisfaction, by the greater weight of the testimony, not only that he was in the lawful possession, on ———, of the premises in suit, but also that defendant forcibly detains the possession thereof from plaintiff, and that unless he has so shown, the verdict and judgment must be for the defendant.[10]

[6] Miller v. Plummer, 152 S. W. 288, 105 Ark. 630.

[7] Miller v. Plummer, 152 S. W. 288, 105 Ark. 630.

[8] Purcell v. Merrick, 158 S. W. 478, 172 Mo. App. 412.

[9] Purcell v. Merrick, 158 S. W. 478, 172 Mo. App. 412.

[10] Purcell v. Merrick, 158 S. W. 478, 172 Mo. App. 412.

CHAPTER CXLVIII

FORGERY

§ 2598. Elements of offense.
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2600. Belief of defendant in authority to sign name of another to note.
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2616. Matters considered in determining issues. Forgery of deed.
2617. Evidence of knowledge of forgery.
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2620. Sufficiency of evidence of intent to defraud.
2621. Sufficiency of evidence as to identity of person writing alleged forged or unauthorized signature.
2622. Effect of possession of forged instrument.
2623. Necessity of corroboration of testimony of accomplice.

Criminal liability for sending forged telegram purporting to give consent of parent to marriage, see post, § 3594.

§ 2598. Elements of offense

§ 2598(1). Alabama

The court charges the jury that if the defendant signed the name of ——— and the name of ——— and made his mark thereto with the intent to defraud, express or implied, without the knowledge and authority of ——— and ———, then you must find him guilty,

whether there was any evidence of indebtedness from ——— to defendant or not.[1]

You are instructed that the mere fact, if it be a fact, that ——— was indebted to defendant would not be sufficient to authorize defendant to sign the name of ——— to the mortgage in controversy.[2]

§ 2598(2). Georgia

You are instructed that, if any one should happen to sign or write their names on a piece of paper, and some one was to get hold of it, and fraudulently write above it a promissory note, it would be a forgery, in the letter and spirit of the law.[3]

§ 2598(3). Missouri

The court instructs the jury that if the jury find and believe from the evidence that the defendant, at the county of ———, in the state of ———, at any time within ——— years before the filing of the information in this case, to wit, ———, caused or procured to be forged or falsely made the deed described in the information and read in evidence, or any part thereof (not including the acknowledgment of the same), purporting to be the act of one ———, who was not then living, but had formerly lived and died in said county, the name of said ——— being affixed to said deed, by which an interest in the lands described in said deed and in the information purported to be transferred or conveyed to one ———, and that the same was done feloniously (that is, wickedly and wrongfully), against the admonition of the law, and with intent on the part of the defendant to cheat and defraud, then you will find the defendant guilty under the second count of the information, and, so finding, will so state in your verdict, and assess his punishment at imprisonment in the penitentiary for a term of not less than ——— years.[4]

§ 2598(4). Texas

The jury are instructed that if you believe from the evidence that the instrument in writing set out in the indictment, and produced in evidence, was not made by ——— nor by ———, but that it is a false instrument, and that it was made by some other person, without lawful authority, and with intent to injure or defraud, this would constitute it a forgery.[5]

§ 2599. Necessity of showing intent to defraud

The court charges the jury that if the defendant owned all of the property set out in the indictment, at the time of making the mort-

[1] Curtis v. State, 24 So. 111, 118 Ala. 125.

[2] Curtis v. State, 24 So. 111, 118 Ala. 125.

[3] Roberts v. State, 17 S. E. 262, 92 Ga. 451.

[4] State v. Psycher, 77 S. W. 836. 179 Mo. 140.

[5] Williams v. State (Cr. App.) 32 S. W. 533.

gage, and that it was the defendant's intention at that time, that the property mentioned in the mortgage should be conveyed and held liable for the debt specified in the mortgage, then they should find the defendant not guilty.[6]

§ 2600. Belief of defendant in authority to sign name of another to note

You are instructed that if the defendant made the note which has been offered in evidence, yet if you believe from the evidence that at the time he did so, if he did do so, and if he did do so in ——— county, negotiations were pending between the defendant and Miss ——— for a loan upon the property described in said note, and that the defendant made said note, believing at the time he did so, if he did do so, that he had the authority from Miss ——— to execute the said note in the name of Miss ——— for the purpose of procuring for her the said loan, you will acquit the defendant; or, if you have a reasonable doubt as to the existence of this proposition, you will acquit the defendant.[7]

§ 2601. Necessity of intent to defraud or injure particular person

You are instructed that it is not necessary, to constitute the offense of forgery of a deed to land, that the person or persons charged with such offense intended to defraud or injure any particular person, or that any particular person was injured or defrauded by the forgery, but it will be sufficient to constitute the offense if it is established that the accused, or that he and others acting with him, and aiding and abetting in the commission of the offense, with intent to defraud, signed the name or names to such deed of the person or persons who purport to be the makers thereof, and that the name or names were signed without authority from such person or persons so to do, and it further appears that the deed, if true and genuine, would have the effect to transfer, convey, or otherwise affect the interest of the person or persons whose act it purports to be in the land described in such deed. Nor is it essential that the purported makers of the deed, in fact, had any interest in the land described therein, but it must appear that the land described did exist at the time of the alleged forgery.[8]

§ 2602. Ratification of signature by person whose name is alleged to have been forged

Certain evidence has been introduced in this case from which you might infer that, if you find that the defendant is guilty of

[6] Beal v. State, 35 So. 58, 138 Ala. 94. The prosecution was based on the alleged forging of the mortgage.

[7] Pye v. State, 154 S. W. 222, 71 Tex. Cr. R. 94.

[8] Wishard v. State, 115 P. 796, 5 Okl. Cr. 610.

the forgeries charged against her, such forgeries have been ratified. You are instructed that ratification or confirmation of such forgeries, if you find they were committed, is no defense to the charges, but such ratification and confirmation may be considered by you as a circumstance in determining whether at the time of the alleged forgeries, the defendant had the authority to sign the names of the persons whose signatures she is accused of forging.[9]

§ 2603. Efficacy of instrument forged to accomplish legal wrong

The jury are instructed that it must appear from the evidence that the instrument forged has some adaptation to accomplish a legal wrong, failing in which there is no forgery. If, therefore, the deed claimed to have been forged would not, if it were genuine, deprive the said ———, mentioned in the indictment, of the land, if it were his, or if the deed, as it is, is not adapted to deprive the said ——— of the land, then you will find the defendant not guilty.[10]

§ 2604. Necessity of showing pecuniary loss from defendant's acts

You are instructed that the fact, if it be a fact, that no person suffered any injury by reason of any of the acts charged against defendant herein, is not to be considered by you in arriving at your verdict as to her guilt or innocence. If you believe to a moral certainty and beyond a reasonable doubt that the prosecution in this case has proved the truth of the allegations of the indictments, you should find the defendant guilty regardless of the question whether or not any injury resulted to any one as a consequence of her act. Therefore the question whether or not any third party suffered any pecuniary loss as a result of the defendant's conduct is a question which should not be considered by you in your deliberations in determining her guilt or innocence.[11]

§ 2605. Alteration of check

You are instructed that if you are not satisfied by the evidence, beyond a reasonable doubt, that the defendant altered the check in question, or caused it to be done, before he parted with the possession of it, you should find him not guilty.[12]

§ 2606. Uttering or publishing forged instrument

§ 2606(1). United States

You are instructed that whoever shall, with intent to injure and defraud any one, knowingly utter or publish as true and genuine

[9] People v. Webber (Cal. App.) 186 P. 406.

[10] Snow v. State, 107 S. W. 980, 85 Ark. 203, 122 Am. St. Rep. 23.

[11] People v. Webber (Cal. App.) 186 P. 406.

[12] Goss v. State, 84 S. W. 1035, 74 Ark. 33.

any false and forged check, is guilty of a crime, and shall be punished as prescribed by the Code.[13]

You are instructed that, before you can find the defendant guilty in this case as charged in the indictment, you must find from the evidence beyond a reasonable doubt that the check set out in the indictment was false and forged; that is to say, that it was not the check, and made, signed, and delivered to the defendant, or to any other person, by the drawer, ———, or any one by him authorized. And if you shall find and believe from the evidence in this case beyond a reasonable doubt that the defendant personally wrote, made, and signed the check, and affixed thereto the name of ———, without his consent, authority, or permission, and that his act in so doing was not thereafter, and before the check was passed to any one else, ratified or assented thereto by ———, then I instruct you that it was false and forged.[14]

§ 2606(2). Missouri

The court instructs the jury that if you find and believe from the evidence that at the county of ——— and state of ———, at any time within ——— years before the ——— day of ———, the defendant did unlawfully and feloniously have in his custody and possession a certain false, forged, and counterfeited check, purporting to be drawn on the ——— Bank of ———, an incorporated bank under the laws of the United States of America, and purporting to be made by the ——— Company, ———, Manager, a fictitious company, and that the said defendants did unlawfully, and with the felonious intent to injure and defraud, sell and deliver the said falsely made, forged, and counterfeited check described in the information herein to one ——— for the consideration and sum of $——— in lawful money, and one trunk of the value of $———, and all of the value of $———, the money and property of the said ———, with the felonious intent to have the same uttered and passed, he, the said defendant, then and there well knowing the said check to be falsely made, forged, and counterfeited, you will find the defendant guilty as charged in the second count in the information, and assess his punishment at imprisonment in the state penitentiary at not less than ——— years and not more than ——— years.[15]

§ 2606(3). Texas

You are instructed that, if you find and believe from the evidence beyond a reasonable doubt that a check in writing, as set out in the ——— count of the indictment, was forged, and that the defend-

[13] Stockslager v. United States (C. C. A. Alaska) 116 F. 590, 54 C. C. A. 46.

[14] Stockslager v. United States (C. C. A. Alaska) 116 F. 590, 54 C. C. A. 46.

[15] State v. Allen, 71 S. W. 1000, 171 Mo. 562.

ant in the county of ——— and state of ———, on or about ———, as alleged, knowing the said check to be a forged instrument, if it was a forged instrument and if accused knew it to be forged, in the manner and under the circumstances set forth in said ——— count of said indictment, did, without lawful authority and with intent to injure and defraud said ———, fraudulently and knowingly pass and introduce the said check so altered, if it was altered, as true and as evidence in behalf of accused in and to the justice court of precinct No. ——— of ——— county, ———, in the case of ——— v. ———, No. ———, in order to receive a credit of $——— in the manner and under the circumstances set forth and alleged in said ——— count of the indictment, then you will find the defendant guilty and assess his punishment at confinement in the penitentiary for any term of years not less than ——— nor more than ——— years.[16]

§ 2606(4). Wyoming

The court instructs the jury that if they believe from the evidence, beyond reasonable doubt, that the instrument set forth in the information is a false or forged instrument; that the defendant knew the same to be false or forged; and that he uttered or published the same to ———, with intent to prejudice, damage, or defraud the said ———, —then you will find the defendant guilty as charged in the information.[17]

You are instructed that to utter and publish an instrument is to declare or assert, directly or indirectly, by words or actions, that such instrument is true and genuine, and it is immaterial whether the same be accepted or not.[18]

§ 2607. Same—Publishing as true and genuine

You are instructed that, if you shall find from the evidence beyond a reasonable doubt that the defendant did knowingly utter and publish the check set out in the indictment, then before you can find him guilty you must further find from the evidence beyond a reasonable doubt that he published the same as true and genuine; that is to say, that it was the check of the person whose name is signed thereto as drawer. If you shall find from the evidence beyond a reasonable doubt that he so knowingly uttered and published the check, that it was signed in the name of ———, that he gave it to another person with the intent to deceive him and obtain money on it, and that he did not inform the person to whom he passed it that it was false and forged, but allowed him to believe it was the check of the drawer, and that the person taking it

[16] Bunker v. State, 177 S. W. 108, 77 Tex. Cr. R. 38.

[17] Leslie v. State, 65 P. 849.

[18] Leslie v. State, 65 P. 849.

relied upon it, and presented it to the bank for payment, then you should find that he so uttered and published it as true and genuine.[19]

§ 2608. Same—Knowledge of defendant

§ 2608(1). United States

You are instructed that, before you can find the defendant guilty in this case as charged in the indictment, you must find from the evidence beyond a reasonable doubt that he knowingly or intentionally uttered or published the check set out in the indictment. To utter a check is to pass or deliver it to any other person; to publish it is to make it known or exhibit or deliver it to another. If you shall find from the evidence in this case beyond a reasonable doubt that the defendant in this case did at the time and place mentioned in the indictment knowingly and intentionally deliver the said check to ———, and procured the said ——— to accept the same, and that ———, relying upon the check, presented it to the bank for payment, then you should find that he knowingly uttered and published it.[20]

§ 2608(2). Arkansas

You are instructed that, should you believe from the evidence, beyond a reasonable doubt, that the instrument in writing offered in evidence was, in fact a forgery, yet this would not be sufficient to authorize you to convict the defendant upon the charge brought against him by the indictment; but the proof must go further and show to the satisfaction of your minds, beyond a reasonable doubt, that the defendant knew, at the time he offered the instrument in writing to the Bank of ———, that the same was a forgery.[21]

§ 2609. Same—Intent to injure and defraud

You are instructed that, if you shall find from the evidence in the case beyond a reasonable doubt that the defendant did knowingly utter and publish the check set forth in the indictment as true and genuine, still, before you can convict him, you must further find that he so uttered and published it with intent to injure and defraud another. And in this respect you may consider whether he had an intent to injure or defraud either the party to whom he gave the check or the person whose name purported to be signed to the check. And if you shall find from the evidence beyond a reasonable doubt that he uttered and passed the check upon ——— with intent to deceive him, and did obtain money on it, and that

[19] Stockslager v. United States (C. C. A. Alaska) 116 F. 590, 54 C. C. A. 46.

[20] Stockslager v. United States (C. C. A. Alaska) 116 F. 590, 54 C. C. A. 46.

[21] Moulton v. State, 152 S. W. 132, 105 Ark. 502.

———, relying upon the check, presented it to the bank for payment, then you may infer from that act an intention to injure the said ——— or ———; and if you shall find from all the evidence in the case beyond a reasonable doubt that the check was so uttered with the intent to obtain money upon it, you should find that he did utter and publish the said check with an intent to injure or defraud.[22]

§ 2610. Liability for aiding and abetting offense by another

§ 2610(1). Georgia

The court instructs the jury that if you do not believe that the defendant uttered, or published, or discounted this check—cashed it—at the bank alleged in the indictment, or if you do not believe that he knew it was a forged check, or do not believe that this defendant intended to defraud the parties named in the indictment, or any of them, or if you do not believe that the ——— Trust Company and parties named in the indictment, or some of them, were defrauded, or suffered a loss of money by reason of having cashed this check, or have a reasonable doubt of it, either from the evidence furnished by the state or the defendant, including his statement, or from both considered together, it would be your duty to acquit the defendant.[23]

The court instructs the jury that the state contends that the defendant is guilty of violating these laws, and depends for conviction upon the proof offered by certain facts and circumstances, which the state claims by their consistency to support the contention of the state, that the defendant is guilty. In other words, the state's contention is that this defendant is guilty because he conspired with the other defendant named in the indictment to commit the offense charged against him. If you find one did the act or acts alleged in the indictment, alleged to be an unlawful act or acts, then find whether the other defendant was present or not, whether or not he was aiding or abetting the act to be done, participating in it, either by acts, or words, and whether they were acting or not with a common intent and purpose in concert.[24]

§ 2610(2). Missouri

You are instructed that, when two or more persons form a design or purpose to do an unlawful act, each of said persons is guilty of any and all acts done by any of them in furtherance of such common design or purpose. If, therefore, you find from the evidence that the defendants P. and T., by themselves, or in con-

[22] Stockslager v. United States (C. C. A. Alaska) 116 F. 590, 54 C. C. A. 46.

[23] Bates v. State, 90 S. E. 481, 18 Ga. App. 718.

[24] Bates v. State, 90 S. E. 481, 18 Ga. App. 718.

nection with another or others, at any time within ——— years prior to the filing of the indictment in this cause, in the county of ———, state of ———, formed a common design or purpose to sign the name of ——— to the deed in evidence, feloniously intending to forge the name of ——— to said deed with intent to cheat and defraud, and that, in furtherance of such common design or purpose, the defendant T. in the county of ———, state of ———, did sign the name of ——— to said deed, you will find the defendant P. guilty as charged in the second count of the indictment, and assess his punishment at imprisonment in the penitentiary for any time not less than ——— years.[25]

§ 2610(3). Oklahoma

Bearing in mind the foregoing definitions and carefully applying these instructions to the evidence, if you believe beyond a reasonable doubt that on or about ———, in ——— county, in the state of ———, ———, ———, and others, acting together and aiding and abetting each other, and with intent to defraud ———, ———, and ———, did write and sign, or, with such intent to defraud, did procure or cause to be written and signed the name of ———, ———, or ——— to the instrument set out and described in the indictment, and further find that said instrument was so signed without authority so to do, then the said ——— and ——— are guilty of forgery of said instrument, and the offense will be forgery in the first degree; and if you so find and further believe beyond a reasonable doubt that the defendant ———, knowing an intent of the said ——— and ——— to defraud, induced or encouraged them to commit such offense, or to procure the commission thereof, then you should find him, the said defendant, guilty of said offense of forgery in the first degree, and so say by your verdict. If you do not so believe, you must acquit the defendant and say by your verdict "not guilty."[26]

§ 2611. Jurisdiction

The jury are instructed that, if you believe from the evidence that the defendant signed and executed the note described in the indictment in ——— county, you will acquit the defendant; or, if you have a reasonable doubt thereof, you will acquit the defendant, although you may believe that the signing and execution of said note was under, the definition above given you, a forgery. In all criminal cases the burden of proof is on the state. The defendant is presumed to be innocent until his guilt is established by legal evidence, beyond a reasonable doubt; and, in case you

[25] State v. Tobie, 42 S. W. 1076, 141 Mo. 547.

[26] Wishard v. State, 115 P. 796, 5 Okl. Cr. 610.

have a reasonable doubt as to the defendant's guilt, you will acquit him, and say by your verdict, "Not guilty." [27]

§ 2612. Correspondence of proofs with description of instrument forged as contained in indictment

The jury are instructed that you will find in the first count of the indictment that the check described therein is a check which is alleged in the indictment to have been indorsed, and you will determine whether the check which has been indorsed in evidence before you corresponds in all material particulars to the check which is described in this count. You will find that the check which is described in the second count is not described as having been indorsed, and if you find that the check which was indorsed, in evidence before you, corresponds with the check which is described in said second count in all particulars, except that the check as described in the second count does not refer to the indorsement, then I charge you there still may be a conviction under the second count, and that the indorsement of the check would not be a material matter under the allegations of the second count.[28]

§ 2613. Presumptions and burden of proof

§ 2613(1). Illinois

The court instructs the jury that the law presumes the forgery was committed at the place where the notes were delivered, unless there was some evidence to show where it was actually done.[29]

§ 2613(2). Missouri

The court instructs the jury that if you find and believe from the evidence that the deed read in evidence and described in the information, or any part thereof (not including the acknowledgment of the same), was falsely made and forged, with intent to cheat and defraud, as defined in other instructions, and the defendant had had possession of the same in ——— county, state of ———, and that he made claim to the land described therein, or any part thereof, by virtue of and under said deed in said county of ———, then such facts raise the presumption that he forged or caused the same to be forged in ——— county, state of ———, and that, unless such possession by the defendant of said deed and his claim thereunder are satisfactorily explained to the jury by the evidence in the case in a manner consistent with the innocence of the defendant then such presumption of guilt becomes conclusive.[30]

[27] Pye v. State, 154 S. W. 222, 71 Tex. Cr. R. 94.

[28] Jackson v. State (Ga. App.) 106 S. E. 924.

[29] People v. McIntosh, 90 N. E. 180, 242 Ill. 602.

[30] State v. Pyscher, 77 S. W. 836, 179 Mo. 140.

§ 2614. Inference of fraudulent intent

You are instructed that, if the evidence shows that a person knowingly and willfully does an act, the probable consequences of which would be to injure or defraud, the jury may infer a fraudulent intent.[31]

§ 2615. Inference as to person committing forgery

You are instructed that the jury may infer that the defendant did himself forge the purported instrument, if they believe beyond a reasonable doubt from the evidence that he uttered and published it as true, knowing it to have been forged.[32]

§ 2616. Matters considered in determining issues—Forgery of deed

The court instructs the jury that, although they cannot find the defendant guilty of the charge in the information upon proof that the acknowledgment to said deed was forged and fraudulently made, yet the jury are further instructed that if they believe from the evidence that the acknowledgment to said deed, and the name of the notary before whom the same purports to have been made, was forged, and that the body of the deed, containing the names of the grantor and grantee, and the description of the land conveyed in said deed, was written by the same person who wrote said acknowledgment, then, in determining whether or not the deed was a forgery, you have a right to consider the fact that the acknowledgment to said deed, and the name of the notary before whom the same purports to have been taken, were forgeries, along with the other facts and circumstances in evidence.[33]

§ 2617. Evidence of knowledge of forgery

You are instructed that the mere uttering—that is, the passing of a forged instrument—is of itself a circumstance tending to show knowledge of its falsity, which you may consider in determining this case, I mean by that, if you find from the evidence that this forged policy of insurance described in the information was forged—that is, falsified—and you further find that it was uttered—that is, passed—by the defendant now on trial, or by his codefendant, ———, with the aid and influence of the defendant now on trial, then you have a right to consider these facts in determining whether or not the defendant now on trial knew that it was forged at the time it was uttered.[34]

[31] Curtis v. State, 24 So. 111, 118 Ala. 125.

[32] Curtis v. State, 24 So. 111, 118 Ala. 125.

[33] State v. Pyscher, 77 S. W. 836, 179 Mo. 140. There are other cases in this jurisdiction, however, which condemn a form of instruction which calls the attention of the jury to certain facts to be considered along with the other facts. See Vol. I, §§ 44, 432.

[34] State v. Elliott, 124 P. 212, 69 Wash. 62.

§ 2618. Limiting effect of evidence

You are instructed that, if there is any evidence before you tending to show that defendant made or passed another forged check, such evidence cannot be considered by you for any purpose, except so far as it may tend to show the intent of the defendant in making or passing the check described in the indictment, if he did make or pass it.[35]

§ 2619. Sufficiency of evidence

The court instructs the jury that if you find and believe from the evidence that the deed read in evidence and described in the information, or any part thereof (not including the acknowledgment of the same), was falsely made and forged, with intent to cheat and defraud, as defined in other instructions, and that the defendant had possession of the same in ——— county, state of ———, and that he made claim to the land described therein, or any part thereof, by virtue of and under said deed, then these facts constitute evidence that he committed the forgery of the same, or caused the same to be forged, and that he committed said forgery in ——— county and state of ———; and, unless he explains or accounts for his possession thereof in a manner consistent with his innocence, then these facts are sufficient to warrant the jury in finding him guilty of forgery, as charged in the information.[36]

The court instructs the jury that, in order to find the defendant guilty under the indictment, it is not necessary for the state to prove by direct evidence (that is, it is not necessary for witnesses to testify who saw the act done) that the defendant signed the names of ——— and ——— to the note in controversy, but the same may be inferred from the proof of other facts and circumstances in the case. Therefore, if the jury find and believe from the evidence that the said note was in the possession of the defendant, in the county of ———, recently after the same is dated and purports to have been executed, and if they further believe that the defendant sold and delivered said note as a genuine note to the witness ———, then these facts, if proven, unless satisfactorily explained by the defendant, will warrant you in finding that the names of ——— and ——— were actually written and signed by the defendant, and you will find the defendant guilty, as defined in other instructions.[37]

[35] Wolf v. State (Tex. Cr. App.) 53 S. W. 108.

[36] State v. Pyscher, 77 S. W. 836, 179 Mo. 140.

[37] State v. Milligan, 70 S. W. 473, 170 Mo. 215.

§ 2620. Sufficiency of evidence of intent to defraud

The jury are instructed that, if the respondent's intention in making the note was to deceive Miss R., if she demanded evidence of the loan, and lead her to believe that he had made the loan, and that the note was evidence of it, and to cover up and conceal his false representations in getting the money and his use of it, if he used it, and his failure to make the loan, then the note was a forgery and with intent to defraud, and the respondent may be found guilty of forgery, provided you find from the evidence all of the essential facts I have mentioned established beyond a reasonable doubt. Now, intent, gentlemen of the jury, is a secret of a man's mind, and unless a man discloses his purpose by words, disclosing his state of mind, what he did it for, then the only way the jury may determine intent is from the acts proved in the case, and the reasonable inferences drawn therefrom. So in this case, having in mind all of the evidence, all of the acts, if any, it discloses relating to the making of the note in evidence, it becomes a question for you, gentlemen, to determine the purpose, if any, the respondent had in making this note, in case you find he made it. Did he form the purpose of making this note in order to have it to show to Miss R. in case she wanted to see evidence of the loan? What was his purpose? Did he get the money from Miss R.? If so, did he use it for his own purposes, or did he make the loan? If he did not make the loan, then why did he make the note, if he made it? Did he make the note? Is it a false note? When did he make it? It is charged he made it on ———, and, it being so charged, in order to find the respondent guilty of the charge here made, it is necessary for you, gentlemen, to be satisfied from the evidence, beyond a reasonable doubt, that the respondent did make the note at the time alleged. First, you will take up the question of whether the respondent made the note at the time alleged. If you cannot say he did, and so find from the evidence beyond a reasonable doubt, the case ends, and your verdict will be that of not guilty. If you find he did make the note, that it is a false note, entirely his own work, without any authority from D., to execute it for him, then you come to the question of his purpose and his intent in making it. As I said to you before, gentlemen, no witness can come and testify to an intent, because intent is a secret of another man's mind, but the intent, if you reach that question, is to be gathered, if at all, from all of the facts disclosed and the circumstances surrounding the doing of the thing charged. If he made the note, and it is a false note, what was his purpose? Was it that he might have it to show to Miss R. in case she wanted to see evidence of the

loan? Did he have it—did he make it to have it for the purpose of perpetrating a fraud upon her? Did he make it for the purpose of concealing his use of the money? Did he make it for the purpose of satisfying Miss R. by its production in case she asked to see evidence of the loan, to satisfy her he had made the loan and held D.'s obligation? If such was his purpose, if he made the note and it is false, then it would be a fraud upon Miss R., and if the note was false, and made by the respondent with the intent of defrauding or working a fraud upon Miss R., then all the elements of the crime of forgery are established, and the respondent may be found guilty. In case you cannot so find beyond a reasonable doubt, then the respondent must be found not guilty.[38]

§ 2621. Sufficiency of evidence as to identity of person writing alleged forged or unauthorized signature

The jury are instructed that, before you can convict the defendant under either the fourth or fifth counts in said indictment upon which you have been charged, you must believe from the evidence, beyond a reasonable doubt, that the defendant added the name of ——— to said note without lawful authority, and with the intent to injure and defraud, as hereinbefore explained to you, and that no other person added or placed the name of ——— thereto, and, if you believe from the evidence that ——— or any other person added the name of ——— thereto, you will acquit the defendant.[39]

§ 2622. Effect of possession of forged instrument

You are instructed that if the evidence does not establish beyond reasonable doubt that the defendant made or altered or forged or counterfeited the check in question, or any part thereof, with intent to defraud another, and if the evidence does not establish beyond a reasonable doubt that the defendant uttered or published or passed, or attempted to pass, as true and genuine, the said check, knowing the same to be false or altered or forged or counterfeited, with intent to prejudice or damage or defraud any person, then the mere possession by the defendant of the said check, and his indorsing and negotiating the same, is not sufficient, standing alone, to convict; for proof of the mere possession and negotiating of a forged check is insufficient to convict a defendant of forgery, in the absence of a guilty intent or guilty knowledge.[40]

[38] People v. Campbell, 125 N. W. 42, 160 Mich. 108, 34 L. R. A. (N. S.) 58, 136 Am. St. Rep. 417.

[39] Baird v. State, 101 S. W. 991, 51 Tex. Cr. R. 322.

[40] People v. Dole, 55 P. 581, 122 Cal. 486, 68 Am. St. Rep. 50.

§ 2623. Necessity of corroboration of testimony of accomplice

You are further instructed that the indictment in this case charges, in the second count, that B., on or about ———, passed as true to one R. the $——— note introduced in evidence; that the said B. forged the names to the same, and that before said B. passed the same the defendant advised and encouraged said B. to pass the same to the said R. You are instructed that the evidence shows that said B. is an accomplice, and that you cannot convict defendant upon his uncorroborated testimony; and you are instructed that the corroboration required by law necessitates that said B. must be corroborated by other evidence as to the specific fact that the defendant encouraged said B. to pass that particular note on R. To render this defendant guilty, the state must prove the following facts to your satisfaction by legal evidence beyond a reasonable doubt: First, that said B. forged the names to said note fraudulently and willfully; second, that said B. passed said note on R.; third, that before he did pass it this defendant knew that said B. had committed said identical forgery, and then advised and encouraged said B. to pass that particular note on R. And you are instructed that unless the state has corroborated said B.'s testimony on the foregoing points, and you further believe said B.'s testimony to be true, you must acquit the defendant, and say by your verdict "not guilty," although you might believe that the state had corroborated him on other facts.[41]

[41] Hinson v. State, 109 S. W. 174, 53 Tex. Cr. R. 143.

CHAPTER CXLIX

FORNICATION

§ 2624. Matters considered on issues.
2625. Sufficiency of evidence.

§ 2624. Matters considered on issues

The jury are instructed that evidence of an act of illegal intercourse which occurred more than ——— years before the finding of the indictment is not competent as substantive testimony, but may be considered, if believed, as corroborating evidence of subsequent association.[1]

§ 2625. Sufficiency of evidence

The jury are instructed that this offense is of such a nature that it is not necessary to show by direct proof the actual bedding and cohabiting together, but that it is sufficient to show, beyond a reasonable doubt, circumstances from which the jury might reasonably infer the guilt of the parties.[2]

[1] State v. Dukes, 25 S. E. 786, 119 N. C. 782.

[2] State v. Dukes, 25 S. E. 786, 119 N. C. 782.

CHAPTER CL

FRAUD

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A. CIVIL LIABILITY FOR DECEIT

1. *In General*

§ 2626. Elements of cause of action for deceit

§ 2626(1). California

You are instructed that before the plaintiff can recover in this action, the evidence must be clear and convincing, so as to satisfy your minds by a preponderance of evidence (1) that the alleged fraudulent representations, or a substantial part of them, were made by the defendant; (2) that such representations were false; (3) that they were made with the intent to deceive the plaintiff, and induce him to enter into the contract; (4) that they did so deceive him, and induce him to enter into the contract; (5) that the plaintiff was damaged thereby. Unless each of these facts is shown to your satisfaction by a preponderance of evidence, you should find for the defendant.[1]

§ 2626(2). Delaware

You are instructed that this is what is commonly known as an action of deceit. The gist of the action is fraud. Fraud necessary to support the action exists where a person makes a false representation of a material fact, susceptible of knowledge, knowing it to be false, with the intention to deceive the person to whom it is made, and the latter relying upon it, acting with reasonable prudence, is deceived and induced to do or refrain from doing something to his pecuniary loss or damage. In order to support an action of this kind, it is necessary for the plaintiff to satisfy the jury by a preponderance of the evidence (1) that the defendant made a substantial, material representation respecting the transaction; (2) that it was false; (3) that when he made it he knew that it was false; (4) that he made it with the intention of inducing the plaintiff to act upon it; (5) that the plaintiff was misled thereby and in reliance thereon, did act upon it, and she thereupon suffered damage. In order to avoid repetition, we will say to you now that if

[1] Hanscom v. Drullard, 21 P. 736, 79 Cal. 234.

you should find that these requisites necessary to sustain the action have been established to your satisfaction, your verdict should be for the plaintiff. If, however, you should find that the plaintiff has failed to prove any one or all of these essential elements, your verdict should be for the defendant.[2]

§ 2626(3). Florida

The court further instructs you that the plaintiffs in this action are suing the defendant in an action of deceit, and in order for the plaintiffs to recover it is necessary for them to prove by a preponderance of the evidence that the defendant made the representation set forth in the declaration of the plaintiffs, meaning that the plaintiffs should act upon it; that such representation was false, and that the defendant when he made it knew it to be false, or did not know whether it was true or not; that the plaintiffs, believing such representation to be true, acted upon it and were thereby injured; and if you believe, from a preponderance of the evidence, that the plaintiffs have proved the foregoing, then your verdict must be for the plaintiffs.[3]

§ 2626(4). Illinois

You are instructed that the law is that, if a person makes an untrue statement to another, concerning a material matter inquired about, knowing it to be untrue, and the person to whom it is made has no knowledge of its untruth, but relied on such statement as true, and acted upon the same, and was injured thereby, then the person so making such statement is liable for the damages accruing to the party thus acting.[4]

§ 2626(5). Kansas

You are instructed that the plaintiff in this case for one of his causes of action claims that the defendant herein made certain representations to him regarding a certain well located upon a portion of the real estate conveyed to plaintiff herein by the defendant herein in the trade or exchange of lands referred to in the testimony. Before the plaintiff is entitled to recover for any damages for any representations made by the defendants to plaintiff concerning said well, you must find that the defendant knew said representations to be false, or at least he must have made them without reasonable grounds for believing them to be true. The representations must be of such a character as are likely to deceive the purchaser, or must be made with intent to deceive him. The representations must be relied on, and must be taken as true by the purchaser or one receiving land in exchange to such an extent as that, if they

[2] Ranch v. Lynch, 89 A. 134, 4 Boyce, 446.

[3] Upchurch v. Mizell, 40 So. 29, 50 Fla. 456.

[4] Endsley v. Johns, 17 Ill. App. 466.

had not been made, he would not have made the purchase or exchange.[5]

§ 2626(6). **Maryland**

The jury are instructed that, in order to entitle the plaintiff to recover in this case, the jury must find from the evidence that the defendants, with a view to induce the plaintiff to subscribe to or purchase the stock in the ——— Company, made representations to him with respect to the value of their assets and extent of their business, which were false in fact when made, and that the defendants had no reasonable ground to believe the same to be substantially correct when made, and also that the same were made with the fraudulent intent to cheat and deceive the plaintiff, and that the plaintiff had not at hand the means of verifying the truth of such representations, and that in subscribing to or purchasing said stock the plaintiff relied on such representation and would not have made such purchase except upon the faith of the same, and that in consequence thereof he was misled and injured.[6]

You are instructed that the plaintiff is not entitled to recover in this case, unless the jury find from the evidence that the defendant procured the money of the plaintiff upon his said subscriptions by means of the representations charged in the declaration or some count thereof, and further that said representations were false in fact, and were made fraudulently and deceitfully, and with an intent that the plaintiff should act thereon, believing the same to be true, and that the plaintiff did act thereon and was injured thereby.[7]

The jury are instructed that, if they find that the defendant falsely represented to the plaintiff, with knowledge at the time of the falsity of such representation, that he had paid $——— in cash money for an undivided fourth interest in the mines mentioned in the declaration, with intent to induce him, the plaintiff, to purchase an interest therein, and that the plaintiff, believing such representation to be true, was actually induced by such false representation to purchase two interests or shares therein, the whole in ——— shares or parts to be divided, and pay to the plaintiff therefor the sum of $———, the plaintiff is entitled to recover in this action such amount as the jury may find the plaintiff has lost, by the direct consequence of such false representation, if he in fact has sustained any such loss, not to exceed, however, the amount paid for said two shares, with interest thereon.[8]

[5] Zuspann v. Roy, 170 P. 387, 102 Kan. 188.

[6] Robertson v. Parks, 76 Md. 118, 24 A. 411.

[7] McAleer v. Horsey, 35 Md. 439.

[8] McAleer v. Horsey, 35 Md. 439.

§ 2626(7). Michigan

You are instructed that fraud is a false statement or statements made for the purpose of inducing another to part with money or other valuable things, which statements are calculated to influence the person to whom they are made, and which statements do actually deceive the person to whom they are made, and thereby induce him to part with money or other valuable things.[9]

You are instructed that you are to determine whether the defendant represented that the ——— Company was accumulating a security fund when in fact it was not, and when he knew it was not, and whether defendant represented that certificates were being paid for in the order in which they were issued when, in fact, they were not, and he knew they were not. If you find that either of these representations was made, and was at the time untrue, and that they related to the then present manner of conducting the business of the corporation, and the defendant knew them to be untrue, and that they were made for the purpose of inducing the plaintiff, among others, to put his money into the scheme, and if you find that the plaintiff did in fact rely upon such representations, and that they are material, and that he paid any portion of the money which he paid in reliance upon the truth of such representations, and that the corporation is now insolvent, and that the certificates are valueless, he will be entitled to recover the amount which he paid in reliance on such representations. By the term "representation" I mean representation by the word of mouth, or by printed documents, or publications, made by the defendant; so that if you find that the publications were made by the defendant in question, were made with the purpose of inducing individuals of the public to act upon them, these would constitute representations to the plaintiff, if they were brought home to him; and if the plaintiff relied upon them, he would have a right to treat them as if they were made to himself. The claim of the plaintiff is that such was the fair import of the articles in question, to wit: That there was a security fund to be accumulated by the proportion of ten dollars from each certificate, and that, in fact, was not done; and that the defendant knew the falsity of the statement when it was promulgated. The plaintiff further contends that the representations were contained in these papers, and in the certificates, that the certificates were to be paid in the order in which they were issued, and that this was not done, but, on the contrary, that certificates of a lower number were substituted for those of a higher number. It will be for you to determine, as a matter of fact, whether these

[9] McDonald v. Smith, 102 N. W. 668, 139 Mich. 211. Substantially correct.

representations were made, and whether they were true or false, and whether the plaintiff acted on them in paying his money, and how much of his money he paid, if any he paid, in reliance upon these representations; for it would be so much of his money as he paid in reliance upon these representations, which are shown to be made thus fraudulently, that he would be entitled to recover. The burden of proof rests on the plaintiff to establish his case by a fair preponderance of testimony.[10]

§ 2626(8). **Missouri**

You are instructed that before plaintiff can recover she must satisfy the jury, by the greater weight of the credible evidence, that the alleged false representations and fraudulent acts of ———, on which she founds her right of recovery, and referred to in instruction No. ———, were material ones, that is, had substantial bearing and influence on the matter of the sale and disposition of her stock; that she believed said alleged representations of ——— to have been true, and their said alleged acts and conduct to have been genuine ones, and to have been done by them sincerely and in good faith; that respondent's reliance on them (if such was the case) was the act of an ordinarily prudent person, and that said alleged representations, acts, and conduct directly influenced her in her action in selling or disposing of her stock, and induced her so to do.[11]

The court instructs the jury that if you find and believe from the evidence that, at the time plaintiff exchanged his real estate for the mining stock in question, defendant represented to plaintiff that the mining company had no debts, except for current expenses, which were usually paid up once a month, and that the mine was producing gold enough to pay all running expenses; that said representations were made by defendant (if you find they were so made) for the purpose of deceiving and inducing plaintiff to trade for said mining stock; and that plaintiff believed said representations were true and relied thereon; and that he exercised reasonable care to ascertain whether said company was or was not indebted and was thereby induced to trade his real estate for said stock; and if you further find and believe from the evidence that said representations were false, and that defendant knew they were false at the time of making the trade, and that plaintiff did not know of their falsity (if you find they were false) and relied on them as true in making the trade and was thereby damaged—then you verdict will be for plaintiff.[12]

[10] Timmerman v. Bidwell, 28 N. W. 866, 62 Mich. 205.

[11] Wagner v. Binder, 187 S. W. 1128.

[12] Addis v. Swofford, 180 S. W. 548.

You are instructed that plaintiff is entitled to a verdict in this case against the defendant, G., if the jury find from the evidence the following facts: First. That on ———, the plaintiff bought from G., or from J., or from both of them, five promissory notes, aggregatng $———, signed by J. and S., and indorsed by J., dated ———, payable ———, and bearing ——— per cent. interest per annum after maturity, paying therefor $———, which was more than the notes were in fact worth. Second. That G., for the purpose of inducing plaintiff to buy the notes and convincing it that they were well secured, either orally or in writing, or in both ways, made, as statements of facts, any one or all of the following representations: (a) That said notes were secured by mortgages upon ——— head of cattle; (b) that they were what is known as "Panhandle cattle"; (c) that they were shipped from the Panhandle of Texas in ———; (d) that they would weigh from ——— to ——— pounds each, and that they were worth $——— per head; (e) that J. and S. had $——— of their own money invested in the cattle Third. That any or all of said representations were false and fraudulent, and plaintiff upon the faith of and reliance upon same parted with his money.[13]

§ 2626(9). Nebraska

You are instructed that, before plaintiff can recover in this action, it must establish by a preponderance of the evidence, as to one or all of its first three claims as explained in the foregoing instruction: First, that the representation or representations as charged in the petition were made by defendant to ———; second, that the representations were false; third, that ——— believed the representations to be true; fourth, that ———, in making the purchase, relied upon the representations, and was only induced to make the purchase because of the same; and, fifth, that, for the reason the cattle were not as represented, plaintiff has suffered damages. And if you believe from the evidence that plaintiff has made out his case, as herein explained, as to part, but not as to all three, of his said claims for damages, then you will allow him damages accordingly, measured as hereinafter explained, but, if it has not made out its case as to either of said three claims, then you will find for the defendant.[14]

§ 2626(10). New Hampshire

The court instructs the jury that if the defendant made the representations substantially as alleged in the writ, that if the plain-

[13] Western Cattle Brokerage Co. v. Gates, 89 S. W. 382, 190 Mo. 391.

[14] Hitchcock v. Gothenburg Water Power & Irr. Co., 95 N. W. 638, 4 Neb. Unof. 620. This is proper, with other instructions telling jury that a false representation, to be actionable, must be an assertion of a fact, and not merely an expression of an opinion.

tiff relied upon them as true, and paid his money on the strength of them, and would not have paid it but for the representations, that if they were false, and the defendant, at the time he made them, knew them to be false, the defendant is liable, and the plaintiff is entitled to recover back the $——— which he has paid the defendant, with interest thereon from the date of the writ.[15]

§ 2626(11). Oregon

You are instructed that if you find that these representations were made, and that they were false, and that the defendants, or one of them, knew them to be false, and that the plaintiff relied upon them, then there would be another question for you to determine. The plaintiff would be entitled to recover some damages, and then it would be necessary for you to determine what damages the plaintiff should recover.[16]

§ 2626(12). Texas

You are instructed that if you believe from the evidence that on ———, the defendant ——— conveyed to plaintiff certain property described in plaintiff's petition, situated in ———, in consideration of plaintiff's conveying to the defendant certain property in ———, and if you further believe from the evidence that as an inducement for plaintiff to make any exchange of his property with the defendant, the defendant made a false and fraudulent representation to the plaintiff, to the effect that he had just struck a gusher of water; that is, a strong flowing well of water on his ——— county land, if you so find, and that said representation, if any, was material and that plaintiff, ———, believed said representation, if any, to be true, and did not know and could not, by the exercise of ordinary care, have known, whether said representation, if any, was true or false, and that the said defendant made such representation, if any, to the said plaintiff, for the purpose of inducing the said plaintiff to make the trade, and accept the ——— county land, if you so find, and that the said plaintiff accepted the ——— county land, relying on said representation—if you so find—then you are instructed to return a verdict for the plaintiff; but if you do not so believe, you will return a verdict for the defendant.[17]

§ 2626(13). Washington

You are instructed that, if you find from the evidence in this case that is clear, satisfactory, and convincing, and in view of the conditions and surroundings of the parties, that the plaintiff, at the time and place in question, did represent that the said land in

[15] Richardson v. Gilson, 55 N. H. 623.

[16] David v. Moore, 79 P. 415, 46 Or. 148. The objection to this instruction was that it omitted the element of belief.

[17] George v. Hesse (Tex. Civ. App.) 94 S. W. 1122.

——— county was as level as a floor, taking said representations as heretofore explained to you as meaning a representation that it was reasonably and practically level, and that said land would not have to be leveled for the purpose of irrigating, and that it was all first-class fruit land, and that all of it was capable of being cultivated and irrigated, and if in truth and in fact said land was not reasonably and practically level, but would have to be leveled for the purpose of irrigating, or was not first-class fruit land in that locality, or that all of it was not capable of being cultivated and irrigated, and you further find that the defendant, in good faith believed and relied on said representations and pretenses, and by means thereof was induced to enter into the exchange of lands in question, and would not have done so but for said representations and pretenses, then you should find for the defendant. If, upon the other hand, you do not believe by testimony that is clear, satisfactory, and convincing, either that said representations were made, or that same, if made, were untrue, then you should find for the plaintiff.[18]

With respect to the alleged representation that said land was as level as a floor, I instruct you that by that expression is meant that said land was reasonably and practically level; and with respect to the alleged representation that said land was first-class fruit land, I instruct you that that representation refers to first-class fruit land in the locality in question.[19]

§ 2626(14). Wisconsin

The jury are instructed that, if one person represents to another as true that which he knows to be false concerning a material matter, and makes the representation in such a way and under such circumstances as to induce a reasonable man to believe that the matter stated is true, and the representation is meant to be acted upon, and the person to whom the representation is made, believing it to be true, acts upon the faith of it and suffers damage thereby, this is fraud sufficient to support an action for deceit.[20]

The jury are instructed that there can be no recovery unless the defendant represented as true a material matter which he at the time knew to be false, or did not have reason to believe to be true, and made the representation in such a way or under such circumstances as to induce a reasonable man to believe it to be true, and it was meant to be acted upon, and plaintiff, believing it to be true, acted upon his faith in it, and by so acting sustained damage.[21]

[18] Grant v. Huschke, 133 P. 447, 74 Wash. 257.

[19] Grant v. Huschke, 133 P. 447, 74 Wash. 257.

[20] Middleton v. Jerdee, 40 N. W. 629, 73 Wis. 39.

[21] Middleton v. Jerdee, 40 N. W. 629, 73 Wis. 39.

§ 2627. Falsity of representations

You are instructed that if you believe, from the testimony, that the defendant made no representations whatever, but simply came here and stated to plaintiff that the mule had died and he wanted another one, and plaintiff gave it over to him, and that in doing so defendant made no representation as to how he died, or no false representation with the intention of deceiving plaintiff, and which did not deceive him, and plaintiff did not act upon it, and that defendant did not willfully conceal from plaintiff some facts which he should have stated to him regarding the death of the mule, then you need not go any further, but you should find a verdict for the defendant right then and there.[22]

§ 2628. Positive misrepresentations as necessary element of cause of action

You are instructed that, in order to make out deception in this class of cases, it is not essential that false assertions should be made in express words, but one may accomplish a fraud by encouraging and taking advantage of a delusion known to exist in the minds of others, especially where assertions or statements are made calculated to create such delusion.[23]

You are instructed that if, at the time of the interviews preceding the execution of the contract of ———, H. knew or had reason to believe that the plaintiff knew or relied upon him for such information necessary to enable plaintiff to enter into the agreement, then it was the duty of H., when he undertook to impart such information, to give it fully and accurately; and if, under such circumstances, H. had an estimate in his possession of the quality and quantity of the timber upon this land by ———, and knew that plaintiff, on account of sickness, was unable to and did not examine the same, and H. undertook to state to plaintiff the quantity and quality of logs shown thereby, then it became his duty to state the same fully and accurately.[24]

§ 2629. Materiality of misrepresentations

§ 2629(1). Idaho

The jury are instructed that, to constitute fraud, a misrepresentation must be as to a material fact; a representation in relation to a fact that is not material to a contract, though it may be false and known to be false by the person making it, and though it may be acted upon by the other party, is not fraud.[25]

[22] Rutherford v. Irby, 57 S. E. 927, 1 Ga. App. 499. Plaintiff sold a sick mule to defendant, and agreed, if mule died, to give defendant another one, provided defendant did certain things with respect to curing the mule sold.

[23] Busch v. Wilcox, 46 N. W. 940, 82 Mich. 315.

[24] Busch v. Wilcox, 46 N. W. 940, 82 Mich. 315.

[25] Breshears v. Callender, 131 P. 15, 23 Idaho, 348.

The court instructs the jury that, if a misrepresentation is not material, a person has no right to act upon it, and if he does he is not entitled to relief or redress on the grounds of fraud; the question is not whether the person to whom the representation was made deems it material, but the question is whether it was in fact material, and if the defendant in this case made representations which were false, and which at the time they were made he knew to be false, and if you find that such representations were not material and that the plaintiffs in this case had no right to act upon them, the plaintiffs cannot recover.[26]

§ 2629(2). Maryland

You are instructed that the representations of defendant, mentioned in the evidence, must have been with regard to a material matter to constitute the basis of an action for deceit, and that to be material they must have been with respect to ascertainable facts, as distinguished from mere matters of opinion or speculation.[27]

§ 2629(3). Massachusetts

The trial court instructs the jury that if the plaintiffs were taken over the farm by the defendants, and were shown the bounds, so that the plaintiffs knew where the farm was and what was comprised within the bounds, it would not be of any consequence that representations may have been made by the defendant in relation to the acreage.[28]

§ 2629(4). Minnesota

You are instructed that, if you believe from the evidence that plaintiff, with a view to purchasing certain real estate owned by ———, applied to defendant for information concerning such real estate, stating to defendant his object in desiring such information, and that defendant made false representations as to the condition, quality, or other matters affecting the value of such real estate, then such representations were concerning a fact material to the purchase which plaintiff contemplated.[29]

§ 2630. Expression of opinion as actionable fraud

§ 2630(1). Kansas

You are instructed that a representation that a certain well is a good well, or that it will supply plenty of water, without stating the amount, would be a mere expression of opinion on the part of the person making said statement, and would constitute no

[26] Breshears v. Callender, 131 P. 15, 23 Idaho, 348.

[27] Robinson v. Parks, 24 A. 411, 76 Md. 118.

[28] Mabardy v. McHugh, 88 N. E. 894, 202 Mass. 148, 23 L. R. A. (N. S.) 487, 132 Am. St. Rep. 484, 16 Ann. Cas. 500.

[29] Basterud v. Farrington, 31 N. W. 360, 36 Minn. 320.

ground for the allowance of damages in case the same were untrue.[30]

§ 2630(2). Maryland

The jury are instructed that the plaintiff is not entitled to recover on account of any representations they may find the defendants, or either of them, may have made to the plaintiff, that the stock of the ——— Company would pay as much as ——— per cent. dividend, or for any other expression of opinion concerning the future value and profitableness of the business they were carrying on, and the jury must exclude such representations as constituting a basis of recovery in this action.[31]

You are instructed that a representation which merely amounts to a statement of opinion, judgment, probability, or expectation, or is vague and indefinite in its terms, or is merely a loose, conjectural, or exaggerated statement cannot be made the basis of an action for deceit, though it may not be true, for a party is not justified in placing reliance upon such statement or representation.[32]

§ 2630(3). Oregon

I instruct you that the expression of an opinion is not a representation and does not amount to a fraud, although false. So if the purchasers had an opportunity to examine the property and ascertain its value, and no fiduciary relationship existed between them and the defendant, the defendant's representation as to the value of the property, if any he made, is but the expression of an opinion and not actionable, even though false and fraudulent.[33]

I instruct you that general assertions or expressions of a seller in commendation of his land and bragging upon it, commonly called "dealers' talk," do not constitute any ground for an action of deceit or fraud; such statements are generally regarded in the law as mere expressions of opinion, upon which a purchaser cannot safely rely.[34]

You are instructed that the evidence in this case tends to show that these parties had some kind of an agreement in regard to locating of the plaintiff on lands which he desired to settle upon and secure as a homestead, and tends to show that the defendant represented that he knew of a piece of land which plaintiff could settle upon, and that he took plaintiff out to this place and showed him the land, and while they were there it appears that there were some

[30] Zuspann v. Roy, 170 P. 387, 102 Kan. 188.

[31] Robertson v. Parks, 76 Md. 118, 24 A. 411.

[32] Robinson v. Parks, 24 A. 411, 76 Md. 118.

[33] McCabe v. Kelleher, 175 P. 608, 90 Or. 45.

[34] McCabe v. Kelleher, 175 P. 608, 90 Or. 45.

indications of mining having been carried on on the premises, and some conversation took place there about that. Now a statement or conversation which simply expressed the opinion of the defendant in regard to the question as to whether or not there was a mining claim, or that it had been abandoned or forfeited, would not be a misrepresentation of a fact, such as would entitle the plaintiff to recover, if he simply gave a statement as to what he deemed the law was in regard to that matter.[35]

§ 2631. Expression of opinion on subject by one possessing special knowledge with respect thereto

You are instructed that, if you believe from the evidence that plaintiff had sustained a fracture at the base of the skull and that such injury was incurable, that defendant was a surgeon possessing special knowledge and skill with respect to treatment of personal injuries, and that plaintiff was an illiterate man, that after an examination of plaintiff's injury defendant represented to plaintiff that he could and would be restored to health by treatment, that defendant made such representation for the purpose of inducing plaintiff to pay over the sum of $——— to himself, or to the institute which he represented, or to both, that he made such representation as true of his own knowledge, without knowing whether it was false or true, and not believing it to be true, and that defendant knew by his previous examination of plaintiff that he could not recover his health, and that plaintiff relied on such statement of defendant, and was thereby induced to pay to defendant the said sum of $——— for treatment which resulted in no benefit to plaintiff, then you should find for the plaintiff.[36]

§ 2632. Necessity of showing intent to cheat and defraud

§ 2632(1). Connecticut

The jury are instructed that, if fraudulent representations are made to one, who acts in reliance upon them to his damage, he can maintain an action therefor, without adducing express evidence of an intent to deceive.[37]

§ 2632(2). Maine

The court instructs the jury that, if one person makes a statement of a positive fact, the truth of which can be ascertained, as of his own knowledge, and such statement concerns a material fact, and is the representation of a fact, and not the mere expression of an opinion, and that statement is untrue, and he has made that

[35] David v. Moore, 79 P. 415, 46 Or. 148.

[36] Hedin v. Minneapolis Surgical Institute, 64 N. W. 158, 62 Minn. 146, 35 L. R. A. 417, 54 Am. St. Rep. 628.

[37] Schoefield Gear & Pulley Co. v. Schoefield, 40 A. 1046, 71 Conn. 1. This is proper, in connection with other instructions as to scienter.

statement for the purpose of inducing another party to act upon it, and the other party relying upon the statement, being induced by the statement, and without knowledge of its falsity on his own part, does act upon such statement to his damage, then such statement is such a misrepresentation as will sustain an action of deceit, and it is not necessary that the false statement should be made with a fraudulent purpose and with intention on his part to cheat or defraud.[38]

§ 2632(3). Maryland

The jury are instructed that, if they find from the evidence that the defendants acted in their dealing with the plaintiff openly and in good faith, and the plaintiff purchased ——— shares of stock in the ——— Company, a corporation in which the defendants were officers, and further find that loss and damage resulted to the plaintiff by reason of said purchase of stock, the plaintiff cannot recover in this suit, even should the jury believe from the evidence that said loss and damage was the direct result of the subsequent management of said corporation by the defendants.[39]

§ 2633. Scienter as element of deceit

§ 2633(1). Alabama

You are instructed that a representation is not fraudulent, unless the party making the same had the knowledge that it was false, or unless he made a fraudulent or reckless representation of fact as true, which he did not know to be false, but by which he intended to deceive the party to whom the same was made.[40]

The jury is instructed that, if ——— honestly stated to plaintiff the condition of the engine as the said ——— believed the same to exist at the time of the sale, the jury must find the issues for the defendant.[41]

You are instructed that you cannot find a verdict for the plaintiff on account of the falsity of any representations which ——— may have made to plaintiff, unless the jury are reasonably satisfied, from the evidence, that at the time of said statements said ——— knew that the same were false, or made the statements fraudulently or recklessly as true, with the intention to deceive the plaintiff.[42]

§ 2633(2). California

You are instructed that, if the jury finds that defendant was a director at the time the sale of stock was made to plaintiff, and at

[38] Pierce v. Cole, 85 A. 567, 110 Me. 134.

[39] Robertson v. Parks, 76 Md. 118, 24 A. 411.

[40] Kilby Locomotive & Machine Works v. D. B. Lacy & Son, 67 So. 754, 12 Ala. App. 464.

[41] Kilby Locomotive & Machine Works v. D. B. Lacy & Son, 67 So. 754, 12 Ala. App. 464.

[42] Kilby Locomotive & Machine Works v. D. B. Lacy & Son, 67 So. 754, 12 Ala. App. 464.

the time the prospectus was being used by the company to her knowledge, and finds that said prospectus contains the false representations alleged in plaintiff's complaint, and that these, or any one of these, alleged false representations induced plaintiff to buy said stock, and were made with the intent to induce the public to buy said stock, and, further, that although defendant and the other directors believed the representations true, still if they were made positively in a manner not warranted by the information that they had, then the sale was actually fraudulent.[43]

§ 2633(3). Delaware

You are instructed that any affirmation or opinion expressed by the defendant through his agent as to the character or value of the farm in question which, in fact, was false, is not alone sufficient in law to establish fraud; but the representation to be fraudulent must have been false and known by the person making it to be so at the time.[44]

§ 2633(4). Indiana

You are instructed that if a party, for the purpose of inducing another party to purchase property, makes material representations concerning the soundness of property, which representations the other party relies upon and believes in good faith without knowing the contrary, and thereon purchases the property, which turns out to be defective and not as represented, by reason of which the purchaser is damaged, the party making such representations will be liable to the injured party in damages as for fraud, without regard as to whether the party making such representations knew at the time he was making them that they were false.[45]

You are instructed that if the stallion in question was in fact afflicted with summer sores at the time of its purchase by the plaintiff, although such disease was in its incipient or dormant stage at that time, which rendered said stallion unsound at that time, and if you believe from the evidence that the defendant company, not knowing whether said stallion was afflicted with summer sores or whether it was unsound, by its agent represented to the plaintiff, for the purpose of inducing him to purchase said stallion, that it was not afflicted with summer sores, or that it was sound, which statement, or statements, the plaintiff believed and relied upon and, so relying, purchased said stallion, and that said statements turned out to be untrue, if they were untrue, then the plaintiff would be entitled to recover in this case.[46]

[43] Neff v. Mattern, 151 P. 382, 28 Cal. App. 99.

[44] Ranch v. Lynch, 89 A. 134, 4 Boyce, 446.

[45] Maywood Stock Farm Importing Co. v. Pratt, 110 N. E. 243, 60 Ind. App. 131.

[46] Maywood Stock Farm Importing Co. v. Pratt, 110 N. E. 243, 60 Ind. App. 131.

§ 2633(5). Iowa

You are instructed that an unqualified statement that a fact exists, made for the purpose of inducing another to act upon it, implies that the person who makes it knows it to exist, and that he speaks from his own knowledge. And if the fact does not exist, and the defendant states, as of his own knowledge, that it does, and thereby induces another to act upon his statement to his injury, the law will impute to him a fraudulent purpose.[47]

§ 2633(6). Maryland

You are instructed that, if you believe from the evidence that the defendant knowingly told a falsehood concerning a material fact, or made a positive representation of a material fact as true, when he did not know it to be true, and had no reasonable ground for believing in its truth, with the intent to induce plaintiff to purchase the shares of stock mentioned in the evidence, and did thereby induce the plaintiff to enter into a contract for the purchase of such shares which, but for such misrepresentations, plaintiff would not have entered into, and the plaintiff was injured by entering into such contract in reliance upon such representations, then you will find for the plaintiff.[48]

§ 2633(7). Michigan

You are instructed that if, at the time H. met plaintiff at ———, he (H.) had two different estimates of the land in question, one showing a much smaller quantity, and in quality inferior to ———'s estimate, and he (H.), knowing that plaintiff was relying upon him for information as to quantity and quality in order to enter into the agreement of ———, and you further find that H. undertook to impart to plaintiff such information, then it was H.'s duty to inform plaintiff as to the quantity and quality shown by each estimate, and if you find that he did not exhibit to plaintiff the smaller estimate, in order to induce plaintiff to enter into the agreement of ———, in reliance upon the accuracy of ———'s estimate, and you further find that the ——— estimate was grossly inaccurate, both as to quantity and quality, and that the other estimate was substantially correct, these would constitute such a fraud as would enable the plaintiff to recover.[49]

You are instructed that if you find H., acting as agent for defendant, knew that plaintiff did not know the quantity of timber upon the land in question, that is, if he did not know from any thing except from what he had heard, because the evidence shows that none of these men had ever been upon the land, and what they

[47] Hess v. McCardell, 166 N. W. 470, 182 Iowa, 1121.

[48] Robinson v. Parks, 24 A. 411, 76 Md. 118.

[49] Busch v. Wilcox, 46 N. W. 940, 82 Mich. 315.

depended upon was ———'s figures, and the books and the map, and that there was also another estimate there got up by ——— and ———, and expected that plaintiff would, in entering upon the agreement, rely upon such information as he (H.) might give him, and you further find that H. did, in good faith, make material representations as to quality and quantity of timber to be lumbered, and at the same time he made such representations stated that he made them upon ———'s estimates, which he believed to be correct, and that plaintiff, relying upon such representations, did enter into these agreements of ———, and you further find that there was not upon the land the timber, either in quantity or quality, as represented, the plaintiff would be entitled to recover. The law of this state considers the deceptive influence of such misrepresentations, though made innocently, as effective in inducing the contract, and the consequences to plaintiff as serious as though the same had proceeded from a vicious motive; the result in either case would be, in contemplation of law, a fraud upon plaintiff, and would entitle him to recover such damages as he has sustained thereof—that is, if H. said or did anything that was untrue.[50]

§ 2633(8). Minnesota

The jury are instructed that, if you find from the evidence that the defendant sold said horse of his to the plaintiff, and at the time of such sale fraudulently concealed from plaintiff any unsoundness or disease then existing in said horse, which proved a contagious infection and incurable disease, and that defendant, with knowledge that the horse was sick, falsely represented that it was sound and free from disease, and that plaintiff relied upon such representations in making the purchase, and if you further find from the evidence that the horse was unsound, and affected with an incurable and contagious disease, at the time of such purchase, you will find for plaintiff.[51]

§ 2633(9). Mississippi

You are instructed that for one to assert as a fact that of which the party so asserting has no knowledge or well-founded belief is knowingly to make a false statement, if such assertion is false.[52]

§ 2633(10). Missouri

You are instructed that if, to induce the plaintiff to act thereon, defendant falsely made any one of the representations of the character and for the purposes as submitted in the foregoing instruction ———, knowing at the time that it was false, then the jury

[50] Busch v. Wilcox, 46 N. W. 940, 82 Mich. 315.

[51] Johnson v. Wallower, 18 Minn. 288 (Gil. 262).

[52] Sims v. Eiland, 57 Miss. 607.

must find that it was fraudulent; or if defendant, without knowledge of its falsity, did make any one of such representations to induce plaintiff to act thereon, assuming or intending to convey the impression that he had actual knowledge of its truth, though conscious that he had no such knowledge, then such representation was just as fraudulent as if he had made it actually knowing that it was false. If any representation was so made and was fraudulent, as that word is herein defined, then defendant cannot claim that he did not intend thereby to actually injure or to actually defraud plaintiff, or that he was innocent and acted honestly and in good faith in relation thereto.[53]

§ 2634. Making false statement recklessly as of own knowledge

§ 2634(1). Florida

The court further instructs you that it is not necessary for the plaintiffs to prove that the defendant had actual knowledge of the falsity of the representation made, if you believe such representation was made and it was false; but it is sufficient that the defendant made the representation as of his own knowledge, or in such absolute unqualified and positive terms as to imply his personal knowledge, when, in truth, defendant had no knowledge whether the representation was true or false.[55]

You are instructed that, if a party has no knowledge on which to base a belief, he is considered reckless in making a statement pretending to give facts; and if you believe from a preponderance of the evidence that the defendant made the representation charged in the declaration to the plaintiffs, meaning that plaintiffs should act upon it, that such representation was false, and that the defendant had no knowledge on which to base his belief, such representation was recklessly made, and, if the plaintiffs, believing such representation to be true, acted upon it and were thereby injured, your verdict must be for the plaintiffs.[56]

The court further instructs you that a corrupt intent to deceive is not necessary to the plaintiffs' cause of action. It is not necessary that the plaintiffs should prove the representation to have been intentionally fraudulent, if the representation was known to be false, and was made with intent to induce plaintiffs to credit ———. If the defendant, without any knowledge of the truth or falsity of the representation, wrote the plaintiffs as alleged, but represented his statement as true of his own knowledge, the law infers that the defendant intended to deceive. The intention of the

[53] Western Cattle Brokerage Co. v. Gates, 89 S. W. 382, 190 Mo. 391.

[55] Upchurch v. Mizell, 40 So. 29, 50 Fla. 456.

[56] Upchurch v. Mizell, 40 So. 29, 50 Fla. 456.

defendant to deceive may be proved by showing that the defendant, having no knowledge of the truth or falsity of his statement, yet represented his statement to be true of his own knowledge. The only proof of fraudulent intent required is that the defendant made a statement as of his own knowledge, which was false, not having any knowledge of the truth or falsity thereof.[57]

§ 2634(2). Minnesota

The jury are instructed that, if you find from the evidence that defendant made the statements and representations complained of as to the grade of the lot in question, and made them positively and unequivocally as of his own knowledge, then it makes no difference whether defendant knew the real facts.[58]

§ 2635. Representations concerning matters not susceptible of exact knowledge

The jury are instructed that, where the representation is concerning a condition of affairs not susceptible of exact knowledge, the assertion of knowledge is to be taken as meaning no other than a strong belief founded upon what appears to the defendant to be reasonable and certain grounds. In such a case the question is wholly one of good faith.[59]

§ 2636. Effect of disclaimer of personal knowledge

§ 2636(1). California

You are instructed that if the representations made to the plaintiff, as to the value of the property sold, were untrue, yet defendant would not be liable if the defendant professed to rely on the knowledge of others, and gave the source of his information, which plaintiff consulted, unless the defendant knew or had reason to believe such representations were untrue.[60]

§ 2636(2). Michigan

The jury are instructed that, if a person receives information from others and believes it, repeats it, explaining that he has no personal knowledge, he is not guilty of fraud. Therefore, if you find that the defendant received information from others and repeated that information to plaintiff, and explained to plaintiff the sources of his information, he is not guilty of any fraud, if he acted honestly and in good faith.[61]

[57] Upchurch v. Mizell, 40 So. 29, 50 Fla. 456.

[58] Bullitt v. Farrar, 43 N. W. 566, 42 Minn. 8, L. R. A. 149, 18 Am. St. Rep. 485.

[59] Krause v. Cook, 108 N. W. 81, 144 Mich. 365.

[60] Hanscom v. Drullard, 21 P. 736, 79 Cal. 234.

[61] Krause v. Cook, 108 N. W. 81, 144 Mich. 365.

§ 2637. Liability for statements in prospectus prepared by others

You are instructed that if the jury find from the evidence that neither of the defendants ———, ———, and ——— prepared the prospectus read in evidence, but that the same was prepared by some other officer or officers of the ——— Company, and if you further find from the evidence that the facts stated in said prospectus were in accord with reports and investigations made by experts or representatives of the said company, and were in accord with the information obtained by the defendants, and if you further find that said defendants honestly believed the statements contained in said prospectus were true, and did not learn of any misstatements of fact therein (if there were any misstatements of fact therein) prior to the purchase of stock by the plaintiff, then the defendants are not liable for any misrepresentations or statements in said prospectus, even though it may have afterwards developed that the same were untrue.[62]

The court instructs the jury that the defendants are not liable in this action for any neglect or failure on their part to make personal investigations to verify the correctness of the statements contained in the prospectus read in evidence, provided that the statements contained therein were in accordance with the reports to the defendants by other officers of the corporation, and provided the defendants honestly believed the statements contained therein to be true, and had no reason to believe that any statements therein contained were false.[63]

You are instructed that, even though the jury may find and believe from the evidence that the defendant made representations or statements to the witness ——— regarding the character and condition of the property of the ——— Company, and even though you may find from the evidence that some one or more of such statements were not true, yet if you further find and believe from the evidence that such statements, if any, were made by the said defendant in good faith, honestly believing the same to be true, and such belief was based on his own examination and on reports from other persons on which he relied, and that the said defendant had no purpose or intent to mislead, deceive, or defraud the plaintiff thereby, then the plaintiff cannot recover on account of any of said statements.[64]

[62] Peters v. Lohman, 156 S. W. 783, 171 Mo. App. 465.

[63] Peters v. Lohman, 156 S. W. 783, 171 Mo. App. 465.

[64] Peters v. Lohman, 156 S. W. 783, 171 Mo. App. 465.

§ 2638. Necessity of showing reliance on representations

§ 2638(1). Maryland

The jury are instructed that if the jury believe from the evidence that in the year, ———, the defendants P. and H., formed a copartnership in the city of ——— under the name of P. & Co., for the purpose of carrying on the fertilizing business, and that thereafter F. became a member of said firm and contributed to the capital thereof $——— for a one-third interest therein, and that thereafter said F. retired from said firm, and the defendant M., on or about the ———, became a member thereof, and contributed the sum of $——— in cash for a one-third interest therein, and that thereafter the said firm of P. & Co. dissolved for the purpose of continuing said business under the management of a company, and to that end, on ———, the defendants, together with S., formed a copartnership known as the ——— Company, under the general incorporation law of the state, for the object and purpose contained in the certificate of incorporation and the prospectus of said company offered in evidence, and that after the organization of said company and the issue of stock to the defendants M., H., and P., as mentioned in the evidence, the directors of said company inserted in the ———, on the ——— day of ———, the advertisement offered in evidence, soliciting subscriptions to the stock of said company and inviting an investigation of its affairs, as therein mentioned, and that the plaintiff, in response to said advertisement, and with a view of purchasing stock therein, made inquiry into the extent and development of the fertilizing business in the city of ———, and also as to the financial responsibility and standing of the defendants, and thereafter visited the office of said corporation on ——— street, and at his request the defendants placed at his disposal all the ledgers, books of accounts, collection books, and other records containing the transactions of said P. & Co. and the ——— Company, for the purpose of making examination of the same, and shall further find that the plaintiff is an expert bookkeeper or accountant, and that he devoted two or three weeks to an examination of said books and records, and shall further find that M. the former bookkeeper of said P. & Co., offered to the plaintiff any assistance or information which he might need in the examination or understanding of said books or records, and that the plaintiff declined said offer and preferred to make said examination without the assistance of the defendants, and shall further find that, after finishing the examination of said books and records, the plaintiff subscribed to ——— shares of the stock of said company, and shall further find that said books and records showed the assets and liabilities of said P. & Co., and also what part of said assets consisted of open accounts and bills receivable overdue, and placed in

the hands of attorneys or collection agents for collection, then the plaintiff is not entitled to recover in this action with respect to any representations made by the defendants, or any of them, as to the character, consideration, or value of said assets, accounts, or bills so overdue and in course of collection as aforesaid.[65]

§ 2638(2). Missouri

The jury are instructed that, if you believe from the evidence that plaintiff was induced to purchase the land mentioned in the evidence through and by both the false and fraudulent representations of defendant and such information as he may have obtained from other sources, even then the plaintiff ought to recover.[66]

§ 2638(3). Nebraska

You are instructed that, before plaintiff can recover in this action, it must establish by a preponderance of the evidence, as to one or all of its first three claims as explained in the foregoing instruction: First, that the representation or representations as charged in the petition were made by defendant to ———; second, that the representations were false; third, that ——— believed the representations to be true; fourth, that ———, in making the purchase, relied upon the representations, and was only induced to make the purchase because of the same; and, fifth, that, for the reason the cattle were not as represented, plaintiff has suffered damages.[67]

§ 2638(4). New York

You are instructed that, to maintain an action for fraud and deceit based upon fraudulent representations, such representations must have influenced the other party to the contract.*

§ 2638(5). Wisconsin

You are instructed that, in order to answer this question (the third one) in the affirmative, you must find from the evidence that the plaintiffs believed said statement to be true, and that said statement constituted a material inducement for them to purchase the land. It is not necessary, however, that the plaintiffs should have relied exclusively upon such statement as an inducement to the plaintiffs to purchase the land, if such statement exerted a material influence upon their minds, inducing them to purchase.[68]

[65] Robertson v. Parks, 76 Md. 118, 24 A. 411.

[66] Becraft v. Grist, 52 Mo. App. 586.

[67] Hitchcock v. Gothenburg Water Power & Irrigation Co., 95 N. W. 638, 4 Neb. Unof. 620. This instruction might well be accompanied by an instruction that an actionable false representation must be an assertion of a fact as a fact, and not merely an expression of an opinion.

* Furman v. Titus, 40 N. Y. Super. Ct. 284.

[68] Darlington v. J. L. Gates Land Co., 138 N. W. 72, 151 Wis. 461.

§ 2639. Right to rely on representations and duty of complaining party to investigate

§ 2639(1). California

You are instructed that plaintiff cannot recover in this action unless he was deceived by the alleged representations, and if the means of knowledge are at hand, equally available to both parties, and the subject of purchase is alike open to their inspection, if the purchaser does not avail himself of these means and opportunities, he will not be heard to say that he has been deceived, unless he was induced by the trick or misrepresentations of defendant not to make such inspection.[69]

§ 2639(2). Illinois

The court instructs the jury that it was the duty of the plaintiff, before acting upon any representations made to him concerning ———, if any such representations have been proved, to have exercised ordinary care and caution to guard against deception and fraud, and if he could by the exercise of ordinary care and caution have ascertained the falsity of any statements or representations made to him, and he failed to do so, then he is not entitled to recover in this action, and the jury should find for the defendant, unless you believe from the evidence that the alleged statements of defendant were of such character as to induce plaintiff to rely entirely on their truth, and to induce plaintiff not to make such investigation as a reasonably prudent man would make under different circumstances.[70]

§ 2639(3). Minnesota

The jury are instructed that the defendants were entitled to rely on the representations of the plaintiff as to the character of the dam and mill, and they were not obliged to make further research as to the same. The capacity of the mill and the character of the dam were not such patent defects as the defendants were bound to take notice of.[71]

§ 2639(4). Missouri

You are instructed that, if defendant had opportunity to have ascertained by reasonable diligence the correct boundaries of said real estate, he cannot succeed in this case, unless it appears from the evidence that plaintiff used some fraud, artifice, trick, or deceit to throw him off his guard and prevent his making proper inquiries and research as to the boundaries.[72]

[69] Hanscom v. Drullard, 21 P. 786, 79 Cal. 234.

[70] Endsley v. Johns, 17 Ill. App. 466.

[71] Faribault v. Sater, 13 Minn. 223 (Gil. 210).

[72] Hitchcock v. Baughan, 36 Mo. App. 216.

§ 2639(5). Oregon

The court instructs the jury that, if you find that the parties stood upon an equality of footing, and that the defendant did not commit any fraud or falsely represent a material fact, or that the plaintiff was not able by the exercise of reasonable caution and vigilance to detect the falsity of the statements complained of, and the statements of defendant were expressions of opinion as to value, then your verdict shall be for the defendant. Where a thing is peculiarly within the knowledge of one making a representation, and the one to whom the representation is made does not stand on an equal footing with the one making the representation, or does not have the same extent of knowledge upon the subject, he may rely upon the statements or representations made to him by the one having superior knowledge, but the law still insists that one must be cautious or vigilant in protecting himself and in looking for his own interest, and must not rely too much upon what others say or represent to him.[73]

§ 2639(6). South Dakota

You are instructed that, if the means of knowledge are at hand and equally available to both parties, and the subject-matter is open to inspection of both parties alike, and there are no fiduciary or confidential relations, and no warranty of the facts, the injured party must show that he has availed himself of the means of information existing at the time of the transaction before he will be heard to say that he has been deceived by the misrepresentations of the other party.[74]

You are instructed that, where there is fraud on one side and inattention to reasonably guard his interests on the other, and but for the latter feature the former would have been ineffective, and loss occurs to the inexcusably negligent one, he is without remedy.[75]

You are instructed that, if you find that the plaintiff after being notified of the mistake did not exercise the prudence of an ordinary man, but went ahead with the deal rashly and negligently, he cannot recover.[76]

§ 2640. Effect of statements made to others than plaintiff

I instruct you on that point that if you find from the evidence that the plaintiff was a man that listened to and was governed by his wife's directions, and that defendant knew or had reason to believe that, any statement made to the plaintiff or his wife, or to

[73] Bouchet v. Oregon Motor Car Co., 152 P. 888, 78 Or. 230.

[74] Roper v. Noel, 143 N. W. 130, 32 S. D. 405.

[75] Roper v. Noel, 143 N. W. 130, 32 S. D. 405.

[76] Roper v. Noel, 143 N. W. 130, 32 S. D. 405.

either of them, would be the same as if it had been made to the plaintiff.[77]

§ 2641. Necessity of showing accrual of benefit to defendant from misrepresentations

The jury are instructed that, if they believe that the defendant, in making sale to the plaintiff of the shares or interest in the silver mines in the declaration mentioned, represented to him that he had paid $——— in money, and not in stock or lands, at a valuation for one-fourth interest in the silver mines in the declaration mentioned, with interest, to induce the plaintiff to purchase such shares or interest, and if the jury find that such statement was falsely and knowingly made by the defendant, and that the plaintiff acted thereon and purchased such shares and paid for them, the plaintiff is entitled to recover for such false representation, although they should find that the defendant was not in fact benefited by such sale and representation, or did not expect to be.[78]

2. *Particular Transactions*

§ 2642. Statements made to commercial agency

You are instructed that the defendant's claim is that he did not make all the representations imputed to him; that those which he did make were true; that the representations were not made for the purpose of obtaining credit, but were made in a casual conversation. To entitle the plaintiffs to recover in this action, they must prove, by a fair preponderance of evidence, that the defendant did make to the agent of ——— Commercial Agency, on or about the ——— day of ———, the statements he is charged in the plaintiffs' declaration with having made, or that he had made some material part of them; that the statements made by the defendant to the ——— Commercial Agency were untrue in fact at the time he made them, or that some material part of such statements were untrue, and that they were made by the defendant with the intention and for the purpose of obtaining a standing thereby; that the agency communicated to the plaintiffs the statement so made to it by defendant; and that the plaintiffs believed such statement to be true, and by reason of such statement were induced to, and did, sell to defendant and give him credit therefor, and that they would not have done so had he not made such statements.[79]

[77] Schmeisser v. Albinson, 138 N. W. 775, 119 Minn. 428.

[78] McAleer v. Horsey, 35 Md. 439.

[79] Hinchman v. Weeks, 48 N. W. 790, 85 Mich. 535.

§ 2643. Representations concerning solvency or worthiness of trust of third person

§ 2643(1). Florida

The court instructs you, gentlemen of the jury, that if you believe from a preponderance of the evidence that the defendant wrote the letter set forth in the plaintiffs' declaration; that the defendant represented to the plaintiffs that one ——— was a man of integrity and fair business dealing and one who could be safely dealt with and trusted in the usual course of business; that such representation was made by the defendant to the plaintiffs, meaning that the plaintiffs should act upon it; that such representation was false, and said ——— was not a man of integrity and fair business dealing, and was not a man to be safely dealt with and trusted in the usual course of business; that the defendant, at the time he made the representation did not know whether such representation was true or not, and had no reason to believe he knew, but negligently and recklessly made such representation; that the plaintiffs believed such representation to be true in fact, and, believing such representation to be true, they acted upon the same and sold to said ——— eight mules and harness, of the value of $———; that said ——— was insolvent, and parted with said mules, and plaintiffs did not and were not able to obtain payment therefor from said ———; that the plaintiffs have been damaged—if you find from a preponderance of the evidence the foregoing; then the court instructs you that as a matter of law the plaintiffs are entitled to recover, and your verdict must be for the plaintiffs.[80]

§ 2643(2). Mississippi

You are instructed that, if you believe from the evidence that defendant made false statements to plaintiff concerning the solvency of ——— for the purpose of inducing the plaintiff to give credit to the said ———, and defendant made such statements recklessly, having no just ground for belief in their truth, and that plaintiff relied on such statements, and gave credit to ———, and was thereby damaged, then you should find for the plaintiff.[81]

§ 2643(3). Pennsylvania

You are instructed that the only questions in this case are whether B. knowingly misrepresented the situation and standing of M. to plaintiff, and whether he was induced, by his misrepresentations, to trust M. with goods, and in consequence thereof trusted a man who was, and is, unable to pay for those goods. If you believe B. did so, his estate is liable. If a man, in whom confidence is placed, suppress the truth when he recommends his friend to

[80] Upchurch v. Mizell, 40 So. 29, 50 Fla. 456.

[81] Sims v. Elland, 57 Miss. 607.

merchants, and that suppression of truth induces them to trust his friend, and causes loss and damage to those merchants, he is equally liable to pay the damage as if he had suggested a positive falsehood.[82]

§ 2644. Representations made to induce plaintiff to take check of third person

You are instructed that if a person makes an untrue statement to another, knowing it to be untrue, for the purpose of inducing such other to take certain action, and the person to whom it is made has no knowledge of its untruth, but relies on such statement as true, and acts upon the same, and is injured thereby, then the person making such statement is liable for the damage accruing to the party thus acting.[83]

§ 2645. Inducing sale of corporate stock below value

§ 2645(1). Missouri

You are instructed that if you find and believe from the evidence, first, that on or prior to ———, plaintiff was the owner of ——— shares of stock; second, that prior to said time defendants formed a conspiracy—that is, an agreement to act in concert and with a common design and purpose—to induce and cause plaintiff to sell her ——— shares at a price below their real worth and value; third, that in carrying out and executing said conspiracy and plan defendants, or either of them, did knowingly, falsely, and fraudulently state to her or her agent that the defendant B. was willing and had agreed to sell his stock at $——— a share, that if she sold her stock at $——— a share she would receive the same price for her minority stock that B. would receive for his majority stock, and for which he was willing to sell his stock, and that the deal for the sale of B.'s stock was being closed at $——— a share; fourth, that in furtherance of said alleged conspiracy, and in aid of its alleged plan and purpose, defendants prepared the B. option (describing it); fifth, that the B. option was not executed in good faith and as a genuine document, but was a pretended one, and was made by B., with the sanction and concurrence of the other defendant, for the purpose of having the same exhibited to plaintiff or her agent, and to thereby fraudulently mislead and deceive her, by causing her to erroneously believe that B. was willing and had agreed to sell his majority stock at $——— a share, and to thereby influence and induce her to sell and dispose of her stock at the same price; sixth, and that respondent, being ignorant of the real value of her stock, "and relying on the truth and accuracy of the

[82] Boyd's Ex'rs v. Browne, 6 Pa. 310.

[83] Endsley v. Johns, 12 N. E. 247, 120 Ill. 469, 60 Am. Rep. 572.

aforesaid statements and representations, so falsely and fraudulently made (if such was the case) and on the genuineness and good faith of" the B. option, and being directly influenced and induced thereby, executed the option for the sale of her stock, and sold her stock at $——— a share, and was thereby damaged and injured in the sale of her stock—then they would find for her and assess her damages at such sum (not to exceed the sum of $——— prayed for in the petition) as would fairly compensate her for the pecuniary loss (if any) she suffered, and naturally and directly caused by the alleged false and fraudulent representations and alleged fraudulent acts and conduct of the defendants, and that in arriving at respondent's damages the jurors should take into consideration the difference between the reasonable value of her stock at the time she parted with it and the price or money value she received for it.[84]

You are instructed that the evidence as to the value of the property and assets of the company (together with all the other evidence and circumstances in evidence relating to the value of the stock) should be taken into consideration in arriving at the value of plaintiff's stock when she disposed of it.[85]

§ 2645(2). West Virginia

The court instructs the jury that, before the defendant will be liable in this case upon the ground that said defendant withheld from the plaintiff information concerning a sale of the property of the ——— Company, the jury must believe from the evidence in this case that on ———, when the defendant purchased the stock of the plaintiff, the defendant knew that a sale of the property of said ——— Company was pending. And the jury must further believe from the evidence that the said defendant, before he bought said stock, undertook to give to the plaintiff information concerning said ——— Company, its property, or financial condition, or its plans and purposes for the future, or other information affecting the value of stock in said corporation, and that the said defendant withheld such information as to such sale from the plaintiff.[86]

The court further instructs the jury that, before the plaintiff can recover in this case, he must prove by a preponderance of the evidence that the defendant, before he purchased the stock of the plaintiff, undertook to inform the plaintiff, concerning ——— Company, its property, or financial condition, or its plans or purposes for the future, or undertook to give to said plaintiff other information affecting the value of stock in such corporation, and that the

[84] Wagner v. Binder, 187 S. W. 1128.

[85] Wagner v. Binder, 187 S. W. 1128.

[86] Staker v. Reese, 97 S. E. 641, 82 W. Va. 764.

said defendant, having undertaken to give such information, designedly made misstatements of fact, or withheld information known to him, affecting the value of shares of stock in the said corporation, and that the said plaintiff sold the stock relying upon such misrepresentations, or without knowledge of the facts so withheld.[87]

§ 2646. Liability of insurer for deceit—Misrepresentations as to terms of policy

The jury are instructed that, if ——— and ——— represented themselves to be agents of the insurance company, and, in the course of soliciting plaintiff for insurance, undertook to describe and explain to plaintiff the terms and conditions of the policy applied for, and which was afterwards delivered, and if they represented to him that, by the terms of said policy, in case of his death within ——— years, the policy being in force, his beneficiary would receive the sum of $———, and in addition thereto an amount equal to all the premiums he had paid to the company at the time of his death, and that they concealed and failed to explain to him that, in case of death, as aforesaid, from smallpox, he not having been successfully vaccinated, his beneficiaries would only be entitled to receive the amount of money paid to the company in premiums at the time of his death, which latter condition was in fact a part of said policy, and which representations plaintiff had a right to and did believe, and by which, together with the aforesaid concealments, plaintiff was deceived and injured, they should find for the plaintiff.[88]

§ 2647. Liability for selling hogs infected with cholera

You are instructed that, if you find from the evidence that the hogs sold by defendant to plaintiffs were infected with cholera, but not to an extent to be perceived by either plaintiffs or defendant, and that such disease arose from infection or contagion communicated by hogs which defendant had but recently purchased in the open market, which were in an apparently healthy state, which continued to a time subsequent to the sale of exposed hogs to plaintiffs, and that defendant honestly supposed his hogs to be free from cholera, then you should find for the defendant.[89]

[87] Staker v. Reese, 97 S. E. 641, 82 W. Va. 764.

[88] Hartford Life Ins. Co. v. Hope, 81 N. E. 595, 40 Ind. App. 354.

[89] Hobbs v. Smith, 115 P. 347, 27 Okl. 830, 34 L. R. A. (N. S.) 697.

3. *Evidence*

§ 2648. Presumptions and burden of proof

§ 2648(1). Delaware

You are instructed that fraud is never presumed, and whenever it is relied upon in support of an action it must be proved to the satisfaction of the jury.[90]

§ 2648(2). Maryland

The jury are instructed that fraud is odious in contemplation of law, and not to be presumed, and the burden of proof is on the plaintiff to overcome such legal presumption by evidence satisfactory to the jury.[91]

§ 2648(3). Michigan

You are instructed that fraud cannot be presumed in a case of this kind. It must be established by proof. It must be proof such as naturally leads your mind to the conclusion that there was fraud committed. The burden of proof is upon the plaintiff in this case. He must establish the claim which he asserts by a preponderance of the evidence—that is, there must be more evidence in favor of the claim that he asserts than there is against it.[92]

§ 2648(4). Minnesota

You are instructed that in determining these questions, fraud is never presumed, but must always be proven by clear and satisfactory evidence. In this case the burden of proving the alleged fraudulent representations by a fair preponderance of evidence is upon the plaintiff. The evidence in support of the alleged fraudulent representations must outweigh the opposing evidence.[93]

§ 2648(5). Oklahoma

You are instructed that the burden is on the plaintiffs to prove by a preponderance of the evidence, not only that the animals sold were infected with a contagious or infectious disease known as cholera, but also that the defendant knew at the time of the selling and delivery of the property that the animals had such disease, or knew facts and circumstances which would cause him to believe that his hogs were so infected and liable to communicate the disease to plaintiffs' hogs, and to die therefrom, and that they did die therefrom and communicated it to other hogs of plaintiffs, so that they died therefrom.[94]

[90] Ranch v. Lynch, 89 A. 134, 4 Boyce, 446.

[91] Robertson v. Parks, 76 Md. 118, 24 A. 411.

[92] McNaughton v. Smith, 99 N. W. 382, 136 Mich. 368.

[93] Schmeisser v. Albinson, 138 N. W. 775, 119 Minn. 428.

[94] Hobbs v. Smith, 115 P. 347, 27 Okl. 830, 34 L. R. A. (N. S.) 697.

§ 2649. Matters considered in determining whether representations were made with fraudulent intent

You are instructed that, in determining whether the alleged representations were made by the defendant and if so whether they were made with fraudulent intent through his son, the admitted agent to effect the purchase of the plaintiff's interest in the farm, and whether the plaintiff was induced to rely upon such representations, all of the circumstances surrounding the parties at the time of the sale should be taken into consideration; and if you find that the representations relied upon were made, you may in determining the question of fraudulent intent take into consideration the kindred of the parties, and any confidential relation existing between them, and the distance of the plaintiff from the land as well as from the place of sale, at the time thereof, and any evidence which may, or may not, tend to establish the knowledge or lack of knowledge of either of the parties to this action as to the value of the land at the time of the sale.[95]

§ 2650. Matters considered on question of scienter

You are instructed that, if you find that the defendant made such representations as to the value of said bank stock, you will next proceed to consider and determine whether or not the defendant knew at said time that said representations were false. Upon this question you will consider and weigh all of the evidence introduced by both parties upon the subject as to whether or not the defendant had knowledge of the value of said bank stock at said time. You will consider all of the evidence as to the relations which defendant sustained to the bank as vice president and director, the condition of the bank, so far as shown, the opportunities of defendant for knowing or ascertaining the condition of said bank and the value of its stocks. You will consider the evidence as to the overdrafts in said bank, and the losses sustained thereby, and whether or not the defendant knew of the same, and, if so, to what extent his knowledge thereof extended. In short, you will carefully consider and weigh all of the evidence which will throw any light upon the question as to whether or not the defendant knew the value of the bank stock at the time of said alleged representations and if you find that the plaintiff has established by a preponderance of the evidence that the defendant knew that said bank stock was not worth $——— per share (if you find the said representation was made by defendant), then you will proceed to the further consideration of the case, but if you do not so find, your verdict will be for the defendant.[96]

[95] Ranch v. Lynch (Del.) 89 A. 134, 4 Boyce, 446.

[96] Baker v. Mathew, 115 N. W. 15, 137 Iowa, 410.

§ 2651. Effect of evidence of representations to others than plaintiff

You are instructed that the representations and statements made by the defendant to witness in this cause, other than the plaintiff, are not evidence to be considered by the jury for the purpose of proving what representations were made by the defendant to the plaintiff, or for the purpose of showing the falsehood of the representations made by him to the plaintiff, and the jury are only at liberty to consider the representations and statements made by the defendant to said witnesses, for the purpose of ascertaining the intent of the defendant in any representations he may have made to the plaintiff.[97]

§ 2652. Sufficiency of evidence

§ 2652(1). Delaware

You are instructed that fraud may be shown either by direct or positive evidence, as by the declarations or admissions, if any, of the party charged, or by circumstantial evidence; that is, by taking into consideration the conduct of the parties, and all the facts and circumstances attending the transaction, if, in the judgment of the jury they are reasonably sufficient to establish the existence of fraud.[98]

§ 2652(2). Indiana

You are instructed that fraud is never presumed, but that the burden rests upon the one charging fraud to make it out by clear and convincing evidence.[99]

§ 2652(3). Washington

The burden of proof with respect to this cause of action is upon the defendant, who asserts it, and I instruct you that it is incumbent upon him, in order to recover, to establish said cause of action, not merely by a preponderance of the evidence but by evidence that is clear, satisfactory, and convincing.[1]

§ 2652(4). Wisconsin

You are instructed that you cannot find that the defendant falsely or fraudulently made representations to ——— from conjecture or mere inference. Fraud must be clearly proved, and the burden of proof is on the plaintiff to establish that fact.[2]

§ 2653. Sufficiency of evidence of falsity of statements

You are instructed that the fact that the plaintiffs did not and could not make any net profits in operating said eating-house during

[97] McAleer v. Horsey, 35 Md. 439.

[98] Ranch v. Lynch, 89 A. 134, 4 Boyce, 446.

[99] Wallace v. Mattice, 20 N. E. 497, 118 Ind. 59.

[1] Grant v. Huschke, 133 P. 447, 74 Wash. 257.

[2] Shaw v. Gilbert, 86 N. W. 188, 111 Wis. 165.

the time they so owned and operated it, does not of itself prove the representations of defendants that they had prior to that time made large profits to be false.[3]

§ 2654. Sufficiency of evidence as to reliance or nonreliance on false representations

The jury are instructed that if they believe from the evidence that plaintiff had not equal means of information with defendant in relation to the ——— property, and that, knowing this defendant made representations as to its value, what it was rented for, and what amount of loan could be procured upon the same, then if defendant asserted that plaintiff did not rely upon such representation, the evidence to show that he did not must be of the clearest and most satisfactory character, and not consist of mere inference or implication.[4]

4. *Damages*

§ 2655. In general

§ 2655(1). Delaware

You are instructed that, if your verdict should be for the plaintiff the sum or measure of her damage is the difference between the value of her interest in the land at the time of the sale, subject to the life estate of her grandmother, and the purchase money paid therefor, which sum is to be determined from all the evidence before you, oral or documentary.[5]

§ 2655(2). Kansas

You are instructed that, if you find the plaintiff is entitled to recover upon his second cause of action herein, the measure of damages which he would be entitled to would be the amount that it would take to put the well, in controversy, in the condition that it was represented to the plaintiff to be in by the defendant, if such representations were so made, or in case it could not be so repaired, then and in such a case the reasonable cost of drilling and making a new well in the same vicinity of the old well, and similar to what the old well was represented to be, if any representations were made concerning the old well, but in any event your verdict on the cause of action cannot exceed the sum of $———.[6]

§ 2655(3). Michigan

You are instructed that the plaintiff claims that H. represented that there was a little under or a little over ——— feet of timber

[3] Markel v. Moudy, 7 N. W. 853, 11 Neb. 213.

[4] Cerriglio v. Pettit, 75 S. E. 303, 113 Va. 533.

[5] Ranch v. Lynch (Del.) 89 A. 134, 4 Boyce, 446.

[6] Zuspann v. Roy, 170 P. 387, 102 Kan. 188.

upon the land, and that about half was cork pine. H., in his testimony, says that he represented the estimates to show by the plat and the book that the quantity was ———, and that a portion of it was cork pine. The plaintiff claims that there was cut about ———, and that about ——— feet left uncut, and but little, if any, of the timber was cork pine. It is for you to find from all the evidence in this case what are the true facts, both as to the representations made, and the quantity cut, and left uncut, and what proportion, if any, was cork pine; and, should you find that the entire quantity of timber cut and uncut was as testified to by plaintiff, he would be entitled to recover all that falls far short of the quantity ——— feet, which H. admits he represented to be on the land, according to ———'s estimate, provided you find that plaintiff, in entering into the agreement of ———, relied upon the representations so made by H. as to the quantity and quality of the timber upon the land.[7]

§ 2655(4). Missouri

You are instructed that, if you find the issue for plaintiff under the petition, then you will assess his damages at such sum as you may find and believe from the evidence was the difference between the actual value of the mining stock traded to him by the defendant at the time of the trade and what its value would have been had the false representations made by the defendant, if any, been true, not to exceed, however, the sum of $———.[8]

§ 2655(5). Nebraska

You are instructed that if, under the evidence and these instructions, you find for the plaintiff, then you will, from the evidence before you, ascertain and determine, as best you can, the difference, if any, between the actual value of said notes and mortgages at the time plaintiff traded for them, and the value they then would have had if said representations had been true. You will then deduct from this difference the $——— which plaintiff collected on the principal of said notes, and the $———, which she bid on said land at sheriff's sale, making a total to be deducted of $———, and, if there is any of said difference remaining, such remainder, together with ——— per cent. interest thereon from ———, the date of said sheriff's sale, will be the true amount of plaintiff's recovery, if you find she is entitled to recover.[9]

§ 2655(6). Oklahoma

You are instructed that, if you find from a preponderance of the evidence that defendant sold to the plaintiffs hogs which the defendant knew were infected with cholera, on or about the date

[7] Busch v. Wilcox, 46 N. W. 940, 82 Mich. 315.

[8] Addis v. Swofford, 180 S. W. 548.

[9] Ellwanger v. Goss, 170 N. W. 830, 103 Neb. 132. Certain notes and mortgages were traded to plaintiff.

stated, and on receipt of such hogs the plaintiffs mingled the same with their other hogs, which were healthy, without knowledge of the diseased condition of the hogs so delivered, and that the hogs delivered communicated such disease to the plaintiffs' other hogs, from which they lost numbers of the delivered hogs and of their own also, then the plaintiffs would be entitled to recover as damages from the defendant the value of the hogs that died, together with such expenses as they were put to in doctoring and caring for such hogs, preventing the spread of the contagion, disinfecting their pens after the disease had disappeared, and the value of their own services rendered in doing those things, caused proximately by the presence of such disease among their hogs by the communication thereof by defendant's hogs.[10]

§ 2655(7). Oregon

You are instructed that, if you find that the plaintiff is entitled to a verdict against the defendant, then the next question you will have to decide will be: How much is the plaintiff entitled to? There has been some evidence offered in the trial of the case which the plaintiff claims tends to show that some of the cattle which he procured from the defendant died after the transfer. The plaintiff would be entitled to recover from the defendant the reasonable value of the cattle that died, estimating the reasonable value of those cattle at what they would have been worth had they not been infected by the infectious disease, as claimed by the plaintiff. In other words, you would be required to estimate the value of the cattle that died, assuming that they did not have any infectious disease, and whatever was the reasonable market value of those cattle, assuming that they were not affected with an infectious disease, would be the amount that the plaintiff would be entitled to recover from the defendant. I am referring now to the cattle that died. There is no evidence in this case at all that would warrant you in assessing any damages against the defendant on account of any cattle that are still alive. The only evidence that has been offered on the trial of the case with reference to the question of damages is merely with reference to the cattle that have died since the transfer of the cattle from the defendant to the plaintiff.[11]

§ 2655(8). Washington

The jury are instructed on the measure of recovery, if any, for the alleged misrepresentation as to the strength or thickness of the walls of the building if you find that such misrepresentations were made, that the plaintiff is entitled to recover the difference between what the building was actually worth at the time of such sale and

[10] Hobbs v. Smith, 115 P. 347, 27 Okl. 830, 34 L. R. A. (N. S.) 697.

[11] Fitzhugh v. Nirschl, 151 P. 735, 77 Or. 514.

what it would have been worth if the walls had been of the strength and thickness as represented.[12]

§ 2655(9). Wisconsin

In considering what shall be your answer to this question you will first consider the sum which you find from the evidence is the difference between the two sums; the first sum is the fair and reasonable value of the cattle here in question if they had been in the condition which you find defendant represented them to be, if you find he made such representations; the second sum is the fair and reasonable value of these same cattle in the condition in which you find them to have been at the time they were in plaintiff's possession in ———; the difference between these two sums is the first element you will have to consider in answering this last question. Other elements that you will have to consider are such sums as you find were reasonably and necessarily expended in railway travel and in transporting these cattle to ———, in caring for them on the way and while they were still under the care of plaintiff in ———, together with such sum as will reasonably and necessarily measure the amount expended in testing these cattle, destroying their carcasses and disinfecting the buildings in which they had been kept. Whatever sum will measure all these elements fairly and reasonably, that sum will be your answer to this last question.[13]

§ 2656. Recovery by purchaser of undivided interest in land for false representations as to size of house

The jury are instructed that, in case the jury find from a preponderance of the evidence that the defendant represented a house of a particular size and description, and further that the jury find that the plaintiff is not barred by the statute of limitations, then there is a measure of damages for the lack of such house in the difference in the value of said land with said house on it and the value without it, and plaintiff, having purchased from defendant an undivided one-half interest in said land, one-half of the increased value of the land with the house on it would inure to the benefit of plaintiff.[14]

§ 2657. Exemplary damages

§ 2657(1). Illinois

You are instructed that if you believe, from a preponderance of the evidence, under the instructions of the court, that the defendant acted knowingly, willfully, fraudulently, maliciously, and deceitfully in causing such actual damage to the plaintiff, if any, then, in fixing the amount of the plaintiff's damages, if any, you are not con-

[12] Hunt v. Allison, 137 P. 322, 77 Wash. 58.

[13] Welch v. Dunning, 158 N. W. 323, 163 Wis. 535.

[14] Sangster v. Prather, 34 Ind. 504.

fined to the actual damages shown by the evidence, if any, but may, in your discretion, award and include in your verdict as punitive or exemplary damages such further sum, if any, as in your judgment is right and proper in view of all the evidence and instructions of the court.[15]

§ 2657(2). Oklahoma

You are instructed that, if you find from the evidence that the defendant, knowing said hogs to be diseased with the cholera, falsely and willfully represented to plaintiffs that the hogs sold and delivered were sound in health and condition, and good stock hogs, and that the plaintiffs had not examined them prior to the purchase, but relied upon such representations, and that such representations were false, and that said hogs were infected with cholera, then you are instructed that for such acts of the defendant he is liable to the plaintiff, in addition to the amount of the actual damages which he has sustained, a reasonable sum as exemplary damages for the sake of example, and as a punishment for the wrong done.[16]

B. Criminal Liability

§ 2658. Liability for selling land twice

You are instructed that, if you believe from the evidence in this case to a moral certainty and beyond a reasonable doubt that the defendant transferred in writing to C. all of his right, title, and interest in and to the lands and premises described in the agreement with ——— and which has been received in evidence, and that he, the said defendant, thereafter again willfully and with intent to defraud said C. and without his consent sold, bartered, or disposed of the same land or any part thereof to another for a valuable consideration, it is your duty to find the defendant guilty as charged.[17]

You are instructed that, if you believe from the evidence to a moral certainty and beyond a reasonable doubt that the defendant entered into an agreement with another for the exchange of certain lands, and that he thereafter assigned, transferred, and sold all of his right, title, and interest in and to said agreement and in and to the lands therein described to E., and that the said defendant did thereafter willfully and with intent to defraud the said E. and without his consent sell, barter, or dispose of the same lands described in said agreement to another person for a valuable consideration, then it is your duty to find the defendant guilty as charged.[18]

[15] Laughlin v. Hopkinson, 126 N. E. 591, 292 Ill. 80.

[16] Hobbs v. Smith, 115 P. 347, 27 Okl. 830, 34 L. R. A. (N. S.) 697.

[17] People v. Scott, 133 P. 496, 22 Cal. App. 54.

[18] People v. Scott, 133 P. 496, 22 Cal. App. 54.

CHAPTER CLI

FRAUDS, STATUTE OF

§ 2659. Promise to answer for debt of another—Original undertaking.
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2660. Oral contracts for sale of goods.
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2665. Agreements not to be performed within a year—Modification of written contract.
2666. Part performance—Payment of part of purchase price.

§ 2659. Promise to answer for debt of another—Original undertaking

§ 2659(1). Michigan

The jury are instructed that the burden of proof is upon the plaintiff to establish her case by a fair preponderance of evidence, and you will understand that it takes two parties to make an agreement. There must be a meeting of minds; each must understand the matter as the other does. This is the sole question in the case: Was the credit for the money which it was claimed was given to ——— extended solely and exclusively to the defendant? The plaintiff claims that it was, and the defendant denies it. The plaintiff cannot recover unless you find that defendant was the sole debtor. If there was any liability whatever existing against ——— in favor of the plaintiff, the plaintiff cannot recover. It must be found by a fair preponderance of evidence that the defendant is the sole debtor; that the credit was extended solely and exclusively to him; that no liability exists, or ever existed, against ——— for this loan, before the plaintiff is entitled to recover. In other words, as I have already said, you must find that the agreement claimed by the plaintiff was not only made, but that it was an independent agreement, separate and apart from any liability on the part of ———. Indeed, you must find that there was no liability on the part of ———, that defendant was the sole promisor, and that the credit was exclusively extended to him, before you could be authorized to find for the plaintiff.[1]

[1] Ford v. McLane, 91 N. W. 617, 131 Mich. 371.

§ 2659(2). North Dakota

You are instructed that the theory of the plaintiff is that he was performing service and furnishing his teams to defendant K. While this work, it is true, was done on the M. farm, and possibly for M., ultimately, yet plaintiff claims that he performed those services at the instance and request of K., and therefore K. is liable as an original payor; while, upon the other hand, K. insists that, if plaintiff did that work for M. he was working for M., either by exchanging works or some other method for which K. was not responsible at all. Now, I charge you, gentlemen of the jury, that as a matter of law, if K. became an original promisor to secure plaintiff to do the work for M., and before the work was done promised to pay for it, and thus put himself in the attitude of securing plaintiff to do the work for him (K.), then K. would be responsible for the full amount of the value of such services as shown by the evidence. Whereas, upon the other hand, if you find that plaintiff was working for M. and exchanging works with M., or had his deal with M., then K. would not be liable under the evidence in this case, because there is no evidence here which shows that he has by any written obligation agreed to become responsible for M.'s debt.[2]

§ 2659(3). Oklahoma

You are instructed that if you find from the evidence that the credit was extended to the defendant, at his request, and that the plaintiff in making the loan of money relied solely on the promise of the said defendant to pay said debt, the defendant would be liable, and you should find a verdict against the defendant for said debt. In determining to whom the credit was given, you will take into consideration the extent of the undertaking, the situation of the parties, their financial condition, and all other circumstances surrounding this transaction.[3]

The court instructs the jury that if you find and believe from the evidence in this case that the credit was extended to one ——, as the original debtor, and that he still remains originally liable to the bank for same; that at the time the bank made the loan and extended the credit that it did not do so solely relying upon the promise and agreement of the defendant as being directly and personally responsible to the plaintiff for the payment of the debt, then your verdict should be for the defendant.[4]

[2] Shellberg v. Kuhn, 160 N. W. 504, 35 N. D. 448.

[3] Waldock v. First Nat. Bank of Idabel, 143 P. 53, 43 Okl. 348.

[4] Waldock v. First Nat. Bank of Idabel, 143 P. 53, 43 Okl. 348.

§ 2659(4). Texas

The court instructs the jury that a promise to pay for services rendered to a third person at the promisor's request is an original undertaking, not within the statute of frauds. Therefore, if you find from the evidence in this case that defendant promised to pay plaintiff for the services rendered ———, if any, by plaintiff, and that such services were rendered said ——— at the request of defendant, then such promise need not be in writing, and defendant would be liable to pay plaintiff for the reasonable value of such services, and if you so find by a preponderance of the evidence, you will find for the plaintiff in such amount as you may find the reasonable value of such services.[5]

§ 2660. Oral contracts for sale of goods

You are instructed that where there is no writing showing the terms of a sale, and the alleged price exceeds $———, and no part of the price is paid, it is necessary, in order that the agreement be valid, that the buyer accept or receive part of the thing sold, or part of the evidences thereof.[6]

You are instructed that oral testimony of the making of the contract is not alone sufficient to take the contract out of the statute of frauds, or to make it valid. Facts additional to the making of the bargain must be proved by plaintiff to show the equivalent of receipt or acceptance.[7]

§ 2661. Same—Necessity of delivery by seller and acceptance by buyer

You are instructed that, to satisfy the statute of frauds there must be a delivery by the seller, with an intention of vesting the right of possession in the buyer, and there must be an actual acceptance or receipt by the buyer, with the intention of taking possession as owner. This rule can only be satisfied by something done subsequent to the sale unequivocally indicating the mutual intention of the parties.[8]

§ 2662. Same—Sufficiency of receipt and acceptance by buyer

You are instructed that mere words are not sufficient to prove a receipt or acceptance of the personal property to take an oral contract of the sale of personal property for a price exceeding $——— out of the statute of frauds. The acts of the parties proved must be of such a character as to unequivocally place the property within the power and under the exclusive dominion of the buyer.[9]

[5] Banfield v. Davidson (Civ. App.) 201 S. W. 442.

[6] Wilson v. Hotchkiss, 132 P. 88, 21 Cal. App. 392.

[7] Wilson v. Hotchkiss, 132 P. 88, 21 Cal. App. 392.

[8] Wilson v. Hotchkiss, 132 P. 88, 21 Cal. App. 392.

[9] Wilson v. Hotchkiss, 132 P. 88, 21 Cal. App. 392.

§ 2663. Same—Rule where subject of sale is already in possession of buyer

You are instructed that, where personal property alleged to have been sold is already in the possession of the buyer at the time of the alleged sale, while it is not necessary for the seller to retake the property and redeliver it to the buyer, yet it is necessary that there be evidence to show the equivalent of a receipt or acceptance, and this must be in addition to the oral evidence of the agreement of sale.[10]

You are instructed that plaintiff must show that the conduct of the buyer in dealing with the property already in his possession was inconsistent with the supposition that the former possession of the property by the buyer continued unchanged.[11]

§ 2664. Application of statute to rights of one purchasing personal property for another as agent

You are instructed that if the jury find from the testimony in this case that the defendant instructed the plaintiffs to purchase for him a carload of cattle, and if the jury find that it was necessary for plaintiffs to advance moneys, for the account of the defendant, in order to get such cattle, and if the jury find that the plaintiffs did so advance money for the benefit of the defendant, and if they find that the plaintiffs in such matter acted in good faith, without fraud, without unfair dealing, and without negligence, and if the jury find that when such cattle were tendered to the defendant he refused to receive them, then the plaintiffs would have the right to sell the said cattle, for the account of the defendant, to give him credit for the net proceeds, after the payment of all legitimate expenses. While the contract sued on is the only one the plaintiffs can recover on, the jury is instructed that if they have proven the contract sued on, the statute of frauds has no application, and it makes no difference in this case whether the defendant received the cattle or not.[12]

§ 2665. Agreements not to be performed within a year—Modification of written contract

You are instructed that, if the arrangement was simply for a postponement of the execution of the contract, and the execution of the contract, under the terms of the postponement, might have been accomplished within one year from its date, by its terms, the plaintiff cannot in this action recover, because in that case the contract which he has made, which is made by the subsequent

[10] Wilson v. Hotchkiss, 132 P. 88, 21 Cal. App. 392.

[11] Wilson v. Hotchkiss, 132 P. 88, 21 Cal. App. 392.

[12] London v. Smith, 85 S. E. 772, 101 S. C. 340.

agreement, is a different contract than that upon which he declares and seeks to recover at your hands. If, upon the other hand, the contract by its terms, by the terms of the oral arrangement between the parties, the contract alleged to have been made could not be performed within one year from the date of the oral agreement in relation to it, it would not be good as a contract. It might be treated by the parties as a waiver of the right upon either side to insist upon the immediate performance of the contract, but it would not be good as a contract to take the place of the original contract.[13]

§ 2666. Part performance—Payment of part of purchase price

The jury are instructed that if they find that, in pursuance of the verbal agreement between the plaintiff and defendant, the plaintiff made and delivered to the defendant the check, hereinbefore referred to, and it was verbally agreed between them that the defendant should receive and accept the check as for payment of part of the purchase, and that the defendant did receive and accept the check as a part of the purchase price, then the plaintiff would be entitled to recover.[14]

[13] Barton v. Gray, 24 N. W. 638, 57 Mich. 622.

[14] Rohrbach v. Hammill, 143 N. W. 872, 162 Iowa, 181.

CHAPTER CLII

FRAUDULENT CONVEYANCES

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Avoidance by trustee in bankruptcy of transfers by bankrupt as fraudulent, see ante, § 1007.
Fraudulent disposition of property as ground for attachment, see ante, §§ 939, 940.

A. In General

§ 2667. Elements, in general, of fraud which will vitiate conveyance as to creditors of transferor

§ 2667(1). Florida

You are instructed that, when a transfer made by a debtor in failing circumstances to one of his creditors is made with intent to hinder, delay, or defraud his other creditors, and the purchaser is aware of that intent, the transfer is fraudulent as to his other creditors.[1]

§ 2667(2). Texas

You are instructed that if you believe, from the evidence, that the said R. was indebted to the ——— Company, as alleged by the plaintiff, and that for the purpose of defrauding the said ——— Company out of its debt she conspired with her son, the defendant, to convey to him the land in controversy, and that so conspiring and agreeing with him, and for the purpose of defrauding her creditors, did make to him the said deed dated ———, given in evidence, and you find and believe from the evidence that at the time said deed was made and executed said defendant knew of the purpose and intention of her, the said R., and that he received the said deed for the purpose of assisting her to defraud her creditors, and you believe that said deed was without consideration and not made in good faith, then you will find for the plaintiff. On the other hand, if you find and believe from the evidence that the said R. executed said deed in good faith for a valuable consideration, and that said defendant was an innocent purchaser of said land for value, then you will find for the defendant.[2]

§ 2668. Necessity of showing fraudulent intent at time of conveyance

You are instructed that the fraudulent intent, alleged in the answer of defendant, must have existed at the time the contract of lease was made, and unless a fraudulent intent did so exist at the making of said contract, you must find that the contract of lease was made in good faith. You may, however, consider the subsequent conduct of the parties thereto in determining the fact of the

[1] Jackson v. Citizens' Bank & Trust Co., 44 So. 516, 53 Fla. 265.

[2] Adams v. Hamilton, 116 S. W. 1169, 53 Tex. Civ. App. 405.

existence of such fraudulent intent at the time of the making of said contract.[3]

§ 2669. Right of debtor to sell property

§ 2669(1). Illinois

The jury are instructed that a sale of property for a valuable consideration, when there is a delivery of the property sold, passes the title to the purchaser, and the fact that the seller was in debt will not, of itself, invalidate the sale, although the purchaser may have known that fact at the time of the purchase.[4]

§ 2669(2). Nebraska

You are instructed that the sale of property in good faith for a valuable consideration, when there is a delivery of the property sold, passes the title to the purchasers; and the fact that the seller was in debt will not, of itself, invalidate the sale, although the purchaser may have known that fact at the time of purchasing.[5]

§ 2670. Right of insolvent debtor to sell property

See, also, post, § 2677.

§ 2670(1). Alabama

I charge you that an insolvent debtor can make a valid sale of his property, if the price received is fair and reasonable, and the entire consideration is paid to his creditors existing at the time of the sale.[6]

§ 2670(2). Arkansas

You are instructed that fraud is never presumed, but must be proved by the party alleging it. One engaged in business, though insolvent, has the right, like any other person, to dispose of the whole or any part of the business, and the purchaser will have a good title, unless the sale was made with the intent on the part of the seller to defraud his creditors, and the fraudulent purpose was participated in by the purchaser, and H.'s purchase of the half interest must be upheld, unless by preponderance of proof you find that ———, in selling to H. the half interest, intended to defraud his creditors, and that H. participated in the fraud.[7]

§ 2670(3). Missouri

You are instructed that a debtor is not deprived of his right to sell or dispose of his property by reason merely of insolvency or embarrassed financial condition, even though a sale or disposition thereof may hinder or delay his creditors.[8]

[3] Prichard v. Hopkins, 2 N. W. 1028, 52 Iowa, 120.

[4] Warner v. Carlton, 22 Ill. 415.

[5] Davis v. Getchell, 49 N. W. 776, 32 Neb. 792.

[6] Lightman Bros. & Goldstein v. Epstein, 51 So. 164, 164 Ala. 660.

[7] Summers v. Heard, 50 S. W. 78, 66 Ark. 550.

[8] Mears v. Gage, 80 S. W. 712, 107 Mo. App. 140.

§ 2670(4). **Nebraska**

You are further instructed that if you find that ——— sold the goods replevied to plaintiff, although the sale may have had the effect to hinder and delay his creditors in the collection of their debts, this fact alone will not render the sale fraudulent or void. A debtor, however insolvent, may lawfully sell his property, if done with a bona fide intention of applying the proceeds in the discharge of any legal liability.[9]

§ 2671. Same—Effect of application of proceeds of sale to payment of debts

You are instructed that an insolvent debtor is not denied the right to sell his property, but the purpose of the same must be to appropriate the proceeds to the full extent to the payment of his debts; and, if the proceeds of the sale of his property to the full extent of said proceeds were applied to the payment of his debts, the sale will not be fraudulent.[10]

§ 2672. Validity of conveyance as against subsequent creditors

You are instructed that, if you believe from the evidence that the said N., did not become indebted to ——— until after, and not for a debt existing at the time of, the execution of the deed from N. to defendant, then plaintiff would be a subsequent creditor of N., and in that event, if you believe from the evidence that said N. made said deed to his son with intent to place the lot in question beyond the reach of, and to hinder, delay, or defraud, his creditors, whether prior or subsequent creditors, and in contemplation of contracting future debts, said deed would be void as to plaintiff, and your verdict should be for the plaintiff.[11]

§ 2673. Conveyance of property exempt from execution

§ 2673(1). **Alabama**

You are instructed that, if you are reasonably satisfied from the evidence that G. at the time of sale was a resident of the state, and that the property owned by him in this state was not worth more than $———, and that he sold the same to E., then you need make no further investigation, and your verdict will be for the plaintiff.[12]

§ 2673(2). **Florida**

You are instructed that a sale by a debtor in payment of and discharge of his debt will be valid, where the creditor obtains other property for which he pays cash, if such other property was not

[9] Lipscomb v. Lyon, 27 N. W. 731, 19 Neb. 511.

[10] Jackson v. Citizens' Bank & Trust Co., 44 So. 516, 53 Fla. 265.

[11] Dosche v. Nette, 16 S. W. 1013, 81 Tex. 265.

[12] Clewis v. Malone, 24 So. 767, 119 Ala. 312.

more than the debtor was entitled to retain exempt from his other creditors, and no other property was reserved by him as his exemption.[13]

§ 2673(3). Wisconsin

You are instructed that, this property in this case being exempt, as it appears it was by the testimony in this case, when ———, the husband of this plaintiff, was the owner, he had the right to donate the property or sell it to his wife; and, it being exempt, it would not be liable to seizure and sale on execution against ———, the husband of the plaintiff.[14]

You are instructed that, this property, being exempt when the husband of the plaintiff conveyed or gave it to his wife, the plaintiff, it cannot be held fraudulent as to the husband's creditors, for the reason that, being exempt, it was as much beyond their reach before the gift as it was after the gift.[15]

§ 2674. Consideration of conveyance

§ 2674(1). Illinois

The court instructs the jury, for the plaintiff, that the sale and purchase of goods for a less sum than the actual cash value is not fraudulent, and, although you may believe from the evidence that plaintiff purchased the goods for less than their real value from F. (the grantee of the insolvent debtor), that of itself is not evidence of fraud or circumvention on the part of plaintiff, and, if you believe plaintiff acted in good faith, you should find for the plaintiff.[16]

§ 2674(2). Massachusetts

The jury are instructed that whether a conveyance of this character is fraudulent or not is a question of fact, to be determined on a view of all the circumstances attendant upon the making of the grant or conveyance, especially on the condition of the grantor as to property, and as to the amount of debts which were due and owing from him at the time he undertook to dispose of his estate, or a portion thereof, by gift, or without adequate consideration. On the one hand, it could not be properly adjudged that a voluntary conveyance was fraudulent and void, either as against existing or subsequent creditors, if it was proved to have been made by a person substantially free from debt and possessed of a large amount of property, who had no purpose to hinder or delay his creditors, whose sole motive was to transfer the property to his wife or children, so that it should not remain at the hazard of business or be subjected to the risk of improvidence. On the other hand, it

[13] Jackson v. Citizens' Bank & Trust Co., 44 So. 516, 53 Fla. 265.

[14] Allen v. Perry, 14 N. W. 3, 56 Wis. 178.

[15] Allen v. Perry, 14 N. W. 3, 56 Wis. 178.

[16] Mathews v. Reinhardt, 37 N. E. 85, 149 Ill. 635.

would be very clear that a voluntary transfer of property by a person deeply indebted, and whose property was inadequate or barely sufficient for the payment of his debts, would furnish strong presumptive evidence of fraud, and, if unexplained, would be set aside as void against creditors.[17]

§ 2675. Inadequacy of price as badge of fraud

§ 2675(1). Georgia

The jury are instructed that gross inadequacy of consideration if it exists, is a badge of fraud, and a circumstance which may be considered by the jury in determining whether the conveyance to Mrs. ——— was fair and honest, or pretended and fraudulent. Transactions between husband and wife should be scanned carefully, when the rights of creditors are to be affected thereby. The law requires them to exercise good faith, and you should be satisfied that they have done so, before sustaining any transaction which would defeat a creditor in the collection of his debt.[18]

§ 2675(2). Iowa

The court instructs the jury that gross inadequacy of price is of itself a badge of fraud; and though not conclusive, yet, when coupled with other circumstances tending to prove fraud, becomes controlling and quite conclusive evidence.[19]

You are instructed that, while gross inadequacy of price is a badge of fraud, a man in dealing and buying goods, if he acts honestly, and not to defraud nor aid in defrauding others, has a legal right to make the purchase at as low a price and at as good advantage as he can.[20]

§ 2676. Property conveyed much in excess of debt secured or satisfied

The jury are instructed that, if you find that the value of the property upon which the mortgage was given by ——— to ———, the plaintiff in this case, was largely out of proportion to the debt secured, then and in that case this is a circumstance from which you may infer the fraudulent intent on the part of plaintiff, which would render that mortgage invalid as against the creditors of ———.[21]

[17] Winchester v. Charter, 102 Mass. 272.

[18] Almond v. Gairdner, 76 Ga. 699.

[19] Bickler v. Kendall, 24 N. W. 518, 66 Iowa, 703.

[20] Bickler v. Kendall, 24 N. W. 518, 66 Iowa, 703.

[21] Ganong v. Green, 38 N. W. 661, 71 Mich. 1.

B. Preference of Creditors

§ 2677. Right of insolvent debtor to prefer creditors

§ 2677(1). United States

The jury are instructed that the defendant's position is simply this: He says that in ———, he owed D., his brother-in-law, about $———, that sum being made up of $——— that he had agreed to pay D. for his interest in the firm, and the balance being money that his brother-in-law had loaned to him subsequent to the dissolution of the firm; that D. demanded payment of that debt, and that he sold him the stock in the store, No. ———, to pay the same. Now, gentlemen, if you believe that statement of defendant and D., if you believe that defendant owed D. the sum stated, or about that sum, and that he made an out and out sale of the stock of goods to D. in good faith to pay that debt, then the sale was not fraudulent, and furnished no ground for the attachment, and you should so find by your verdict. If that sale was made, as above stated, in good faith to pay an honest debt, then the sale was not fraudulent, even though the sale of that stock in the store at No. ——— did operate to hinder or delay other creditors of the defendant in collecting their debts. In other words, gentlemen, a debtor has a right to prefer one creditor over another, even if he is insolvent; and if he does so in good faith, that is, if he pays one creditor to the exclusion of another, such preference is not a fraudulent act, no matter how it may affect his other creditors.[22]

§ 2677(2). Florida

You are instructed that, except in a case of a general assignment for the benefit of creditors, which does not enter into this case, a debtor in failing circumstances—that is, owing more than he can pay—has a right to prefer one of his creditors to the exclusion of the others; in other words, he can pay one creditor in full, and not pay the others at all, provided the transaction is bona fide and untainted with fraud, and, in case the payment is made by a transfer of his property, a fair and reasonable price is paid.[23]

You are instructed that the law permits a debtor, even though insolvent, to prefer a creditor by paying such creditor in cash, or by a transfer of property; and although a preference thus created may operate to delay or hinder other creditors, yet, if not created for that purpose, but to secure or pay a bona fide debt, and only hinders or delays other creditors as to the property so appropriated to the payment of such debt, it is lawful.[24]

[22] Strauss v. Abrahams (C. C. Mo.) 32 F. 310.

[23] Jackson v. Citizens' Bank & Trust Co., 44 So. 516, 53 Fla. 265.

[24] Jackson v. Citizens' Bank & Trust Co., 44 So. 516, 53 Fla. 265.

You are instructed that a debtor in failing circumstances has the right to prefer one or more of his creditors by paying them in full, either in cash or by a transfer of property, even if the result of such preference is to disappoint his other creditors; and knowledge on the part of the creditors receiving the preference that the debtor was insolvent at the time will not make such a preference invalid.[25]

You are instructed that, in order to make such a transfer void for actual fraud, the creditor must assist the debtor in hindering or delaying his other creditors, either by receiving from him an unreasonable amount of property for his debt, or assisting the debtor in retaining some benefit or advantage from the sale.[26]

§ 2677(3). Georgia

You are instructed that a debtor may prefer one creditor to another, and, to that end, he may bona fide give a lien, by mortgage or other legal means, or he may transfer negotiable papers as collateral security, the surplus in such cases not being reserved for his own benefit. If a surplus is reserved for his own benefit, it destroys the validity of the mortgage so given.[27]

§ 2677(4). Illinois

You are instructed that, if a man find himself in failing circumstances, he has a right to prefer one creditor to another—to so dispose of his property that one of his creditors shall receive his pay in full, and another receive nothing; nor is there any presumption of fraud in so doing.[28]

The court instructs the jury that the main question in this cause is as to the honesty and good faith of the alleged transfer of the goods in question from M. to the plaintiff. If that sale was in good faith, for an adequate consideration, for the purpose of paying a debt or debts, which he owed to her, and if the possession of the goods was delivered to her, or to ———, acting for her, by her authority, for her use, then no subsequent acts or declaration of M., as to the goods that arrived at ———, would affect her title or right to recover for the taking of the goods in question, and therefore, if the jury believe, from the evidence, that the goods were so transferred as above mentioned, and if the jury further believe, from the evidence, that the defendant took the goods in question, under the attachments against M., after such transfer and delivery, then the plaintiff is entitled to recover as damages in this action, the value of the goods at the time of such taking with

[25] Jackson v. Citizens' Bank & Trust Co., 44 So. 516, 53 Fla. 265.

[26] Jackson v. Citizens' Bank & Trust Co., 44 So. 516, 53 Fla. 265.

[27] Fidelity Banking & Trust Co. v. Kangara Valley Tea Co., 22 S. E. 50, 95 Ga. 172.

[28] Schroeder v. Walsh, 11 N. E. 70, 120 Ill. 403.

interest from that time to the present, at the rate of ——— per cent. per annum. But if on the contrary, the jury find, from the evidence, that such transfer was not in good faith, for an adequate consideration as before mentioned, or that the possession was not delivered as before mentioned, and if the jury find, from the evidence, that the defendant, as sheriff of ——— county, ———, took the goods under writs of attachment against M., in favor of persons who were creditors of M., upon debts existing at the time of such transfer, then the plaintiff is not entitled to recover in this action.[29]

§ 2677(5). Missouri

The jury are instructed that if they believe from the evidence that S. was actually indebted to said plaintiff in the amount of the several notes read in evidence, and that for the purpose of paying said notes on ———, he conveyed to said plaintiff the stock of liquors, cigars, fixtures, etc., in the store of said S. at No. ——— street, and delivered him possession thereof, and that the said property so conveyed was no more than was reasonably necessary to pay said notes, then the said property became the property of said plaintiff. And if you believe that afterwards the defendant ———, as sheriff of ——— county, under and by virtue of said writs of attachment against said S., levied upon and took said property, or any part thereof, then you will find in this action for the plaintiff, and assess his damages at the value of the property so taken.[30]

The court instructs the jury that the only question herein is whether the transfer of the property in controversy to plaintiffs was valid; the validity of no other transfer is in issue in this cause. A debtor in failing circumstances has the right to prefer one of his creditors to another, or any number of them to the exclusion of others. A mere preference alone is no fraud. A debtor, therefore, may lawfully pay, either in money or property of like amount, one or more of his creditors their demands in full, and allow others to go unpaid in whole or in part; and if the creditor who receives such a preference does so only for the purpose of receiving his demand, his payment is valid, although at the time he receives it he may know his debtor owes other demands, and that he is, by such payment, receiving a preference. But if, in accepting such payment or transfer of property therefor, the said creditor does not act solely with the purpose of obtaining a preference for himself, but also thereby intends to aid the debtor in hindering, delaying, or defrauding his other creditors, irrespective of the preference such

[29] Hessing v. McCloskey, 37 Ill. 341.

[30] State ex rel. Robertson v. Hope, 14 S. W. 985, 102 Mo. 410.

creditor secures thereby, then such intent makes such payment or transfer of property fraudulent and void. If, then, on the ——— day of ———, 19—, T. was indebted to the ——— Bank of ——— for the note of $———, read in evidence, and to ———, or said bank, in the amount of the note for $———, and to ——— on open account for $———, and on that day sold and delivered the goods in controversy to plaintiffs in payment of his indebtedness to them, and in consideration that they would pay off and discharge the said $——— note to said bank, then and in that case, in the absence of any intent on the part of the plaintiffs to do more than secure payment of T.'s indebtedness to them, and so protect themselves against their liability to said bank in respect of said note or notes, such sale of said property was a valid sale, and did operate to pass the bill to them free from the claim or claims of other creditors of T.[31]

§ 2677(6). Nebraska

You are instructed that in this action the plaintiff has taken, by writ of replevin, the property described in the petition, claiming to be entitled to its possession as mortgagee, under a mortgage executed by H., previously the owner of the property. The property in question was in the possession of defendant as a constable, by virtue of a writ of attachment executed against the property of H. The issues made by the pleadings raise the question for you to determine as to the validity of the plaintiff's mortgage. You are instructed (1) that H. had a right to secure plaintiff any valid and subsisting indebtedness owing by him to plaintiff, and, for that purpose, to execute to her a mortgage on his property, if made in good faith, without any intention to defraud a creditor.[32]

You are instructed that, if you find ——— was indebted to plaintiff, she had a right to take, as payment on her claim against ———, the goods in question, if done in good faith, though others are thereby deprived of all means of obtaining satisfaction of their equally meritorious claims.[33]

§ 2677(7). Texas

You are instructed that an insolvent debtor has the right to transfer his property to one of his creditors in payment of the debt due such creditor, even though the effect of such transfer is to hinder and delay other creditors, providing the creditor receiving such property acts in good faith and takes the property for the sole purpose of collecting a bona fide debt. The fact that such transfer may

[31] State v. Mason, 10 S. W. 179, 96 Mo. 559.

[32] Houck v. Heinzman, 55 N. W. 1062, 37 Neb. 463.

[33] Lipscomb v. Lyon, 27 N. W. 731, 19 Neb. 511.

have the effect of preventing other creditors from collecting their debts will make no difference.[34]

The jury are instructed that if they believe, from the evidence, that ——— conveyed said goods to the claimants before the levy, and that the claimants openly received said goods, and the same were taken solely for the purpose of securing their debt, and not for the purpose to cover up said goods, or its proceeds, for the benefit of ———, to the prejudice of their other creditors, and no more goods were received than were reasonably sufficient to discharge their debt, to find for the claimants.[35]

§ 2678. Same—Effect of conveyance as hindering and delaying creditors

See, also, ante, § 2677(1).

You are instructed that it is claimed on the part of the plaintiff in this suit that this bill of sale was not a bona fide bill of sale; that is, that it was fraudulent, and therefore void. I charge you that, in order to make this bill of sale fraudulent or void in this case, it is necessary that it should be executed with an intent to hinder, delay, or defraud creditors. If it was executed for the purpose of securing bona fide indebtedness, it would not be fraudulent, no matter if it did in effect hinder or delay or defraud creditors; but if executed, not to secure a bona fide indebtedness, but for the purpose of hindering, delaying, and defrauding creditors, it would be void in law, and no title would pass under it by virtue of the bill of sale, if you should find it to be fraudulent—that is, if it was not executed for the purpose of paying a bona fide indebtedness owed by ——— to the ———.[36]

§ 2679. Effect of intent of debtor to delay or defraud other creditors

See, also, post, § 2685.

§ 2679(1) Indian Territory

You are instructed that the plaintiff had the right at the time to purchase from her brother, ———, the property, to protect herself on any bona fide claim which she held against him, or upon which she was security; and she would have the right to do that though he was insolvent at the time, and was seeking even to defraud his creditors, provided she was not at the time a party to a combination with him, and aiding him in his efforts to defraud his creditors.[37]

[34] Whitesides v. Bacon (Civ. App.) 150 S. W. 301.

[35] Brown v. Lessing, 7 S. W. 783, 70 Tex. 544.

[36] Sloman v. Goebel Brewing Co., 76 N. W. 975, 118 Mich. 442.

[37] Dorrance v. McAlester, 45 S. W. 141, 1 Ind. T. 473.

§ 2679(2). Missouri.

The jury are instructed that although the jury may believe from the evidence that S. was largely indebted to other parties than said plaintiff, and that he had many and large sums of money due him which he fraudulently concealed, for the purpose and with the intent of placing the same beyond the reach of his other creditors, yet, if you further believe that said S. was indebted to said plaintiff in the amount of the notes read in evidence, and that in payment of said indebtedness said plaintiff received the property described in the petition for the purpose of such payment, and none other, and that subsequently the defendant, under and by virtue of writs of attachments against said S., levied upon and took said property then you will find for the plaintiff.[38]

§ 2679(3). Texas

You are instructed that, if you shall find from the evidence that S. E. W. was justly indebted to his wife, M. N. W., on the ——— day of ———, and if he conveyed the land in question in payment of such indebtedness, or a part thereof, and if the only purpose on the part of Mrs. W. in taking such conveyance was to collect her debt, or a part thereof, the conveyance would be valid, even though you may believe S. E. W. was insolvent, and that his purpose in making such conveyance was to hinder, delay, or defraud other creditors, and you should find for M. N. W.[39]

The jury are instructed that an insolvent debtor has the right to transfer his property to one of his creditors in payment of the debt due such creditor, even though the effect of such transfer is to hinder or delay other creditors in the collection of their debt or debts, provided the creditor securing said property act in good faith, for the sole purpose of collecting his debt; and the fact that said debtor acts in bad faith in making said transfer, and that the effect of making it will be to hinder and delay other creditors from collecting their debts, will make no difference. Therefore, gentlemen, if you find from the evidence that ——— was justly indebted to his mother, ———, and that the mules and horse in question were transferred to her in payment of such debt, and if you further believe that the property transferred was not of greater value than the amount of said debt, and if you further believe that the only purpose of ——— in accepting said property was to collect said debt, in such event you should find in favor of the defendant.[40]

[38] State ex rel. Robertson v. Hope, 14 S. W. 985, 102 Mo. 410.

[39] Whitesides v. Bacon (Civ. App.) 150 S. W. 301.

[40] Awalt v. Schooler (Civ. App.) 131 S. W. 302. This instruction is correct as far as it goes.

§ 2680. Preference of wife as creditor

§ 2680(1). Kansas

The court instructs the jury that a debtor in failing circumstances may prefer one bona fide creditor to the exclusion of others and regardless of the debtor's motives, and you are instructed that the fact that such creditor is the wife of the debtor does not change the rule, for, if a wife is a bona fide creditor of her husband, she has a right to expect and to receive security or payment from him, or out of his estate, the same as any other creditor, and he has a right to prefer her to other creditors by transferring real estate or other property at a fair price in payment of her claim against him, so long as she acts in good faith. And while the fact of the relationship existing between the parties may be taken into consideration by you, yet the conveyance cannot be overturned on account of the mere fact that it is between husband and wife, even though he is in failing circumstances.[41]

§ 2680(2). Nebraska

You are instructed that a husband, indebted to his wife, may prefer her to other creditors, and make a valid appropriation of his property to pay her claim, even though he is thereby deprived of the means to pay other debts.[42]

§ 2680(3). South Dakota

You are instructed that a husband has the right to deal with his wife. A husband has the right to pay his wife an honest indebtedness in an honest manner. If it is a good-faith transaction, an honest transaction, he has a right to do that. Now, this was a transaction between husband and wife, and the husband had a right to pay that wife, if there was an honest indebtedness; and if he paid her what was right, and reasonable, and just, he had a right to pay that.[43]

§ 2681. Sale made to pay debt to grantee and other debts

§ 2681(1). Illinois

The jury are instructed that, if R. was indebted to the plaintiff, and the plaintiff assumed and agreed to pay debts due from R. to third persons, these constitute a good consideration for the sale (if proven) from R. to plaintiff.[44]

§ 2681(2). Kansas

You are instructed that a sale by B. to M. of the property in controversy and other property, in payment of the debts of B. to M., would not be a fraud on other creditors of B., provided such

[41] Brecheisen v. Clark, 176 P. 137, 103 Kan. 662.

[42] Lipscomb v. Lyon, 27 N. W. 731, 19 Neb. 511.

[43] Kolbe v. Harrington, 88 N. W. 572, 15 S. D. 263.

[44] Warner v. Carlton, 22 Ill. 415.

sale was made in good faith, and to satisfy a real and valid indebtedness to M. A sale by B. to M., in payment of a valid indebtedness of B. to M., or to provide for the payment of debts to other creditors of B., on which M. was liable as surety or indorser, would not be fraudulent if made in good faith. A sale by B. to M. of the property in controversy and other property, to pay the debts of B. to M., and to provide for the payment of certain other debts of B., upon which M. was liable as surety or indorser, and also to provide for the payment of still other debts of B., and upon which M. was not legally liable, and leaving still other debts and creditors of B. unsecured and unprovided for, would be fraudulent upon the part of B. as to such other debts and creditors so unprovided for. Such sale would also be fraudulent upon the part of M., provided he purchased with knowledge of such facts.[45]

§ 2682. Conveyance to creditor in consideration of debt and additional cash sum

You are instructed that if a debtor in failing circumstances proposes to sell to one of his largest creditors practically all his property for a price in excess of what he owes him, and the creditor is informed, and has reason to believe, that it is the purpose of the debtor to use the excess in the payment of his honest debts, even though not enough to pay all his creditors, the sale is not fraudulent as to creditors who are not paid.[46]

You are instructed that, if you find from the evidence that at the time of the transaction ——— had no intention of hindering, delaying, or defrauding their other creditors, but intended to apply the $——— to the payment of a part of their honest debts, even if not enough to pay all of them, the sale was not fraudulent, and you should find for the plaintiff.[47]

You are instructed that, where a debtor in failing circumstances prefers one of his creditors by transferring to him property in payment of a bona fide debt for a reasonable price, receiving cash for the excess above the amount of the debt, such transaction is not fraudulent per se, but is only fraudulent if it was the intention of the debtor to hinder, delay, or defraud his other creditors, which intention must be participated in by the purchaser before the transaction is void, if the effect of such transaction was to hinder or delay creditors in procuring the application of the debtor's property to the payment of his debts.[48]

You are instructed that a creditor has a right to receive personal property from his insolvent debtor in payment of a bona

[45] National Bank of Paola v. Banta, 49 P. 815, 6 Kan. App. 922.

[46] Jackson v. Citizens' Bank & Trust Co., 44 So. 516, 53 Fla. 265.

[47] Jackson v. Citizens' Bank & Trust Co., 44 So. 516, 53 Fla. 265.

[48] Jackson v. Citizens' Bank & Trust Co., 44 So. 516, 53 Fla. 265.

fide debt, and to pay him in cash the balance of the reasonable value of said property, if such transaction does not hinder or delay the appropriation of such property or its proceeds to the payment of the debts of the insolvent; and the creditor's knowledge of the insolvency of his debtor will not make the transaction fraudulent, if all of such cash payment is used by the debtor to pay his bona fide debts.[49]

You are instructed that if you find from the evidence that the $——— paid ——— in excess of their indebtedness to the bank was actually appropriated to the payment of the just debts of ———, even if those debts were due to members of the ——— family, and even if a large number of ———'s creditors went unpaid, the sale was not fraudulent, and you should find for the plaintiff.[50]

You are instructed that if you find from the evidence that, at the time of the sale to the bank, ——— was informed by the debtor firm, B. & Co., or by their attorney, whom he knew, and in whose integrity and veracity he had confidence, that it was the purpose of B. & Co. to appropriate the $——— received from the bank, for the excess of the property above the debt due to the bank, to the payment of their just debts, even though those debts may have been owing to members of the B. family, and there was nothing in the surrounding circumstances to arouse the suspicion of an ordinarily prudent man, or to put him on inquiry as to the purpose of B. & Co., then the sale was not fraudulent, even though it may have been the secret intention of B., or of B. & Co., to place the $——— beyond the reach of other creditors, and you should find for the plaintiff.[51]

You are instructed that, if you find from the evidence in this case that B. & Co. were in failing circumstances; that they were practically insolvent, which fact was known to the bank, or which T., the president of the bank, with whom the trade was made, ought to have known; that B. & Co. proposed to sell their goods to the bank, demanding $——— over and above their indebtedness to the bank; that B. & Co. intended at the time to so dispose of the $——— that their creditors could not reach it, or so as to hinder or delay their creditors in the collection of their claims; that this fact was known to ———, or by diligent inquiry he could have discovered it—then the sale was fraudulent, and you should find for the defendant, provided there were such circumstances attending the transaction as to raise a suspicion of

[49] Jackson v. Citizens' Bank & Trust Co., 44 So. 516, 53 Fla. 265.

[50] Jackson v. Citizens' Bank & Trust Co., 44 So. 516, 53 Fla. 265.

[51] Jackson v. Citizens' Bank & Trust Co., 44 So. 516, 53 Fla. 265.

the bona fides of the transaction in the mind of a reasonably prudent man, or to put him upon inquiry.[52]

You are instructed that, if you should find from the evidence that J. M. B., doing business as ———, was the owner of the stock of merchandise in controversy, and that on ———, he was indebted to the ——— Bank in the sum of $———, and shall further find that he sold to the said bank the entire stock of goods for the sum of $———, and that this was a reasonable price therefor, and received therefor a discharge of the debt of $———, and $———, which was promptly applied to the payment of other debts, then the transaction would not be fraudulent, even though J. M. B. was largely indebted to other people, the payment of whom was not provided for; and the fact that the said bank knew at the time that J. M. B. was insolvent would not render the sale fraudulent or void.[53]

§ 2683. Transfer to creditor in consideration of debt and payment of liens on property

You are instructed that, in addition to the amount due the creditor, he has the right to pay in cash for the property purchased from his insolvent debtor the amount of any liens on the same, if the debt and the amount of the liens do not exceed the reasonable value of the property under the circumstances, and all of the cash so paid is promptly applied to the payment of such bona fide debts of the debtor.[54]

C. Intent of Transferee or Knowledge by Him of Intended Fraud or Participation Therein

§ 2684. Necessity that attacking creditors should show, to invalidate conveyance, knowledge by transferee of fraud or participation therein

§ 2684(1). Alabama

The jury are instructed that, if the evidence reasonably satisfies them that plaintiff bought the goods, paying a fair and reasonable price for them, they must find for the plaintiff, unless the evidence reasonably satisfies them that plaintiff's vendors made said sale with the intent or purpose to delay, hinder, or defraud their creditors; and that when plaintiff made his purchase he knew, or had notice, that such was the intention or purpose of his vendors, or had information of suspicious circumstances, which ought to have

[52] Jackson v. Citizens' Bank & Trust Co., 44 So. 516, 53 Fla. 265.

[53] Jackson v. Citizens' Bank & Trust Co., 44 So. 516, 53 Fla. 265.

[54] Jackson v. Citizens' Bank & Trust Co., 44 So. 516, 53 Fla. 265.

led him to make inquiry, and, if followed up, would have led to knowledge of such intent.[55]

§ 2684(2). Georgia

You are instructed that if you find from the evidence in this case that the claimant ——— bought the property in good faith and paid cash for it, that there was no intention or purpose on his part to defraud, hinder, or delay present or subsequent creditors of R., that it was a bona fide transaction on a valuable consideration, and without notice or ground for reasonable suspicion, then you should find the property not subject; and this would be true although you may find from the evidence that the purpose on the part of R. in selling the property was to defraud or delay his present or subsequent creditors. If such purpose existed on the part of R. but was unknown to claimant; if claimant had no notice or grounds of reasonable suspicion of R.'s purpose, he (claimant) would not be affected thereby. Whether or not claimant was a bona fide purchaser on a valuable consideration and without notice or ground for reasonable suspicion, and whether the transaction was made with the intention to delay or defraud present or subsequent creditors of R., you will determine from the evidence; and, in determining these matters, you can consider the possession of R. after the alleged sale, the failure of claimant to record his deed, and all the facts and circumstances as shown by the evidence.[56]

§ 2684(3). Illinois

The jury are instructed that, even if the jury should believe, from the evidence, that the object and purpose of R. in making the sale was to hinder, delay, or defraud his creditors, yet unless the jury are satisfied, by the proof, that the plaintiff knew that fact, and bought the goods with such knowledge, the jury cannot find that the sale was fraudulent for that reason.[57]

§ 2684(4). Iowa

You are instructed that the plaintiffs also claim, in this case, that said P. sold said goods to said R. for the purpose of defrauding, or hindering or delaying the creditors of said P., and that said R. purchased said goods with the intent to aid said P. in hindering, delaying, and defrauding his creditors; and in relation to these matters you are instructed that if said P. sold said goods to said R. for the purpose of defrauding his creditors, or hindering or delaying his creditors in the collection of their claims against him; and if said R. purchased said goods with intent to aid said P. in accomplishing such purpose; or if said R. purchased said goods knowing that P. intended, by the sale to him, to hinder, delay or de-

[55] Skipper v. Reeves, 8 So. 804, 93 Ala. 332.

[56] Bernard Frank & Co. v. Adams, 87 S. E. 3, 144 Ga. 270.

[57] Warner v. Carlton, 22 Ill. 415.

fraud his creditors; or if said R. made said purchase, having notice or knowledge of such facts as would have put an ordinarily cautious person upon inquiry, which, if made with ordinary diligence, would have led to a knowledge of the intent of said P., in making said sale, to hinder, delay or defraud his creditors; then, and in either of the events of purchase just stated, said sale and purchase would be fraudulent and void as to the creditors of said P., and the goods thus sold would be liable to attachment by such creditors. But if said sale was not made by said P. with the intent on his part to hinder, delay, or defraud his creditors, then the sale was not void, and said goods were not liable to be seized under the plaintiffs' attachment. Nor was said sale void as to the creditors of P., although made with intent on his part to hinder, delay, or defraud his creditors, provided the purchase was not made by said R. with intent to aid P. in accomplishing said fraudulent purpose, or made with knowledge of said purpose on the part of P., or with knowledge of such facts as would have put an ordinarily prudent man upon inquiry, which, if made with ordinary diligence, would have led to the discovery of the fraudulent purpose on the part of P.[58]

§ 2684(5). Kansas

You are instructed that if you find from the evidence that the contract of sale and purchase between B. and M. was entered into by them for the purpose or with the intent to cheat or defraud the plaintiff, or to hinder or delay him in the collection of his debt against B., then you ought to find for the plaintiff. If you find from the evidence that, in the contract of sale and purchase between B. and M., B. sold to M. all of his personal property which was subject to the payment of his debts, and thereby paid or provided for the payment of all the debts of B. to M., and all the debts of B. upon which M. was legally liable, and also certain other debts of B., upon which M. was not legally liable, and left the debts of B. to the plaintiff unpaid, unsecured, and unprovided for, and that M. entered into said contract and accepted said bill of sale with knowledge of such facts, then you ought to find for the plaintiff. But if you find from the evidence that M. acted in good faith, and in ignorance of the existence of the debt of B. to plaintiff, then you ought to find for the defendant.[59]

The jury are instructed that, if there was a sale to ———, then, even though ———, the vendor intended to defraud his creditors by that sale, yet unless the vendee knew of such intention or was in such a situation that a reasonably prudent man in his situation

[58] W. C. Wadsworth & Co. v. Walliker, 2 N. W. 420, 51 Iowa, 605.

[59] National Bank of Paola v. Banta, 49 P. 815, 6 Kan. App. 922.

should and would have known of such intention on the part of the vendor, plaintiff can recover.[60]

§ 2684(6). Texas

You are instructed that, though you should believe from the evidence that the purpose of the said R. in making said deed was to defraud her creditors, still you should find for the defendant, unless you further find and believe that the said defendant had notice of the fraudulent intent and purpose of the said R.[61]

The jury are instructed that, if you believe from the evidence that a mortgage or deed of trust was executed by ———, and that the claims secured by it were just, but the same was made, on the mortgagor's part, to cover up the property, and fix it so that said property, or the proceeds of the sale thereof, after any specified claim or claims are paid, should revert to the benefit of the mortgagor, and thereby prejudice other creditors, and hinder or defraud them in the collection of their debts; and if you further believe from the evidence that the claimants named in the mortgage or deed of trust knew of this intent upon the part of the mortgagor, and participated in such intent, then such mortgage or deed of trust would be void, as to the creditor or creditors so delayed, hindered, or defrauded.[62]

The jury are instructed that, although you should find that C. made one or both sales to plaintiff with intent to hinder, delay, and defraud his creditors, yet, if he paid a valuable consideration for the goods, such intent on the part of C. would not alone make the sale void. In order to invalidate the sale, it must further appear from the evidence that the plaintiff, at the time he bought and paid for the goods, had notice of such intent on the part of C., or that he had a knowledge of facts or circumstances such as would have put an ordinary prudent man upon inquiry, which, by the use of proper diligence on his part, would have led to a knowledge of such intention on the part of C.[63]

§ 2685. Same—Knowledge by preferred creditor of fraudulent intent of debtor

See, also, ante, § 2679.

You are instructed that, if you believe from the evidence in this case that it was the intention and purpose of J. M. B., in making the sale in controversy to the ——— Bank, to preserve for the ben-

[60] Kurtz v. Miller, 26 Kan. 314.

[61] Adams v. Hamilton, 116 S. W. 1169, 53 Tex. Civ. App. 405.

[62] Frost v. Mason, 44 S. W. 53, 17 Tex. Civ. App. 465. The court does not decide that participation by the mortgagee in the fraud of the mortgagor was necessary to be shown to invalidate the transaction, but concedes the point for the purposes of the case.

[63] Dodd v. Gaines, 18 S. W. 618, 82 Tex. 429.

efit of any member of his family to whom he was not bona fide indebted any part of the sum of $——— paid him in cash, then the court instructs you, as matter of law, that the sale as to the said J. M. B. was fraudulent, but not fraudulent as to the bank, unless the bank knew or ought to have known of this purpose.[64]

The court charges you that under the facts and circumstances of this case the plaintiff, the ——— Bank, is chargeable with knowledge of all facts that it could have ascertained in respect to the sale of the property in controversy by the exercise of reasonable diligence, provided you further find that the circumstances were such as to put the bank on inquiry.[65]

The court charges you that, if you believe from the evidence in this case that the property in controversy was conveyed to the ——— Bank by B. for the purpose of hindering, delaying, or defrauding his creditors, you must find a verdict for the defendant, provided you further find that the bank participated in the fraud, or knew of the fraudulent purpose of the debtor, or could have ascertained the same by inquiry.[66]

You are instructed that, if you believe from the evidence in this case that, during several months preceding the sale to the ——— Bank, J. M. B. was concealing or secreting the moneys taken in in the course of business, or a substantial part thereof, preparatory to attempting a sale of substantially all the remaining property belonging to him, and as part of a scheme to place his property, or any substantial part thereof, beyond the reach of his creditors, then the court instructs you, as a matter of law, that the sale as to the said J. M. B. was fraudulent. But before you can find it fraudulent as to the bank, you must further believe that at the time of the sale the bank knew, or should have known, of B.'s purpose.[67]

§ 2686. Sufficiency of notice to grantee of fraudulent intent of grantor—Knowledge of facts putting on inquiry

§ 2686(1). Florida

You are instructed that, when a debtor in failing circumstances proposes to sell to one of his creditors practically all of his property for more than he owes, with intent to hinder, delay, or defraud his other creditors, and the circumstances under which he proposes the sale are suspicious, or the circumstances are such as to put an ordinarily prudent man on inquiry as to the purpose of the debtor, and if a diligent inquiry would have discovered the fraudu-

[64] Jackson v. Citizens' Bank & Trust Co., 44 So. 516, 53 Fla. 265.

[65] Jackson v. Citizens' Bank & Trust Co., 44 So. 516, 53 Fla. 265.

[66] Jackson v. Citizens' Bank & Trust Co., 44 So. 516, 53 Fla. 265.

[67] Jackson v. Citizens' Bank & Trust Co., 44 So. 516, 53 Fla. 265.

lent purpose of the debtor, and the purchaser fails to make such an inquiry, the sale is fraudulent.[68]

§ 2686(2). Indian Territory

You are instructed that, if plaintiff knew that her brother, from whom she purchased the property mentioned in the evidence, was insolvent, or in failing circumstances, and knew of his purpose to defraud his creditors, and participated in the transaction, she could not recover in this case. Again, if she knew of his purpose to defraud his creditors, and his condition, or if she had notice of such facts and circumstances in regard to his business and financial standing and condition, and his purpose, as would put an ordinarily prudent person upon inquiry, she would be charged with a knowledge of all the facts which she could ascertain by inquiry; and if the jury should believe from all the facts and circumstances that such was his purpose, and the facts and circumstances attending and surrounding the transaction were sufficient to put a person of ordinary prudence upon inquiry, then she could not recover in this case, and you will find for the defendants.[69]

You are instructed that, to make void a sale by a failing debtor to a creditor, actual notice to the creditor of the fraudulent intent of the vendor is not necessary, if the facts and circumstances within his knowledge are sufficient to put a person of common sagacity upon inquiry, and the use of reasonable diligence would lead to discovery of the fraudulent purposes of the vendor; and, if he fails to make inquiry, he will be charged with notice of the fraudulent intent.[70]

§ 2686(3). Kansas

The jury are instructed that, if you find from the evidence that, at the time the plaintiff claims he purchased the goods in controversy from W. K. R., said W. K. R. was attempting to dispose of his property with the intent to defraud his creditors, or hinder or delay them in the collection of their debts, and that such intention was known to the plaintiff, or that the plaintiff had knowledge of facts sufficient to awaken the suspicion of an ordinarily prudent man, and lead him to make inquiries, and further find that said plaintiff, in the purchase of said goods, did not allow an adequate price therefor, your verdict should be in favor of the defendant, although you may find that the debt which the plaintiff claims W. K. R. owed him was a bona fide debt.[71]

I further instruct you that, in cases of this kind, knowledge sufficient to arouse the suspicions of a reasonably prudent man, and

[68] Jackson v. Citizens' Bank & Trust Co., 44 So. 516, 53 Fla. 265.

[69] Dorrance v. McAlester, 45 S. W. 141, 1 Ind. T. 473.

[70] Dorrance v. McAlester, 45 S. W. 141, 1 Ind. T. 473.

[71] Morse v. Ryland, 48 P. 957, 58 Kan. 250.

put him upon inquiry, is, as a general proposition equivalent to knowledge of the ultimate fact which might be ascertained by such inquiry. And if, in these cases, you believe from the evidence that the alleged sale of the goods in controversy to the plaintiff was made by ——— with intent to defraud her creditors, and that the plaintiff had enough knowledge to arouse the suspicion of a reasonably prudent man, under similar circumstances, that such intent existed, and put him upon inquiry, and if, by such inquiry, he could have ascertained that such intent did exist, then he must be held to have had knowledge that it did exist.[72]

The jury are instructed that the law makes every gift, grant, or conveyance of goods or chattels, made or obtained with the intent to hinder, delay, or defraud creditors of their just and lawful debts, utterly void and of no effect. In order to render a sale of goods utterly void under the above law, the purchaser of the goods must have notice or knowledge that the sale is being made by the seller with such fraudulent intent. Therefore, if ——— sold the goods in controversy to the plaintiff with the intent to hinder, delay, and defraud his creditors, and the plaintiff was ignorant of such intent, and bought the goods in good faith for a valuable consideration, then the plaintiff would take a good title to the goods; but if the sale of the goods by ——— to the plaintiff was under such a state of facts or circumstances as would lead a man of ordinary and usual caution to suspect that the sale was being made with a fraudulent intent, then the plaintiff would be chargeable with notice of such fraud, and would take no title to the goods. If the transfer of the goods in question was made to plaintiff by the agent of ——— for the purpose of placing them beyond the reach of legal process, so as to delay the creditors of ———, then in law there would be legal fraud, and the sale would be void as against the creditors of ———.[73]

§ 2686(4). Missouri

The court further instructs the jury that it is not necessary for the attaching plaintiffs to prove by a direct and positive evidence that the interpleader had knowledge or notice of any fraudulent purpose on the part of ——— in making the transfer to hinder, delay, or defraud his creditors; but if the jury shall be satisfied from the evidence that such fraudulent purpose on the part of ——— did exist, and shall find that the facts and circumstances attending the transfer were such as naturally to put a person of ordinary caution upon inquiry which would lead to a knowledge of the truth,

[72] Haskett v. Auhl, 45 P. 608, 3 Kan. App. 744.

[73] Moon v. Helfer, 25 Kan. 139.

then the jury may infer that the interpleader had knowledge and notice of ———'s purpose in making the transfer.[74]

§ 2686(5). Nebraska

You are instructed that every mortgage made with the intent to hinder, delay, or prevent creditors from the collection of their debts is fraudulent and void as to such creditors, and if the plaintiff either participated in such intent, or knew of such intent on the part of ——— at the time of taking the mortgage, or if she had notice of such facts as would put a person of ordinary prudence and care on such inquiry as would have led to knowledge of such fraudulent intent on the part of the mortgagor, the mortgage would be void as to her. In determining the question of whether plaintiff has shown an absence of such notice or knowledge on her part, you are to consider the relations of the parties, the surrounding circumstances, the manner of the transaction, and any other fact shown by the evidence.[75]

§ 2686(6). South Dakota

You are instructed that, where one buys property, if that person intends by such transfer to defraud creditors, and if the purchaser knows of that intent, or has sufficient knowledge of the facts and circumstances to put him or her upon guard—that is, if the facts are before a person to give a reasonable person notice, under all the circumstances of probable fraud—then the transfer is fraudulent as against creditors.[76]

You are instructed that, if you are satisfied that ———, in disposing of the notes described in the complaint, made such disposition with the intent to defraud his creditors, and C. knew of such intent, or if C. was aware of such facts and circumstances as would put a reasonably prudent person on inquiry concerning such intentions, and she failed to make such inquiry, then in either of these events she could not recover, and your verdict must be for the defendant.[77]

§ 2686(7). Texas

The court instructs the jury that if the sale was made by C. with intent to hinder, delay, or defraud his creditors, and that plaintiff, at the time of the purchase, knew of such intent upon the part of C. to hinder, delay, or defraud his creditors, or if he knew such facts or circumstances as would have put a man of ordinary prudence upon inquiry, and which, by the use of ordinary diligence on his part, would have led to a knowledge that such was the inten-

[74] Mears v. Gage, 80 S. W. 712, 107 Mo. App. 140.

[75] Houck v. Heinzman, 55 N. W. 1062, 37 Neb. 463.

[76] Cole v. Reiley, 150 N. W. 299, 35 S. D. 30.

[77] Cole v. Reiley, 150 N. W. 299, 35 S. D. 30.

tion of C. in selling the goods to him, then such sale, as between plaintiff and defendant, is fraudulent and void.[78]

§ 2687. Sufficiency of facts to put purchaser on inquiry as to intent of debtor

The court charges the jury that if you are reasonably satisfied on the evidence in this case that the price paid by the defendant to M., was greatly disproportionate to the value of the property that he obtained from said M., then I charge you that this fact was sufficient to have excited defendant's suspicion as to the bona fide intent of said M.; and if defendant could have, on proper investigation and inquiry, diligently pursued, ascertained that it was the purpose and intent of said M. to convert their property into money so as to put it beyond the reach of their creditors, then under the law said sale is fraudulent and void as to such creditors, and it would be your duty to so declare, and to return a verdict for the plaintiff.[79]

§ 2688. Effect of knowledge of preferred creditor of insolvency of debtor

You are instructed that a creditor, in the absence of fraud, has the right to be preferred, even if he knew his debtor was insolvent, and received payment of his debt in property, even if it takes all of the property of his debtor to pay him.[80]

You are instructed that a conveyance by an insolvent debtor in consideration of a bona fide debt due the grantee equal to the value of the property is valid as against other creditors. The grantee's knowledge of the debtor's insolvency is not sufficient to establish fraudulent intent.[81]

§ 2689. Effect of knowledge by purchaser of, or participation in, fraudulent intent of debtor

§ 2689(1). Florida

You are instructed that, when a debtor in failing circumstances transfers to one of his creditors practically all of his property, and in addition to his indebtedness receives an additional sum over and above what he owes, either in notes or cash, with the intent to appropriate the overplus to his own use and deprive his creditors of it, and the purchaser knows of such purpose, the sale is fraudulent.[82]

[78] Dodd v. Gaines, 18 S. W. 618, 82 Tex. 429.

[79] Montgomery Moore Mfg. Co. v. Leeth, 50 So. 210, 162 Ala. 246.

[80] Jackson v. Citizens' Bank & Trust Co., 44 So. 516, 53 Fla. 265.

[81] Jackson v. Citizens' Bank & Trust Co., 44 So. 516, 53 Fla. 265.

[82] Jackson v. Citizens' Bank & Trust Co., 44 So. 516, 53 Fla. 265.

§ 2689(2). Indian Territory

You are instructed that no purchaser thus put upon inquiry has the right to remain willfully ignorant of the facts within reach. It is not sufficient for his protection to show that he was a purchaser for value. He must also be a bona fide purchaser, a purchaser in good faith, a purchaser without notice of the fraudulent intention on the part of the party from whom he purchases.[83]

You are instructed that, by aiding a debtor to convert his property into money or promissory notes, which can be easily concealed from the creditors and placed beyond their reach, with notice, actual or constructive, that he is doing so to defraud his creditors, the person so purchasing participates in the fraud of the debtor, by assisting him in carrying out his fraudulent purpose.[84]

Now, applying the instructions here given in charge to the jury to the facts in this case, if you should find from the evidence that the transaction between plaintiff and her brother, ———, was fraudulent, and that she knew of his fraudulent purpose, or had knowledge of facts and circumstances sufficient to put a person of common sagacity and prudence upon inquiry, it would be your duty to find for the defendant. If, on the contrary, you conclude from the evidence that the brother was guilty of no fraud, or that, if he was guilty of fraud, the plaintiff had no knowledge of his fraud, or no means of knowing of the existence of such fraud as suggested above, it would be your duty to find for the plaintiff.[85]

§ 2689(3). Iowa

You are instructed that, if the sale of said goods by P. and purchase by R. was not an honest and real sale and purchase, but was a sham transaction or trade made and gone into by them for the purpose of deceiving the creditors of P., or some of them, as to the real disposition to be made of the goods—they, P. and R., knowing the trade would have the effect to defraud some of P's creditors, or hinder or delay some of them in the collection of their claim against him—then such sale and purchase was fraudulent and void as to creditors, though said R. may have given his note for the goods, and the note may have been applied or used in extinguishing some of the claims against P. Said R., under such circumstances, and if such was the real character of the transaction, cannot in law be considered a purchaser in good faith; and if you find said sale and purchase to be substantially of the character above stated, or for other reasons or facts presented by the evidence find said sale and purchase to have been made with intent to hinder or delay some of

[83] Dorrance v. McAlester, 45 S. W. 141, 1 Ind. T. 473.

[84] Dorrance v. McAlester, 45 S. W. 141, 1 Ind. T. 473.

[85] Dorrance v. McAlester, 45 S. W. 141, 1 Ind. T. 473.

P.'s creditors in the collection of their claims, then you should find said sale and purchase fraudulent and void as to the creditors of said P.[86]

§ 2689(4). Kansas

The jury are instructed that, if you find from the evidence that the goods in controversy were transferred by ——— and accepted by the plaintiffs for the purpose of defrauding the creditors of ———, then your verdict should be for the defendant.[87]

§ 2689(5). Nebraska

The court instructs the jury that the law requires the debtor to act in good faith with his creditors, and apply his property not exempt, if need be, to the payment of his debts. If he attempts to evade this duty, and, for the purpose of hindering, delaying, or defrauding his creditors, transfers his property to others, with knowledge on the part of such grantees of such intent, such grantees will take no title to such property, as against such creditors proceeding to the collection of their claims by attachment upon said property.[88]

The court instructs the jury that if they believe from the evidence that the property in controversy was sold by ———, and in making such sale it was the intent of the seller to hinder, delay, or defraud his creditors, and the plaintiff purchased such goods, and by herself, or her agent acting for her, participated in such fraudulent purpose, or, at or before the time such sale was made, had knowledge of such facts and circumstances as would have aroused the suspicions and have put a reasonably prudent man upon inquiry, which inquiry, if pursued, would have led to the knowledge or notice of such fraudulent intent on the part of the seller, then in such case the plaintiff took no title to the property so conveyed, as against the creditors of the seller; and the fact that the plaintiff may have paid a valuable consideration, or even full value, for the goods will not render such sale good as against the creditors.[89]

§ 2690. Same—Effect of payment of valuable consideration

You are instructed that all sales or gifts made by an insolvent debtor, and made for the purpose of hindering, delaying, or defrauding his creditors, when such intention is known to the purchaser, or could have been known by the use of ordinary diligence, even though the purchaser may have paid a valuable consideration for such property, are void as against the creditors of the vendor.[90]

[86] W. C. Wadsworth & Co. v. Walliker, 2 N. W. 420, 51 Iowa, 605.

[87] McCluskey v. Cubbison, 57 P. 496, 8 Kan. App. 857.

[88] Brown v. Sloan, 85 N. W. 37, 61 Neb. 237.

[89] Brown v. Sloan, 85 N. W. 37, 61 Neb. 237.

[90] Whitesides v. Bacon (Tex. Civ. App.) 150 S. W. 301.

§ 2691. Effect of participation by preferred creditor in, or knowledge of, fraudulent intent of debtor

§ 2691 (1). United States

The jury are instructed that should you find from the evidence that L. S. was fairly and honestly indebted to plaintiff, his brother, G. S., in the full amount claimed (which I believe is about $———; you will remember the exact amount), and that with the honest intention of securing such indebtedness he purchased the property in question without notice or knowledge of any fraudulent intent on the part of L. S. to delay or defraud his creditors, and without any intent on his own part to secure any interest in said property, present or future, to his brother L., and without any intent to delay or defraud the creditors of L. S., then he is entitled to recover whatever may have been the intent of L. S. himself, for the intent of L. S. can affect the plaintiff only in the case that he knew, had notice, or as a prudent man had knowledge sufficient, from the circumstances, to put him upon inquiry as to his brother's fraudulent intent. On the other hand, should you find that the alleged indebtedness from L. to G. S., and which forms a part of the consideration of the sale, was knowingly false and fictitious in whole or in a material part, or should you find that the balance of the consideration money or price was paid by L. to G. S. with the intent to place the same out of and beyond the reach of the creditors of L. S., or should you find that G. S., in making this purchase, had any intent, not only to secure his own indebtedness, but also the further intent to hinder and delay the creditors of L. S., or any intent to so dispose of the remainder of the property, after the satisfaction of his own debt, either that it would be out of the reach of the other creditors, or that it would inure, in the future, to the use and benefit of L. S., then, and in either event, the transaction would be tainted with fraud, and the plaintiff cannot recover.[91]

§ 2691 (2). Georgia

You are instructed that every conveyance of real or personal property or estate, by writing or otherwise, and every bond, suit, judgment, execution, or contract, of any description, had or made with the intention to delay or defraud creditors, and such intention known to the party taking, is considered in law as fraudulent against creditors, and as to them null and void.[92]

You are instructed that if you believe from the evidence that the mortgage in question was executed by M., one of the members of the firm of ———, to the ——— Trust Company, and was intended

[91] Shauer v. Alterton, 14 Sup. Ct. 442, 151 U. S. 607, 38 L. Ed. 286.

[92] Fidelity Banking & Trust Co. v. Kangara Valley Tea Co., 22 S. E. 50, 95 Ga. 172.

to delay or defraud creditors, and such intention was known to said Trust Company, then such mortgage would be void, and it would be your duty to find that it be set aside. If you believe from the evidence that the mortgage in question was executed by M., a member of the firm of ———, and was partly intended to delay or defraud creditors, and partly with the intent to secure a debt, and the said Trust Company had knowledge of the intention to defraud creditors, or had grounds for a reasonable suspicion that such intent existed, said mortgage would be void, and you should find against it, accordingly.[93]

§ 2691(3). Indian Territory

You are instructed that a creditor may purchase goods from an insolvent or failing debtor in satisfaction of his debt, and it matters not whether or not he knew of the fraudulent intent of the debtor as to other creditors, so the purchasing creditor does not aid him in defeating his other creditors; but the purchasing creditor must have a bona fide debt, and must purchase the goods at a fair price, and to the extent only, and in satisfaction, of his debt.[94]

§ 2691(4). Missouri

The jury are instructed that if they believe from the evidence that ——— made the transfer of the goods in question to plaintiffs, with intent to hinder, delay, or defraud his creditors, and that plaintiffs participated in such intent, as explained in instruction numbered ———, then the jury must find for defendants.[95]

§ 2691(5). Texas

The jury are instructed that, if you believe from a preponderance of the evidence that the property levied upon in the writ of attachment was the property of G., at the time said levy was made, and that the transfer introduced in evidence before you is fraudulent, and was made for the sole purpose of defeating the creditors of said G., and you further find that S. knew and participated in said fraud and accepted said bill of sale for said purpose, as alleged, you will find for plaintiffs and so say by your verdict.[96]

§ 2692. Effect of knowledge by preferred creditor that effect of transfer would be to hinder or defraud other creditors

You are instructed that, if defendant intended by this transaction or the effect of it was to hinder, delay, or defraud his creditors, then the transfer would be bad as to him, and if ———'s participation in the transfer was with knowledge of such fact, or with

[93] Fidelity Banking & Trust Co. v. Kangara Valley Tea Co., 22 S. E. 50, 95 Ga. 172.

[94] Dorrance v. McAlester, 45 S. W. 141, 1 Ind. T. 473.

[95] State v. Mason, 10 S. W. 179, 96 Mo. 559.

[96] Awalt v. Schooler (Civ. App.) 131 S. W. 302.

knowledge of such facts as would put a reasonably prudent person upon inquiry, and still with such knowledge participated in the transaction for the purpose of assisting the defendant in his purpose, then the transfer should be set aside as to her as well; but the mere fact that she knew the effect of the transfer would be to hinder, delay, or defraud creditors would not make the transfer fraudulent as to her if she was acting in good faith for the purpose of paying or partially paying a bona fide indebtedness to her. And if she was acting in good faith for that purpose, then the transaction should not be set aside, even though you may find she knew what the consequences would be to the other creditors.[97]

D. Reservation of Benefits to Transferor

§ 2693. Reservation in general of rights or benefits to insolvent debtor on conveying property

See, also, ante, § 2677(3).

§ 2693(1). Alabama

The jury are instructed that, if the jury believe from the evidence that the transfer of chattel mortgages from ——— was not a part of the transaction in controversy, and that it had no relation thereto, then a reservation of a benefit to ———, if such there was in the chattel mortgages, or their proceeds, could not be visited upon the transaction in controversy.[98]

§ 2693(2). Florida

You are instructed that if you believe from the evidence in this case that it was the intention of B. in making the sale in controversy to the ——— Bank, to secure for himself the sum of $——— in cash then paid by the ——— Bank, or any part of the said sum. then the court charges you that as a matter of law the sale as to the said B. was fraudulent, provided you further find that the bank knew of such purpose or could have ascertained it by inquiry.[99]

You are instructed that, if the jury should find from the evidence that ——— was a minor at the time he collected wages due him for work for his father, but that for years he had been permitted to collect and use his own wages, he occupies in law the same position of any other creditor of the father, and a payment of his wages to him would not be a reservation for the benefit of the father.[1]

§ 2693(3). Georgia

You are instructed that, if you believe from the evidence that the giving of the mortgage and the conveyance of the real estate were

[97] Brecheisen v. Clark, 176 P. 137, 103 Kan. 662.

[98] Nelms v. Steiner, 22 So. 435, 113 Ala. 562.

[99] Jackson v. Citizens' Bank & Trust Co., 44 So. 516, 53 Fla. 265.

[1] Jackson v. Citizens' Bank & Trust Co., 44 So. 516, 53 Fla. 265.

parts of the same agreement, and that there was an intention, known to both parties (——— and the bank officials), to delay or defraud creditors by saving property for ——— from his creditors, the whole transaction would be avoided thereby, as against creditors, and this mortgage, which is now involved, would accordingly be avoided, as a part of the transaction. If this mortgage was executed by M., a member of the firm of ———, to the ——— Banking & Trust Company, for the purpose of securing the banking company, as a creditor, and, as a part of the same, an agreement was made by which certain other property was to be conveyed by ——— to the bank, which the bank agreed to hold for said ———, and save from his creditors, and eventually return to him, in whole or in part, and that there was an intention on the part of ——— to delay or defraud his creditors, of which intention the bank had notice, or grounds for reasonable suspicion, in such event the mortgage would be void as against other creditors, and you would find against it accordingly.[2]

§ 2693(4). Virginia

The jury are instructed that, if they believe from all the evidence that Mrs. S. was the bona fide purchaser of the property levied upon and sold under the defendants' execution against J. S., they should find for the plaintiff. But if the jury believe that she was not the bona fide purchaser thereof, but that her alleged purchase was a device to transfer to her the title of C., trustee, for the real benefit of J. S., and to shelter it under her name from liability to his creditors, they should find for the defendants. And in considering the question the jury should take into consideration all the evidence in the cause, and, if they believe from the evidence that the original deed of J. S. to C. was founded in fraud, that is to be regarded as one of the circumstances to be weighed by the jury in connection with all the other circumstances detailed in evidence.[3]

§ 2693(5). Washington

Now, gentlemen, I charge you that a failing debtor has a right to prefer a creditor, if it is done in good faith, and not for the purpose of defrauding other creditors. I charge you, further, that, so far as the question of fraud is concerned, it would not make any difference what the fraudulent intent of J. was, unless you find from the evidence that Mrs. ——— knew of that fraudulent intent, and participated in the fraud. I charge you that the transfer of the property merely to Mrs. ——— as J.'s agent would not be such a sale as would protect Mrs. ——— in the possession of the property,

[2] Fidelity Banking & Trust Co. v. Kangara Valley Tea Co., 22 S. E. 50, 95 Ga. 172.

[3] Hughes v. Kelly, 30 S. E. 387.

or protect it from the attachment of creditors. I charge you that if the transfer, if there was such a transfer, was made for the purpose of protecting the interest of J., that it was not a sale, and would not protect Mrs. ——— in the possession of the property, or protect the property from the attachment of creditors.[4]

§ 2694. Use by debtor of part of purchase price to pay relatives

You are instructed that if the jury find from the evidence that part of the purchase price of the stock of goods in question was used to pay the creditors of J. M. B., and that some of these creditors were the sons of J. M. B., the fact of the relationship would not make the sale fraudulent.[5]

§ 2695. Transfer to creditor reserving surplus to grantor

You are instructed that, if a debtor, who is insolvent, transfer to one of his creditors all his property, except such as is exempt from execution, with an understanding or agreement between himself and his creditor that the latter will dispose of the property so transferred, and, after paying himself, refund whatever remains to the debtor, such an understanding or agreement would be a circumstance tending to show that the transfer was made with intent to delay and defraud creditors. And, where the value of the property so transferred is grossly in excess of the creditor's claim, that is a circumstance tending to show that such an understanding exists.[6]

E. Change of Possession

§ 2696. Sufficiency of change of possession as against creditors of seller

Presumption from absence of change of possession, see post, § 2709.

§ 2696(1). Arizona

The jury are further instructed that, if they believe from all the evidence that the plaintiff, in good faith, purchased the property in dispute from T. before the levy thereon by defendant, and that, by the terms of such purchase, the plaintiff took immediate possession and control thereof, and that there was such advertisement of plaintiff's claim as would enable an ordinarily prudent man to ascertain that he could no longer rely on his knowledge of the ownership of the former proprietor, T., then will the jury find for the plaintiff.[7]

The jury are instructed that a delivery of personal property must be a transfer of possession and control, made by the seller with

[4] Dow v. Dempsey, 57 P. 355, 21 Wash. 86.

[5] Jackson v. Citizens' Bank & Trust Co., 44 So. 516, 53 Fla. 265.

[6] Sukeforth v. Lord, 25 P. 497, 87 Cal. 399.

[7] Gant v. Broadway, 15 P. 862, 2 Ariz. 315.

the purpose and effect of putting the goods out of his hands. This is sufficient delivery, whatever its form. Hence it may be constructive, as by delivering the key of a warehouse, or even a receipt, or without such when the goods are bulky and difficult of access, as in the case of the hay in suit.[8]

You are instructed that actual change of the situation of cumbersome property is not necessary to the immediate delivery and actual and continued change of possession required by our statutes to render a sale valid as against the creditors of the vendor, so that other circumstances connected with the sale preclude a continued ownership or possession in the vendor, and which, taken all together, exclude from the transaction the idea of fraud.[9]

You are instructed that, if the jury believe from all the evidence that, by the terms of the sale from T. to plaintiff, the property in dispute was, before the levy thereon by defendant, placed unequivocally within the power and under the exclusive dominion of plaintiff, as absolute owner, discharged of all lien for the price, or that the change of ownership was substantial and permanent as between the parties to said sale, and that the apparent custody of the property was such as to put one dealing with the vendor with respect to it upon inquiry, or such, at least, as might suggest a change of ownership, or that there was such advertisement of the plaintiff's claim as would enable an ordinarily prudent man to ascertain that he could no longer rely on his knowledge of the former ownership of T., then, as a matter of law, would said sale be valid as against the attaching creditors of T., and the jury will find for the plaintiff.[10]

§ 2696(2). Arkansas

You are instructed that if you find from a fair preponderance of the evidence in this case that on the ——— day of ———, the interpleader, H., purchased the property described in the bill of sale introduced in the evidence from the ——— Company, or from ———, or from either of them, and paid therefor the sum of $——— by paying to the ——— Bank of ——— said sum of $——— for the surrender of a note held by said bank against ———, and you further find from a fair preponderance of the evidence that the said H. sent one U. to the place where the said property was situated to take possession of the said property for him, the said H., and that the said U. did go to the place where the said property was located, and did take possession of said property for the said H.,

[8] Gant v. Broadway, 15 P. 862, 2 Ariz. 315.

[9] Gant v. Broadway, 15 P. 862, 2 Ariz. 315.

[10] Gant v. Broadway, 15 P. 862, 2 Ariz. 315.

and you further find that said purchase and taking possession of said property was in good faith on the part of the said H., then I instruct you that such possession was paramount to the rights of these plaintiffs as creditors of the sellers, the said ——— or the said ——— Construction Company.[11]

§ 2696(3). California

You are further instructed that if you find that H., prior to the time of delivering to plaintiff said bill of sale, dated ———, had the use of said automobile, and that thereafter subsequent to the delivery of said bill of sale he still continued to have the use and control of said automobile in the same manner and to a like extent, that there is no such delivery as the law contemplates as requisite to constitute a valid transfer.[12]

§ 2696(4). Illinois

The jury are instructed that, although a delivery of property sold is necessary to pass the title thereto, yet such delivery need not be an actual manual delivery; but anything which clearly shows a surrender of ownership by the seller, and an assumption of ownership by the purchaser, accompanied by such circumstances as would reasonably advise the world of such change of ownership, is all that is necessary on that point.[13]

§ 2696(5). Michigan

The jury are instructed that, if you find from the evidence that ——— sold the stock of goods mentioned in the evidence to the plaintiff, his father, and delivered the key of the store where the said goods were to plaintiff, yet if you further find from the evidence that the son was left in the management of the store, and that the possession of the goods was not thereafter actually and continually in plaintiff from such delivery of the key to him to the levy of the execution by defendant on behalf of creditors of the son, then the burden of proof is on the plaintiff to show that the said sale was an honest one.[14]

§ 2696(6). Missouri

The jury are instructed that, unless you are satisfied from the evidence that P. had actual possession of the goods in question, and that the change of possession was visible, continuous, and exclusive as against the vendor, such a change of possession as to indicate to purchasers at large that said vendor no longer had possession or control over said goods, then said sale was fraudulent and void as against creditors, even though the jury believe from

[11] Burke v. Sharp, 115 S. W. 145, 88 Ark. 433.

[12] Tennant v. Cline (App.) 190 P. 1065.

[13] Warner v. Carlton, 22 Ill. 415.

[14] Hopkins v. Bishop, 51 N. W. 902, 91 Mich. 328, 30 Am. St. Rep. 480.

the evidence that said sale to P. was made in good faith and for a valuable consideration.[15]

§ 2696(7). Pennsylvania

The jury are instructed that, to constitute a valid sale of personal property, the possession must pass at the time of the sale. If there is no change of possession, any creditor may levy upon and sell it. Timber made and lying in the woods, which is the subject of controversy in this case, is not the subject of manual delivery, but everything in the power of the parties should be done to indicate a change of possession. If plaintiff took such possession as the nature of the property was capable of, he is entitled to your verdict. If he did not, then you will find for defendant.[16]

§ 2697. Same—Goods in hands of third person

You are instructed that, when the goods at the time of the sale are in the possession of a third party, an actual receipt by or delivery to the vendee takes place when the vendor, the purchaser, and the third party agree that the latter shall cease to hold the goods for the vendor, and shall hold them for the purchaser.[17]

The jury are further instructed that, under the evidence, the possession of T. of the property in dispute, as derived by his purchase thereof from ———, the property still remaining on the premises of the latter at the time of the sale by T. to plaintiff, was at best but a constructive possession; and that, therefore, any bona fide change of property therein, from T. to plaintiff, which would give to the latter the immediate control of the same, and his (the plaintiff's) ownership as open and notorious as was the previous ownership of T., and of such character as to the apparent custody of the property as to put one dealing with the vendor, with respect to such property, upon inquiry, or such at least as might suggest a change of ownership, would constitute such an immediate delivery, and actual and continued change of possession, as to render the sale valid as against the creditors of T., and entitle plaintiff to a verdict.[18]

§ 2698. Same—Constructive possession by buyer of personalty

You are instructed that the possession which the law requires the vendee to have after a transfer to him of personal property is not sufficient if it amounts simply to constructive possession, or the mere possession which the law attaches to the ownership of land. Therefore, if the personal property so sold is located on land to which the vendee obtains a title then or thereafter, the

[15] State v. Merritt, 70 Mo. 275.
[16] Chase v. Ralston, 30 Pa. 539.
[17] Gent v. Broadway, 15 P. 862, 2 Ariz. 315.
[18] Gant v. Broadway, 15 P. 862, 2 Ariz. 315.

mere transfer of ownership of the land is not sufficient to constitute a change of possession of the personal property so sold. The possession of the personal property must be in some way so changed as to indicate by the change that the former owner no longer owns it.[19]

§ 2699. Same—Effect of lease of property by purchaser to vendor

The jury is further instructed that, if H. was the owner of the property described in the bill of sale introduced in evidence herein, then the said H. had the right to lease, rent, or hire said property or any part thereof to the said sellers, and that if, at the time he so leased, rented, or hired said property to the said sellers he was the owner thereof, such leasing, renting, or hiring said property did not divest him of the constructive possession thereof, and the fact that the sellers had the physical possession of said property at the time it was attached herein gave the plaintiffs no rights in said property against the right of the said H.[20]

§ 2700. Same—Putting seller in charge for purpose of resale

The jury are instructed that, if there was a delivery of the property sold to the plaintiff by R., that was all that was necessary to vest the title in the plaintiff (if there was a sale on a good consideration), and the fact that the plaintiff afterwards employed R. to assist in carrying on the business, and left him in connection with others in charge of the property as plaintiff's agent, would not invalidate the sale.[21]

The jury are instructed that a party may be in possession of property by his agent, as well as by himself, and if the goods were sold for a valuable consideration, and the possession delivered to the purchaser, it is not necessary that he should remain in the actual possession of the property sold to guard his title; but such possession may be by an agent or agents, and such agent may be the seller of the property, if such possession is such as to advise creditors of the change in the title of the property.[22]

§ 2701. Same—Leaving goods in same location for purpose of resale by former clerk of seller

The court further instructs you that if you find from the evidence that the vendee merely went into the store and directed one of the clerks, who had formerly worked for the vendor, to take charge of said stock of goods and commence selling them at cost, such possession would amount to no more than a constructive change of possession, and would not amount to such an immediate

[19] Bunting v. Saltz, 24 P. 167, 84 Cal. 168.

[20] Burke v. Sharp, 115 S. W. 145, 88 Ark. 433.

[21] Warner v. Carlton, 22 Ill. 415.

[22] Warner v. Carlton, 22 Ill. 415.

delivery "and actual continued possession of the things transferred," as is contemplated by the Statutes of ———, section ———, which I have read to you.[23]

F. EFFECT OF FRAUDULENT TRANSACTION AS BETWEEN PARTIES

§ 2702. In general

The jury are instructed that, if the jury believe from the evidence adduced that the conveyance from the plaintiff to the defendant was for the purpose of hindering, delaying, or defeating the creditors of the plaintiff in any attempt they might make to enforce their claims against the plaintiff, and that was the understanding and agreement between the plaintiff and defendant, and that the notes in suit were given in pursuance of this agreement between plaintiff and defendant, then the jury are instructed as a matter of law that the said agreement between the plaintiff and the defendant was illegal, and cannot be enforced, and the jury must find for the defendant.[24]

§ 2703. Recovery by grantor on notes given for purchase price

The jury are instructed that if the jury believe from the evidence that the conveyances to the defendant in evidence were made for the purpose of hindering, delaying, or defrauding the creditors of the said plaintiff, or any of them, and that the notes sued on herein were executed and delivered by defendant to plaintiff in pursuance of such unlawful agreement, and upon no other consideration, then you are instructed that such unlawful purpose precludes any recovery by the plaintiff against the defendant upon any notes so given upon such unlawful and fraudulent consideration, and your verdict should be for the defendant.[25]

G. EFFECT OF FRAUD AS TO OTHER THAN CREDITORS

§ 2704. In general

The jury are instructed that under the laws of ———, every gift, grant, conveyance, assignment, or transfer of, or charge upon, any estate, real or personal, or right or thing in action, or any rent or profit thereof, made with the intent to disturb, delay, hinder, or defraud creditors or other persons, and every bond or other evidence of debt given, suit commenced, or decree or judgment suffered with the like intent, shall be void as against creditors or other persons.[26]

[23] Ellet-Kendall Shoe Co. v. Ross, 115 P. 892, 28 Okl. 697.

[24] Riedle v. Mulhausen, 20 Ill. App. 68.

[25] Riedle v. Mulhausen, 20 Ill. App. 68.

[26] Riedle v. Mulhausen, 20 Ill. App. 68.

§ 2705. Rights of purchaser from fraudulent grantee

The jury are instructed that, if the jury believe, from the evidence, that the sale of the property, the title to which is in controversy in this suit, made by S. to B., was made for the purpose of hindering, delaying, or defrauding the creditors of said S. in the collection of their demands against S., and that B. participated in the said fraudulent intent of S. in making his (said B.'s) purchase of the said property, and if the plaintiffs only have shown a title to said property acquired through B., and if the jury believe from the evidence that said plaintiffs purchased from B. with a full knowledge of the said fraudulent contract between S. and B., then the plaintiffs have shown no better title to said property as against the rights of S.'s other creditors than B. had thereto at the time when he sold the same to the plaintiffs.[27]

The jury are instructed that, if they believe, from the evidence, that the contract between S. and B. was of the fraudulent character mentioned in the above instruction, then the pretended sale between S. and B. would be void as against S.'s creditors, and such creditors could attach and hold said property in the hands of B. for the satisfaction of their demands; and in like manner said creditors could attach and hold said property in the hands of the plaintiffs, if the plaintiffs only purchased said property of B., and before and at the time of their purchase had full knowledge of the void character of said B.'s title on account of such fraud.[28]

H. Evidence and Matters Pertaining to Remedies of Attacking Creditors

§ 2706. Presumptions and burden of proof

§ 2706(1). Arkansas

You are further instructed that the validity of a bill of sale, regular on its face, cannot be overcome by oral testimony, unless it is shown to have been for fraudulent purpose, and unless you find from a fair preponderance of the evidence that the bill of sale introduced in evidence was made for the purpose and with the intent to defraud the creditors of ———, then you should find that the bill of sale is valid and entitled to full faith and credit.[29]

You are instructed that fraud is never to be presumed, but must be proved by good and sufficient evidence in the case. Therefore, before you can find for the plaintiff on the ground of fraud, you will have to find that the interpleader, at the time of the purchase, knew of grantor's intent to defraud the plaintiffs.[30]

[27] Waggoner v. Cooley, 17 Ill. 239.
[28] Waggoner v. Cooley, 17 Ill. 239.
[29] Burke v. Sharp, 115 S. W. 145, 88 Ark. 433.
[30] Burke v. Sharp, 115 S. W. 145, 88 Ark. 433.

You are further instructed that the burden of proving the allegation of fraud as set forth in the answer of the plaintiffs filed to the interplea of ——— rests upon the plaintiffs, and that unless such fraud exists and is proved to your satisfaction by a fair preponderance of the evidence, then it is your duty to find for the interpleader therein, provided you find as hereinbefore instructed that the said interpleader purchased and took possession of said property and was the owner thereof at the time it was attached.[31]

§ 2706(2). Florida

You are instructed that, where the defendant relies on the allegation of fraud to maintain a levy on goods purchased by plaintiff from the execution debtor, the burden of proof is on the party alleging such fraud to prove by the preponderance of the evidence such allegation; otherwise, you will find for the plaintiffs.[32]

§ 2706(3). Illinois

You are instructed that fraud is never to be presumed, but must be affirmatively proved by the party alleging the same. The law presumes that all men are fair and honest; that their dealings are in good faith, and without intention to disturb, cheat, hinder, delay, or defraud others; and if any transaction called in question is equally capable of two constructions, one that is fair and honest and the other that is dishonest, then the law is that the transaction questioned is presumed to be honest and fair.[33]

The jury are instructed that fraud cannot be presumed, but must be proved; and the jury are not at liberty to infer that the sale from R. to plaintiff (if such sale was made) was fraudulent, but the same must be proved to the satisfaction of the jury before they can find the property to be the property of R.[34]

§ 2706(4). Iowa

The jury are instructed that the burden of proving fraud is upon the defendants. Fraud is not to be presumed without proof. Yet fraud, like any other fact, may be proved by showing such circumstances as lead fairly and naturally to the conclusion that fraud has been committed; and if such circumstances are proved, and if the circumstances are of such a character as to lead the jury to believe from a preponderance of the evidence that fraud has been committed, then it may be considered that fraud is proved. But before fraud can be proved by circumstances, the conclusion of fraud should be inconsistent with any other probable or reasonable theory. Fraud will not be imputed when the facts upon which it is

[31] Burke v. Sharp, 115 S. W. 145, 88 Ark. 433.

[32] Williams v. Finlayson, 38 So. 50, 49 Fla. 264.

[33] Schroder v. Walsh, 11 N. E. 70, 120 Ill. 403.

[34] Warner v. Carlton, 22 Ill. 415.

predicated may be consistent with honesty and fair dealing; and should you find from a preponderance of the evidence that the sale between plaintiff and ——— was fraudulent, then your verdict should be for the defendant; but, if otherwise, you should find for the plaintiff upon this issue.[35]

You are instructed that, if you find there was a sale by ——— to plaintiff of the property in controversy, then you will inquire into and determine the character of this sale; that is, determine from the evidence whether or not it was fraudulent. It is alleged by defendants that it was and is fraudulent, and you are instructed that the burden of proving the same rests upon the defendants, and they must do so by a fair preponderance of the evidence; and you are instructed that the law presumes that all persons transact their business honestly and in good faith, until the contrary appears from a preponderance of the evidence; and, in this case, if you find there was a sale as claimed, it will be presumed that plaintiff and ——— acted honestly and in good faith in making the same, until such time as the defendants, who allege the contrary, establish the same by a fair preponderance of the evidence; and if the case is left in equipoise, then the defendants must fail as to the fraud; and fraud will never be imputed when the facts upon which the charge is predicated are or may be consistent with honesty and purity of intention.[36]

You are instructed that fraud is never to be presumed. The allegations of fraud in defendant's answer must be by him affirmatively established by the evidence, and will not be presumed by acts of the parties which may be accounted for on the basis of honesty and good faith.[37]

§ 2706(5). Kansas

You are instructed that whether or not there was fraud in the sale and transfer of the property in controversy, from B. to M., is a question of fact for you to determine from the evidence, and under the instructions of the court. Fraud is not presumed, but must be proved by a preponderance of the evidence before a jury is authorized to find that it exists.[38]

§ 2706(6). Nebraska

You are instructed that fraud is never presumed, but must be proved, and that fraud will never be imputed to a transaction where the facts and circumstances upon which it is predicated may exist with honesty and purity of intention; and, if you can reconcile the facts with reference to the sale of the goods from ——— to the

[35] Turner v. Hardin, 45 N. W. 758, 80 Iowa, 691.

[36] Sunberg v. Babcock, 24 N. W. 19, 66 Iowa, 515.

[37] Prichard v. Hopkins, 2 N. W. 1028, 52 Iowa, 120.

[38] National Bank of Paola v. Banta, 49 P. 815, 6 Kan. App. 922.

plaintiff, and said facts and circumstances can be reconciled with an honest purpose, then your verdict should be for the plaintiff.[39]

You are instructed that the law presumes transactions all honest and made for an honest purpose till the contrary is shown; and the burden of proof to show a dishonest purpose in this case is upon the defendant.[40]

You are instructed that the burden is upon the plaintiff to show by a preponderance of the evidence that at the commencement of this action he was the owner and entitled to the possession of the goods in controversy, and that the same were at that time wrongfully detained from him by the defendant, to entitle him to recover. Or, if the plaintiff's ownership and right of possession are established in any portion of said property, he is entitled to recover for that portion.[41]

You are instructed that the burden of proof of fraud in this case is on the defendant, and, in order for defendant to establish fraud, he must show a fraudulent intent on the part of ——— to hinder, delay, or defraud his creditors, and that plaintiff herein knew and participated in said fraud, or had knowledge of facts that would put an ordinarily prudent man on inquiry to ascertain said fraudulent intent, and, if the evidence in this case fails to show facts and circumstances (or such fraudulent intent) on the part of ———, and that the same was participated in by plaintiff, or known to him, then in that case you should find for the plaintiff.[42]

§ 2706(7). Texas

The jury are instructed that the burden of proof is upon the plaintiff to show by a preponderance of the evidence that the transfer of the said policy was made with the intent on the part of said ——— to hinder, delay, and defraud plaintiff; and, further, that said ——— had notice of such intent, or that he had notice of such facts as would have excited in the mind of a person of ordinary prudence a suspicion of such intention.[43]

§ 2707. Badges of fraud in general

Inadequacy of price as badge of fraud, see ante, § 2675.

§ 2707(1). Georgia

The jury are instructed that any unusual act, outside of the usual course of business, or differing from the manner in which such busi-

[39] Davis v. Getchell, 49 N. W. 776, 32 Neb. 792.

[40] Davis v. Getchell, 49 N. W. 776, 32 Neb. 792.

[41] Davis v. Getchell, 49 N. W. 776, 32 Neb. 792. The action was in replevin by the purchaser against the sheriff, who attached the goods on behalf of creditors of the seller.

[42] Davis v. Getchell, 49 N. W. 776, 32 Neb. 792.

[43] Martin Brown Co. v. Cooper, 17 S. W. 1051, 82 Tex. 242. It was proven that the transferee paid a valuable consideration.

ness is generally transacted, which would excite suspicion that the transaction was unfair, would be a badge of fraud, from which its existence may be inferred.[44]

§ 2707(2). Indiana

The jury are instructed that a badge of fraud is a fact calculated to throw suspicion upon a transaction and calling for an explanation. Its only effect, in general, is to require proof of the circumstances connected with the transfer and of the good faith of the parties thereto. It is not conclusive of fraud, but simply an inference drawn by experience from the customary conduct of men, and hence is open to any reasonable and fair explanation.[45]

§ 2708. Presumption of fraud from secrecy

The jury are instructed that, if the sale was secret, and no means taken to apprise the public of the sale, these are facts which throw suspicion upon the transaction, but do not make the sale fraudulent in law as against the defendant.[46]

§ 2709. Absence of change of possession as raising presumption of fraud

§ 2709(1). Nebraska

You are instructed that the evidence in this case shows that, after the giving of the mortgage to plaintiff, no change in the possession of the property took place, and the law is that the mortgage is to be conclusively presumed to be fraudulent, and shall be considered as void, unless the plaintiff shows on her part that the mortgage was made in good faith, and without any intent to defraud creditors; and the burden of showing such good faith and absence of fraud is on the plaintiff.[47]

The court instructs the jury, as a matter of law, that any sale or conveyance of personal property, to be valid as against the creditors of the seller, must be accompanied and followed by a change in the possession of such property from the seller to the purchaser, so far as the situation of the parties and the character of the property will reasonably admit of a change of possession.[48]

You are instructed that the statute provides that "every sale made by a vendor of goods and chattels in his possession, or under his control, and every assignment of goods and chattels, by way of mortgage or security, or upon any condition whatever, unless the same be accompanied by an immediate delivery, and be followed by an actual and continued change of possession of the things sold, mortgaged, or assigned, shall be presumed to be fraudulent and

[44] Hoffer v. Gladden, 75 Ga. 532.

[45] Sherman v. Hogland, 73 Ind. 472.

[46] Warner v. Norton, 20 How. (U. S.) 448, 15 L. Ed. 950.

[47] Houck v. Heinzman, 55 N. W. 1062, 37 Neb. 463.

[48] Lipscomb v. Lyon, 27 N. W. 731, 19 Neb. 511.

void, as against the creditors of the vendor, or the creditors of the person making such assignment or subsequent purchases in good faith, and shall be conclusive evidence of fraud, unless it shall be made to appear on the part of the persons claiming under such sale or assignment that the same was made in good faith, and without any intent to defraud such creditors or purchasers.[49]

§ 2709(2). North Dakota

You are instructed that every sale made by a vendor of personal property in his possession or under his control and every assignment of personal property, unless the same is accompanied by * * * an actual and continued change of possession of the property sold or assigned, shall be presumed to be fraudulent and void as against the creditors of the vendor or assignor, or subsequent purchasers or incumbrancers in good faith and for value, unless those claiming under such sale or assignment make it appear that the same was made in good faith and without any intent to hinder, delay or defraud such creditors, purchasers or incumbrancers.[50]

You are instructed that the burden of proof is upon the plaintiff upon the whole case to show you that he is entitled to a recovery, and if the plaintiff shows to you that this transfer from ——— to him of the automobile was made in good faith, and for value, it is immaterial as to whether or not possession of the property changed. But it is necessary that the plaintiff should show that the transfer from ——— to him ——— was made in good faith, and for value, and without any intention of hindering, delaying, or defrauding creditors, purchasers, or incumbrancers for value; so that, upon the whole case, gentlemen of the jury, the burden of proof rests upon the plaintiff to show you that he purchased this automobile in good faith, without any intention of hindering or delaying the creditors of said ———, and particularly this defendant, ———, the intervener, and the sheriff who stands in his position.[51]

§ 2710. Same—Rebuttal of presumption

You are instructed that the laws of this state provide that a sale of such goods as are involved in this action shall be presumed fraudulent as against creditors, unless the same be accompanied by an immediate delivery and followed by an actual and continued change of possession. You will note that this rule only applies when there has not been some immediate delivery and change of possession. If there had been no such delivery or change of possession, the presumption of fraud is fully rebutted by proof that a

[49] Lipscomb v. Lyon, 27 N. W. 731, 19 Neb. 511.

[50] Macdonald v. Fitzgerald, 171 N. W. 879, 42 N. D. 133.

[51] Macdonald v. Fitzgerald, 171 N. W. 879, 42 N. D. 133. Plaintiff was the purchaser of the automobile, and sued one attaching it as the property of the seller, and who retained possession.

full and adequate consideration has been paid for the property in question. Giving credit on an existing bona fide indebtedness is such full and adequate consideration.[52]

§ 2711. Presumption as to good faith of transactions between relatives

§ 2711(1). Illinois

You are instructed that a man has a perfect right to deal with his friends and relations; to buy and sell from or to them; and the presumption of the law is that dealings between relatives are fair and honest, without any wrongful or fraudulent intent, and no presumption of fraud attaches to such dealings.[53]

§ 2711(2). Nebraska

You are instructed that transactions between relatives, whereby property is transferred from one to another, when it is shown that the person parting with the property is in embarrassed circumstances, are to be closely scrutinized, and the good faith of such transaction must be clearly established.[54]

§ 2712. Presumptions as to transactions between husband and wife

See, also, ante, § 2675(1).

§ 2712(1). Georgia

The jury are instructed that, whenever a transaction is between husband and wife, and creditors attack it, then the law throws the onus—that is, the burden of proof—on the wife, when she claims the property purchased or received from her husband, to make a fair showing of the whole transaction.[55]

§ 2712(2). Nebraska

The court instructs the jury that transactions between husband and wife, in relation to the transfer or sale of property from one to the other, by reason of which creditors are prevented from collecting their just dues, should be scrutinized very closely, and the bona fides of such transactions should be established beyond question.[56]

[52] Griswold v. Nichols, 105 N. W. 815, 126 Wis. 401. This instruction does not say that fraud is disproved by proof of a consideration, but merely that the statutory presumption is rebutted.

[53] Schroder v. Walsh, 11 N. E. 70, 120 Ill. 403.

[54] Houck v. Heinzman, 55 N. W. 1062, 37 Neb. 463.

[55] Strickland v. Jones, 62 S. E. 322, 131 Ga. 409.

[56] Lipscomb v. Lyon, 27 N. W. 731, 19 Neb. 511.

§ 2713. Matters considered in determining question of good faith or fraud

§ 2713(1). Arkansas

You are instructed that if you believe from the evidence that at time ——— purchased the property in controversy from ———, he took precaution as a reasonably prudent man would in order to determine whether or not said property was free from incumbrances, and that he was assured by ——— and ——— that they would or had released any claim they might have to said property, then I instruct you that such precaution may be considered by you as an evidence of good faith in the purchase of said property.[57]

§ 2713(2). Iowa

You are instructed that, if you find from the evidence that at the time of the sale of the stock of jewelry by H. to the plaintiff said H. was indebted in an amount equal or nearly equal to the value of said property so sold, and that said stock constituted all or nearly all of the property of said H., and that plaintiff knew these facts, and so knowing them purchased said stock upon the terms as disclosed by the evidence in this case, and that the notes executed in part payment for said stock were executed in favor of the mother of said H. with intent on the part of said H. to place the stock beyond the reach of his creditors or prevent said plaintiff from being garnished by the creditors of said H., and said intention was known to the plaintiff at the time of the execution of said notes and before the delivery thereof, such facts, if proved, should be considered by you in determining the question of fraud.[58]

§ 2713(3). Kansas

The jury are instructed that fraud is very difficult of proof. It is generally devised secretly, and you cannot expect direct evidence of it, as one of the objects is to evade proof; but close relationship of the parties, the embarrassed condition of the grantor, great anxiety and particularity as to form in the sale, taking unsecured notes on long time, the grantee's inability to make the purchase in a large amount, frequent removals and changes in business, the grantee's failure to pay taxes, and false and contradictory statements, are all circumstances which you should take into consideration in determining the soundness or unsoundness of the transaction.[59]

§ 2713(4). Massachusetts

I instruct you that the debts of C. to his sons are to be considered in determining whether C. was insolvent or deeply in-

[57] Burke v. Sharp, 115 S. W. 145, 88 Ark. 433.

[58] Spaulding v. Adams, 19 N. W. 341, 63 Iowa, 437.

[59] Kurtz v. Miller, 26 Kan. 314.

debted, when the conveyance was made by him, and whether the conveyance was fraudulent or not, but, upon the question whether fraudulent or not, they are to be considered in connection with the fact that the sons consented to the conveyance.[60]

§ 2714. Presumption from failure to produce grantor as witness

You are instructed that the failure of the plaintiffs to introduce the debtor as a witness for the plaintiffs, he being present in court, is not a suspicious circumstance against the validity of the transaction, and does not authorize any presumption against plaintiffs.[61]

§ 2715. Sufficiency of evidence of good faith or fraud

§ 2715(1). United States

Now, with reference to the kind of proof required in this class of cases, I will say this: When a person contemplates or undertakes to perpetrate a fraud, he does not usually publish his intentions to the world. For this reason the law does not require that a fraudulent intention shall be established by what is known as direct testimony. The law permits a jury to find or to infer from a variety of circumstances, such as the conduct, the actions, the financial situation, and the method of dealing adopted by a person on a particular occasion, whether his intentions on that occasion were fraudulent or otherwise; and in trying an issue of this nature a jury should always pay careful attention to all the details of the conduct and actions and business dealings of the person accused of the fraud, in order to arrive at a correct conclusion as to whether his motives were honest or dishonest. Now, while the law permits the jury to find that a man has acted fraudulently on the strength of circumstantial evidence alone, yet the rule is subject to this just qualification: That, if the circumstances relied upon by a plaintiff to establish a fraudulent intent are just as consistent with honesty of purpose as with dishonesty of purpose, then the jury are not warranted by such circumstances in inferring that the person in question was actuated by a fraudulent intent.[62]

§ 2715(2). Kansas

The court instructs the jury that, while fraud is not to be presumed without proof, yet fraud, like any other fact, may be proved by proving circumstances from which the inference of fraud is natural and irresistible; and, if such circumstances are proved, and they are of such a character as to produce in the minds of the jury a conviction of that fact of fraud, then it must be considered that fraud is proven.[63]

[60] Winchester v. Charter, 102 Mass. 272.

[61] Nelms v. Steiner, 22 So. 435, 113 Ala. 562.

[62] Strauss v. Abrahams (C. C.) 52 F. 310.

[63] McCluskey v. Cubbison, 57 P. 476, 8 Kan. App. 857.

The jury are instructed that, while it is true that the law never presumes fraud without some evidence of it, yet, in order to show fraud, direct and positive proof is not required. The jury may infer fraud from the circumstances proven by the evidence, if, in the minds of the jury, they are such as show that fraud was practiced. Fraud may be proven by circumstantial evidence, as well as by direct and positive proof. It may be inferred from strong presumptive circumstances; and, while it is true that the party alleging fraud must prove it, yet in civil actions, like this, the party alleging fraud is not bound to prove it beyond a reasonable doubt. It is sufficient if the fact of fraud is established in the minds of the jury by the greater weight of evidence.[64]

§ 2715(3). Missouri

The jury are instructed that it is not necessary to establish a fraudulent intent by direct and positive evidence, but that an intent to defraud may be established by inference in the same way as any other fact, by taking into consideration the acts of the parties, and all the facts and circumstances of the case.[65]

The jury are instructed that fraud is not to be presumed, but must be proven by the party alleging it, and therefore, in this case, by the defendants. And while it need not be established by direct and positive evidence, but may be proven by the facts and circumstances indicative of it, still, mere matters of suspicion, which are not sufficient to satisfy the mind and conscience of its existence, do not establish it, and it should never be imputed when the facts and circumstances upon which it is predicated are as consistent with a lawful purpose and intent as with an unlawful one.[66]

§ 2715(4). Nebraska

If, under these instructions, you find that the plaintiff has, by a preponderance of the testimony, shown her good faith, as defined herein, in the taking of the mortgage, your verdict will be for the plaintiff. If plaintiff has failed satisfactorily to show such good faith on her part, your verdict will be for the defendant.[67]

§ 2716. Sufficiency of evidence of good faith of transactions between relatives

The jury are instructed that, while it is not unlawful for brothers to deal with each other, yet where the parties to a transfer are near relatives, clearer and more convincing proof is required of the good faith of the transaction than where they are strangers.[68]

[64] Morse v. Ryland, 48 P. 957, 58 Kan. 250.

[65] State v. Mason, 10 S. W. 179, 96 Mo. 559.

[66] State v. Mason, 10 S. W. 179, 96 Mo. 559.

[67] Houck v. Heinzman, 55 N. W. 1062, 37 Neb. 463.

[68] Martin v. Duncan, 41 N. E. 43, 156 Ill. 274.

§ 2717. Effect of testimony of parties as to intent

You are instructed that, while parties are allowed to testify as to the intent with which they did any act, such testimony is not conclusive, and does not necessarily outweigh the evidence of facts and circumstances tending to contradict such negative testimony.[69]

§ 2718. Questions for jury

The jury are instructed that, whether the sale was or was not fraudulent, is a question of fact, to be determined by the jury under all the circumstances of the case.[70]

§ 2719. Right of attachment or judgment creditor of grantor to levy execution on property fraudulently transferred

§ 2719(1). Illinois

The jury are instructed that, if property is conveyed for the purpose of hindering, delaying, or defrauding the creditors of the seller, and such property is attached by such creditors, such property is considered as still the property of the seller in favor of his creditors' rights.[71]

§ 2719(2). Texas

You are instructed that, if you believe from the evidence that the cattle in controversy were put in the name of J. V. H., and were held and kept in the name of J. V. H., a minor son of W. T. H., not in good faith, but for the purpose of concealing said cattle from the creditors of W. T. H., and if you believe that, notwithstanding the cattle were kept in the name of J. V. H., that still W. T. H. was the real and beneficial owner of said cattle, having the real control and beneficial ownership thereof, then such cattle were subject to the levy of the execution on the part of the defendant ———; and if you so find and believe from the evidence in this case you will return your verdict for the defendant ———.[72]

[69] Bleiler v. Moore, 75 N. W. 953, 99 Wis. 486.

[70] Warner v. Norton, 20 How. (U. S.) 448, 15 L. Ed. 950.

[71] Waggoner v. Cooley, 17 Ill. 239.

[72] Randolph v. Hudson (Civ. App.) 50 S. W. 128.

CHAPTER CLIII

GAMING

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A. Criminal Liability

§ 2720. Liability for keeping gambling place

The court instructs the jury that, in order to convict the defendant of the offense charged in the indictment, the state must show that gaming was carried on at the place charged in the indictment to such an extent to constitute a nuisance, and that the defendant was the proprietor of the game or interested therein, or in the profits thereof, and that a nuisance cannot be established by merely showing that there was gaming conducted at a particular place at one time or on one occasion; but it must be shown that gaming

was carried on to such an extent as to constitute a nuisance, or tend to corrupt the youths or other persons who frequent the place.[1]

§ 2721. Same—Liability of one loaning money to another to maintain gambling house

You are instructed that if the accused loaned money to another person for the purpose of maintaining a gaming house, and after the loan was made the accused visited the gaming house, and did anything towards keeping and maintaining such house and room so kept and maintained for the purpose of gaming, he [the accused] would be equally guilty with [the person to whom the money was loaned], inasmuch as keeping and maintaining a gaming house in ——— is a misdemeanor, and all persons concerned in such keeping and maintaining are principals.[2]

§ 2722. Liability for permitting gaming in house over which defendant has control

You are instructed that it is provided by law that if any person shall knowingly permit property or premises under his control to be used as a place to bet or wager or to gamble with cards, or to keep or exhibit for the purpose of gaming any table or bank or as a place where people resort to gamble, bet, or wager, he shall be guilty of a felony, and shall be punished by confinement in the penitentiary not less than ——— nor more than ——— years. Now, if you believe from the evidence beyond a reasonable doubt that the defendant, on or about ———, in the county of ——— and state of ———, had under his control the building known as the ———, and that one ——— then and there used a room in said building as a place to bet and wager or to gamble with cards or to keep or exhibit for the purpose of gaming any table or bank, or as a place where people resorted to gamble, bet, or wager, and if you further believe from the evidence beyond a reasonable doubt that the defendant knew that said ——— was so using said room, and permitted said ——— to so use it, then you will find the defendant guilty as charged in the indictment, and assess his punishment at confinement in the penitentiary not less than ——— nor more than ——— years. You are instructed that where a person rents the whole of a building from the owner, and uses a part of it for his own purposes, and sublets other parts of it to other persons, he is nevertheless in control of the whole building within the meaning of the gaming laws. If the defendant sublet or rented a room in the ——— building to ——— to be used by said ——— as a barber shop, and defendant did not know that ——— was using said room for gaming purposes (if he was so using it), then defendant is not guilty;

[1] State v. Duffy, 83 S. E. 990, 75 W. Va. 299.

[2] Groves v. State, 51 S. E. 627, 123 Ga. 570.

and, in case you have a reasonable doubt as to this issue, you must give defendant the benefit of such doubt and acquit him. The defendant in a criminal case is presumed to be innocent until his guilt is established by legal evidence beyond a reasonable doubt; and, in case you have a reasonable doubt as to the defendant's guilt, you will acquit him, and say by your verdict "Not guilty." [3]

The jury are instructed that the word "permit," as used in our statutes, means either that one has given his consent, or that gaming took place in a house, and the person in control of the house knew that gaming was taking place. Now, if you believe from the testimony beyond a reasonable doubt that defendant was in control of an outhouse situated in ——— county, state of ———, on or about the date alleged in the information, and that people resorted to said outhouse for the purpose of gaming, and that defendant knew of such facts, he would be guilty.[4]

§ 2723. Same—Outhouse

The jury are instructed that a house situated some 20 or 50 feet from a saloon, and which is not kept as a business house, if it be resorted to for gaming, or for other purposes, is an outhouse, within the meaning of our statute; and the fact that it may have been occupied a part of the time as a bedroom does not prevent it from being an outhouse if the jury find it was a common resort for the purpose of gaming.[5]

§ 2724. Suffering games of cards to be played at which property risked

You are instructed that if you believe from the evidence beyond a reasonable doubt that the defendant did in this county and state and within ——— years previous to the finding of the indictment herein suffer games of cards to be played in a house in his occupation or under his control at or in which money or property was won or lost, then you will find the defendant guilty, and fix his penalty at a fine of not less than $——— nor more than $———, in your discretion governed by the proof.[6]

You are instructed that the expression "suffering games of cards to be played at which money or property was won or lost," as used in instruction No. —, means allowing or permitting games of cards to be played with the knowledge that money or property was or is to be won or lost thereon.[7]

[3] De Los Santos v. State, 146 S. W. 919, 65 Tex. Cr. R. 518.

[4] Stuart v. State (Tex. Cr. App.) 60 S. W. 554.

[5] Stuart v. State (Tex. Cr. App.) 60 S. W. 554.

[6] Ruh v. Commonwealth, 133 S. W. 219, 141 Ky. 585.

[7] Ruh v. Commonwealth, 133 S. W. 219, 141 Ky. 585.

§ 2725. Keeping and exhibiting gaming table

The jury are instructed that if you believe from the evidence, beyond a reasonable doubt, that defendant established a raffle for gaming purposes, and exhibited it to obtain betters thereat, and you further believe from the evidence, beyond a reasonable doubt, that he kept or exhibited the same as these terms have been heretofore defined, and that the same was a table or bank, and kept and exhibited by him for the purpose of gaming, you will find defendant guilty, and assess his punishment as hereinbefore directed.[8]

§ 2726. Keeping or exhibiting poker table

§ 2726(1). Delaware

You are instructed that in this indictment there are four counts. In substance the state charges: First, that the accused, in ——— on ——— last, did unlawfully exhibit a certain table at which a game of chance called poker was played with cards for money; second, that he on the same day was unlawfully concerned in interest in exhibiting a certain table at which a game of chance called poker was played with cards for money; third, that on divers days between ——— and ——— he did unlawfully keep a certain table at which the game was played as stated; fourth, that on divers days between ——— and ——— he unlawfully did exhibit a certain table at which poker, a game of chance, was played, etc. The statute under which the indictment is found is ———, and provides: "* * * "[9]

You are instructed that the statute does not prohibit gambling, but it does prohibit the keeping or exhibiting a table for gambling purposes. The words "keep" or "exhibit" as used in the statute have no technical meaning. They mean to maintain, to control, to carry on, to display. The display or maintenance of such a table by one having authority over it, and the invitation or permission of the one having control of it to use the table for gambling purposes, constitute a keeping and exhibiting within the meaning of the law. Games of chance with cards are not apt to be played for money in public places, or places where the public generally have access, and the display or maintenance of a table under circumstances where knowing persons, by invitation or permission of the one in control of it, use the table for gambling purposes, would be a keeping or exhibiting within the terms of the statute and a violation of the law.[10]

You are instructed that, to support an indictment of this kind, it is not necessary that the person charged with keeping or exhibit-

[8] Dalton v. State (Tex. Cr. App.) 74 S. W. 25.

[9] State v. Titleman, 7 Boyce, 443, 108 A. 92.

[10] State v. Titleman, 7 Boyce, 443, 108 A. 92.

ing the table for gambling purposes should be an actual player in the game, for it is sufficient if he should keep or exhibit, or be concerned in interest in keeping or exhibiting, the table to be so used. And if a person charged with being concerned in interest in exhibiting a gaming table, when games of chance are played for money, should either directly or indirectly be paid for permitting the use of the table for such purposes he would be a violator of the law.[11]

You are instructed that whether a person charged with keeping, exhibiting, or with being concerned in interest in keeping or exhibiting, a gaming table, is guilty or innocent of the offense charged depends upon all the facts and circumstances surrounding the display of the table and its use for gambling purposes, as the same may appear from the evidence. The question is whether the accused did keep or exhibit a gaming table, or was concerned in interest in keeping or exhibiting such a table as charged in the indictment. If the accused did violate the statute, as charged, by keeping a gaming table, the fact that he kept it at his place of residence at which social games may have been played is of no consequence.[12]

You are instructed that, if the accused did not keep or exhibit such table as he is charged with having, and he only permitted a social game to be played at his residence, then your verdict should be not guilty. It is your duty to determine the guilt or innocence of the accused from the evidence you have heard in the case, taken in connection with the law as the court states it to you, and you should not be influenced by any views you may entertain with regard to the propriety or impropriety of the statute under which the indictment is found. The defendant does not deny that he played a game or games of chance with cards for money on the table in question, but he does deny that he kept or exhibited the table, or was concerned in interest in exhibiting the table, in violation of the provisions of the statute as charged in the indictment.[13]

§ 2726(2). Missouri

The court instructs the jury that before you can convict the defendant in this case of the charge mentioned in the indictment, you must not only find that the defendant set up or kept the table mentioned in the evidence, and that the same was a gambling device, but that he induced, enticed or permitted other persons to play upon it whilst he was himself in charge of setting up or keeping said table; and unless you find that the defendant set up or kept

[11] State v. Titleman, 7 Boyce, 443, 108 A. 92.

[12] State v. Titleman, 7 Boyce, 443, 108 A. 92.

[13] State v. Titleman, 7 Boyce, 443, 108 A. 92.

said table, or had charge of the same, and also induced, enticed or permitted other persons to play upon the same, you will acquit the defendant of the charge.[14]

You are further instructed that it is not necessary for the state to prove that the defendant owned the "poker table" mentioned in the indictment and the evidence. If you find and believe from the evidence that the defendant had charge and control of said table, that is sufficient, provided, you find the facts to be as required and specified in the foregoing instructions designated "first" and "second." [15]

§ 2727. Keeping faro bank

The jury are instructed that it must appear from the testimony: (1) That at the place mentioned by the witness a gambling device or instrument was in existence. (2) That that gambling device was what is generally known as a faro bank. (3) That the defendant was the keeper of that faro bank. To establish the fact of one being the keeper of a faro bank, it is sufficient to show that he appeared thus acting as the one having control, in charge, superintending the same. It is not necessary to show that he was actually the owner. (4) That the defendant, being the keeper, kept such gambling device for the purpose of gain. (5) That defendant, being the keeper and keeping the said device for purposes of gain, induced or permitted other persons to bet and play upon such gambling device either on his side or against him.[16]

§ 2728. Playing at cards in gaming house

The jury are instructed that all houses commonly known as public and all gaming houses are included in the meaning of a public house or place. Now, if you believe from the evidence beyond a reasonable doubt that the defendant did, in the county of ——— and state of ———, play at a game with cards in a public house, to wit, at a certain gaming house there situate, on or about the time alleged in the indictment, then you will find him guilty, and assess his punishment at a fine of not less than ——— nor more than ——— dollars. The term "public house" is generic, and includes all houses made public by the occupation carried on in them. A "gaming house" is defined as a house where gaming is practiced; a gambling house; a house or room whose use is intended to facilitate gaming purposes, and where sporting characters are invited to congregate for illegal amusement and gaming, or to take money or other thing of value upon trials of chance or skill or endurance.[17]

[14] State v. Chauvin, 132 S. W. 243, 231 Mo. 31, Ann. Cas. 1912A, 992.

[15] State v. Chauvin, 132 S. W. 243, 231 Mo. 31, Ann. Cas. 1912A, 992.

[16] Rice v. State, 3 Kan. 141.

[17] Morgan v. State, 60 S. W. 764, 42 Tex. Cr. R. 422.

§ 2729. Betting on game of pool

The jury are instructed that, if you believe from the evidence that the defendant played at a game commonly called pool by means of a billiard table, and that at such game of pool so played money or property was bet, won or lost, such game so played would be in law a game of chance, and if such game was so played upon a billiard table, as charged in the indictment, such billiard table did thereby become in law a gambling device.[18]

§ 2730. Betting on horse race—Necessity of putting up cash

The court instructs the jury that the evidence that the witness may have telephoned the defendant to bet money on a horse race, and that he supposed that defendant telephoned the bet away would not be sufficient to authorize you to convict the defendant; but before you can convict him the evidence must show that a wager was placed with him and that he accepted it. As I have stated in the instructions, you must find that he bet money or something of value. But on that point, to amplify it a little bit more, and apply it to the evidence, if you believe from the evidence, beyond a reasonable doubt, that the witness telephoned or told him that he wanted to bet or to place such money on a certain horse in a race, and that a horse race was had in which that horse ran, and the parties treated that as a binding obligation after the result of that race, either as having won or lost, one or the other, and treated it between themselves as a binding obligation, then the court would instruct you that that would be something of value, and it would be a wager, the same as if the cash money had been placed.[19]

B. Civil Rights and Liabilities Arising from Gambling Transactions

§ 2731. Speculative buying or selling on margin—Dealing in futures

§ 2731(1). United States

The jury are instructed that another defense in this case on the part of the defendant is that this was a wagering contract pure and simple—that is, a gambling transaction—without any intention whatever, on the part of the defendant, to deliver cotton when sold or to receive cotton when bought, and that the plaintiff understood this to be his intention. If the jury find that defendant did not contemplate the delivery of any cotton on the future contracts bought and sold for him by the plaintiffs, and only intended to

[18] State v. Jackson, 39 Mo. 420.

[19] Wolf v. State, 206 S. W. 39, 135 Ark. 574.

wager or gamble on the fluctuations in the price of cotton futures, expecting to settle by the receipt or payment of differences, and that the plaintiffs were advised thereof and well understood that in buying and selling for defendant's account no delivery was to be made or expected by him even if third parties should become interested in the future contracts entered into by them on defendant's account, then this arrangement would be one in which recovery could not be had for money advanced in this connection and to carry out these purchases and sales.[20]

§ 2731(2). Virginia

The jury are instructed that every contract is presumed to be made with honest intent by the parties making the same, and the burden of proving that the contract in question in this case was not made with such intent rests upon the defendants. The court further instructs the jury that before they can find that the contract between the plaintiff and defendants was illegal, for the reason that it was a gambling contract, the defendants are required to prove by a preponderance of evidence to the satisfaction of the jury, not only that plaintiff did not intend or contemplate the actual purchase of the stocks or the commodities ordered by him from the defendants, but must also prove by a preponderance of evidence to the satisfaction of the jury that the defendants likewise did not intend or contemplate the actual purchase of such stocks or commodities for the plaintiff.[21]

You are instructed that, if the parties intended that the goods were actually to be delivered by the seller to the buyer, said transactions are valid, even though at the time of the sale the seller had not the goods and no other means of getting them except to go into the open market and buy them; that is, such contract is valid where the parties really intended and agreed that the goods were to be delivered by the seller and to be paid for by the buyer.[22]

§ 2732. Recovery back of moneys paid on a wager

The jury are instructed that a wager upon the result of either a state or national election is an illegal contract and utterly void, and that an action upon such a contract cannot be maintained by the winning party against the losing party, but that, if the money has been paid over to the winning party by the consent of the losing party, the latter cannot maintain an action against the former to recover the wager back.[23]

[20] Haven & Clements v. James (D. C. Ga.) 206 F. 683.

[21] McIntyre v. Smyth, 62 S. E. 930, 108 Va. 736.

[22] McIntyre v. Smyth, 62 S. E. 930, 108 Va. 736.

[23] Fisher v. Hildreth, 117 Mass. 558.

§ 2733. Recovery back of moneys lost at poker

§ 2733(1). Arkansas

Gentlemen of the jury, the plaintiff sues to recover money lost in a game of poker. If you believe from a preponderance of the evidence that plaintiff played in a game of poker with these men, the defendants, and that they won his money, he can recover, and you will render a verdict for the amount of money won from him.[24]

§ 2733(2). Kentucky

The court instructs the jury that if they believe from the evidence that the plaintiff lost at or upon a game of chance, known as poker, played by him and others in the house or building in which defendant, under a license, had a saloon and was the proprietor or owner thereof, the sum of $———, or any greater sum of value than $——— within ——— hours of the first loss, if any, and further believe that the defendant received the money that plaintiff lost upon the game, or any part of it, to his credit in bank and subject to his check or order, or that it was placed to his credit in bank, or cashed by him or his agent, they will find for plaintiff as against defendant the amount that they believe plaintiff lost at said game or games, not to exceed the amount sued for, to wit, $———.[25]

You are instructed that if, from all the evidence, the jury believe that the defendants, or either of them, invited, persuaded, or otherwise induced plaintiff to visit the place at the southeast corner of ——— avenue, and ——— street, in the proof described, and that at the said place a game of chance was being carried on, to wit, a poker game, by defendants, as partners, or either of them, and that while playing said game the plaintiff lost at any time and within ——— hours $——— or more, they shall find a verdict for the plaintiff for the amount of his losses, not exceeding the sum of $———, the amount claimed in the petition; otherwise they will find for the defendants, or either or all of them.[26]

The court instructs the jury that by inviting, persuading, or inducing is not meant that personal application be made to the person invited, but that any conduct that induces such a person to visit such place is sufficient.[27]

The court instructs the jury further, that by inviting, persuading or inducing is not meant that personal application be made to such person visiting such place, but the mere setting up and fur-

[24] Bynum v. Brady, 100 S. W. 66, 82 Ark. 603.

[25] Cartwright v. McElwain, 116 S. W. 297, 132 Ky. 83.

[26] Roberts v. Respass, 114 S. W. 341, 131 Ky. 10.

[27] Roberts v. Respass, 114 S. W. 341, 131 Ky. 10.

nishing a place to carry on a game of chance is sufficient invitation.[28]

§ 2734. Recovery back of moneys loaned to one using them for gambling purposes

The jury are instructed that, if they believe from a preponderance of the evidence that the plaintiff, loaned to the defendant money as claimed by the plaintiff, and that the sum of $——— of said moneys has not been repaid and if you further believe from a preponderance of the evidence that, in loaning said money the plaintiff did not know that the said defendant was going to gamble with said money, then you should find for plaintiff.[29]

§ 2735. Betting on horse races

The court instructs the jury as a matter of law that, if they believe from the evidence that the plaintiff and the defendant in this suit put together the sum of $——— each for the purpose of betting and wagering the same on horse races, then the jury will find the issues for the defendant.[30]

§ 2736. Accounting between members of firm formed to make books on horse races

The court instructs the jury as a matter of law that, if they believe from the evidence that the plaintiff and the defendant were copartners in the business of making books on horse races, and that the money given the defendant by the plaintiff was in furtherance of said partnership business of book-making on horse races, then the jury will find for the defendant.[31]

§ 2737. Who liable

§ 2737(1). Arkansas

You are instructed that if the money was won by somebody else besides these men, or if there is any one or more of the defendants who did not win any of it, then you cannot find a verdict against all of the defendants, only against the men that won the money; that is, if you find that the money was won from the plaintiff by one or more of the defendants, then you can find for the plaintiff against such number of defendants, naming them, as won the money, and you will find for these defendants who did not win the money, unless you find there was some concerted plan among them to deprive this man of his money in a poker game, then you will find against all who participated in it.[32]

[28] Roberts v. Respass, 114 S. W. 341, 131 Ky. 10.

[29] Ripley v. Vorslowski, 109 Ill. App. 659.

[30] Shaffner v. Pinchback, 24 N. E. 867, 133 Ill. 410, 23 Am. St. Rep. 624.

[31] Shaffner v. Pinchback, 24 N. E. 867, 133 Ill. 410, 23 Am. St. Rep. 624.

[32] Bynum v. Brady, 100 S. W. 66. 82 Ark. 603.

§ 2737(2). Kentucky

The court instructs the jury that, although the jury may believe from the evidence that the defendant was the owner of the saloon business conducted on ——— street in ———, and may further believe that ———, or other person, above said saloon, conducted a gambling room wherein the plaintiff lost the money sued for, or some part thereof, yet if they further believe from the evidence that the defendant did not authorize said ——— to run or conduct said gambling room, and did not participate in any of the profits thereof, if any, or received any of the money, lost by plaintiff, then the jury shall find for the defendant.[33]

§ 2738. Liability of stakeholder to loser of bet

The jury are instructed that, if the money was, as in the present case, deposited with a stakeholder, either party may forbid his paying over his money to the other party, and after proper proofs may maintain an action against the stakeholder to recover the money so deposited with him, and that the action may be maintained against the stakeholder, even after he has paid the money to the winner, if he has paid it over after his authority to do so had been revoked, or after he had been directed by the loser not to pay it over.[34]

The jury are instructed that, as there is no dispute in this case as to the amount of money deposited, or as to the person with whom, or the terms upon which, the deposit was made, the only question of fact for the jury to pass upon is as to whether the defendant paid over to ——— the $———, with or without the consent and permission of the plaintiff; that the fact, if it was a fact, that the parties had agreed to submit to the determination of sporting men the question of ———'s right to the money, would not legalize the wager, or make it any the less illegal or void, but that the jury should consider this evidence, in connection with the other evidence in the case, as bearing upon the question whether the money was or was not paid over by the defendant to the said ——— with the consent and permission of the plaintiff; that if, upon all the evidence, the jury should find the money was paid with the consent or permission of the plaintiff, it would be their duty to return a verdict for the defendant, but if they should, upon the evidence, find that the money was paid over without the consent or permission of the plaintiff, and after the plaintiff had directed him not to pay it over, they should return a verdict for the plaintiff.[35]

[33] Cartwright v. McElwain, 116 S. W. 297, 132 Ky. 83.

[34] Fisher v. Hildreth, 117 Mass. 558.

[35] Fisher v. Hildreth, 117 Mass. 558.

§ 2739. Rights of transferee of check given for gambling consideration—Payment of value

The jury are instructed that the plaintiff was not bound to make inquiry at the bank, or ascertain whether or not his check had been presented or paid at the time he presented the ——— check for payment. Neither was it necessary for plaintiff to stop payment on his check, if at the time he presented the check to the bank for payment he was a bona fide holder thereof. The fact that his own check had not yet been cashed would make no difference.[36]

[36] Matlock v. Scheuerman, 93 P. 823, 51 Or. 49, 17 L. R. A. (N. S.) 747. Plaintiff had given his own check in payment for the check presented to the bank, which latter check was based on a gambling consideration.

CHAPTER CLIV

GARAGE KEEPERS

§ 2740. Liability for negligence.
2741. Degree of care required with respect to car left for repairs.

§ 2740. Liability for negligence

The court instructs the jury that, if you find that the contract was as claimed by defendant, viz. that the car was to be kept in the country garage, and at the owner's risk, the plaintiff is still entitled to recover if defendant was guilty of negligence.[1]

The court instructs the jury that by negligence is meant the failure of the defendant to exercise that care in protecting plaintiff's property that an ordinarily careful and prudent man would have exercised under the circumstances.[2]

The jury are instructed that, in deciding whether defendant exercised ordinary prudence, you must take into account the snowfall, the construction of the roof, and the fact that the attention of ———, who was acting for defendant, was called to the amount of snow on the roof.[3]

The court instructs the jury that, in case you find there was a latent defect in the construction, a defect which a man of ordinary observation would not have discovered in an examination of the building, still the plaintiff is entitled to recover if you find that the defendant was negligent in permitting the snow to remain on the roof, and that such negligence proximately caused the damage.[4]

§ 2741. Degree of care required with respect to car left for repairs

You are instructed that the plaintiff claims that there was lack of ordinary care by defendant company with respect to his automobile left with defendant to be repaired, and therefore legal responsibility; but the defendant, on the other hand, claims that they used diligence and care and prudence, and that there was therefore the absence of negligence. That raises an issue of fact, and your duty will be to study the evidence carefully and see whether or not the defendant, in what it did in accepting the automobile for hire and placing the responsibility in the hands of this employé of its, did use ordinary diligence. The claim of the plaintiff is that they did not use ordinary diligence, that a man with unknown re-

[1] Pilson v. Tip-Top Auto Co., 136 P. 642, 67 Or. 528.
[2] Pilson v. Tip-Top Auto Co., 136 P. 642, 67 Or. 528.
[3] Pilson v. Tip-Top Auto Co., 136 P. 642, 67 Or. 528.
[4] Pilson v. Tip-Top Auto Co., 136 P. 642, 67 Or. 528.

sponsibility had been given means to do damage to the plaintiff's and other persons' property, had been given a key, and by the use of this key he was given an opportunity to do damage to the plaintiff, and that damage actually came to him. The plaintiff therefore says that the defendant was responsible for the damage subsequently following. So much for the plaintiff's claim. The defendant, on the other hand, says, in regard to that, that it, through the principal member of the company, had made inquiry concerning the character of this employé; that they had found him to be a careful, prudent, and good man, and that was all that was expected of him; and that the giving of the key was a necessity for the character of the business which required the shop to be open early in the morning, earlier than some member of the firm could be there; and that there was no act of negligence on their part in doing that. These are the claims of the parties in regard to the question of liability. There cannot be any liability in this case unless the plaintiff has established by a fair preponderance of the evidence that there had been neglect of the duty that the defendant owed to him when the defendant became a bailee for hire.[5]

[5] Smith v. Bailey, 161 N. W. 822, 195 Mich. 105.

CHAPTER CLV

GARNISHMENT

§ 2742. Extent of liability of garnishee.
2743. Lien of garnishment—Effect of subsequent payment of debt by garnishee to defendant.
2744. Claims by third persons.
2745. Right of set-off.
2746. Wrongful attempt to cause one to be summoned as garnishee—Exemptions.

See, also, Attachment.

§ 2742. Extent of liability of garnishee

You are further instructed that, if your verdict in this case should be for the plaintiff, then and in that event you are further authorized to find for the plaintiff and against the garnishee such amount as shown by a preponderance of the evidence that said garnishee was indebted to the defendant on ———, not to exceed such amount as you may find due from the defendant.[1]

You are instructed that, if you find from the evidence that the garnishee did not purchase any timber from the defendant, but purchased the timber from ———, then you cannot find against the said garnishee for more than $——— owing by the garnishee to the defendant for work.[2]

§ 2743. Lien of garnishment—Effect of subsequent payment of debt by garnishee to defendant

The jury are instructed that, if the garnishee was indebted to the defendants at the time of the service upon its agent of the writs of garnishment, no subsequent payment of the money in its hands belonging to defendants would relieve if of liability, even if made to the defendants under different names, if the section foreman or other officers or agents of the garnishee in charge knew that the persons named in the writs were the defendants.[3]

§ 2744. Claims by third persons

I charge you that, although you might believe from the evidence in this case that G. secured from the intervening bank advances to make his crop of cotton, corn, and peaches for the year ———, and gave a mortgage to such bank after the crops were planted to secure his indebtedness past, present, and future, I charge you that in law would constitute a lien only upon the crops for the current

[1] Weatherly v. Stane, 184 S. W. 41, 122 Ark. 612.
[2] Weatherly v. Stane, 184 S. W. 41, 122 Ark. 612.
[3] St. Louis Southwestern Ry. Co. v. Matiatas, 133 S. W. 600, 97 Ark. 206.

year, ———, and would not constitute title, and that, although the mortgages which were executed by G. to the bank have been admitted in evidence for your consideration, yet, while this is true, I charge you that you cannot consider those mortgages as a basis of title to the peaches or proceeds of the peaches in favor of the bank. You will bear in mind that the question that you are to try is as to whether or not the bank had a title to the peaches from which the proceeds were derived, or the title to the proceeds, for that is the only basis of their claim which they can rely upon in this case; they must stand upon title, and not upon a mortgage lien.[4]

§ 2745. Right of set-off

The court instructs the jury that the garnishee has a right to have any sum or sums of money paid by him, or any property delivered by him to defendants, or either of them, on the purchase price of said premises prior to the time the notice of garnishment was served upon him, offset against the purchase price of said land, and he has a right to have offset against said purchase price any indebtedness, whether notes or accounts owing by defendants, or either of them, to him, at the time said notice of garnishment was served upon him; but he cannot offset against such purchase price any debt owing to him by defendants that had been previously paid, nor can he offset against such purchase price any sum or sums of money paid or any property furnished by him to defendants, or either of them, since the said notice of garnishment was served upon him.[5]

§ 2746. Wrongful attempt to cause one to be summoned as garnishee—Exemptions

You are instructed that, if the jury shall believe and find from the evidence that at the time of the delivery to the railroad companies of the notices of garnishment in evidence the plaintiff resided in this state, and was the head of a family, as explained in instruction No. ———, then plaintiff's employers were not chargeable as garnishees, on account of wages due plaintiff for the last ——— days' service next before the service of such garnishments, and the defendant had no right to cause plaintiff's employer to be summoned as garnishee on account of such wages due plaintiff, or to attempt to subject them to the payment of defendant's judgment.[6]

[4] Commercial City Bank v. Sullivan, 90 S. E. 173, 18 Ga. App. 608.

[5] State Bank of Stratford v. Young, 140 N. W. 376, 159 Iowa, 375.

[6] Cooper v. Scyoc, 79 S. W. 751, 104 Mo. App. 414.

CHAPTER CLVI

GAS

A. Liability for Injuries Resulting from Gas

§ 2747. Care required to avoid injuries in handling and transporting.
2748. Duty of one selling gas to prevent injuries therefrom to customers.
2749. Liability of gas company for injuries caused by explosion.
2749(1). Massachusetts.
2749(2). West Virginia.
2750. Duty to provide appliances for controlling pressure.
2750(1). Indiana.
2750(2). West Virginia.
2751. Negligence of gas company as proximate cause of injury to consumer.
2752. Contributory negligence of consumer.
2752(1). Massachusetts.
2752(2). West Virginia.
2753. Presumptions and burden of proof.
2753(1). Massachusetts.
2753(2). West Virginia.

B. Contracts to Furnish or Take Gas

§ 2754. Liability for breach of contract to take gas.

See, also, Electricity.

A. Liability for Injuries Resulting from Gas

§ 2747. Care required to avoid injuries in handling and transporting

You are instructed that a person handling an inherently dangerous instrumentality, such as natural gas is required to use a high and great degree of care and diligence in order that no injury may be occasioned therefrom. By great care or high degree of care is meant that care or diligence usually exercised by persons about their own affairs of great importance under like or similar circumstances.[1]

You are instructed that one handling a dangerous commodity, such as natural gas, is not an insurer against unforeseen and unavoidable accidents, but in using the public streets and alleys of a town for its pipes and appliances in conducting its business, is required to exercise a high degree of care and caution, and to use due care and caution to maintain the best possible condition, the best appliances practicable in order to render its business safe to the general public, and to use such degree of care and caution and circumspection as is in keeping with the dangerous character of the commodity handled.[2]

[1] Bellevue Gas & Oil Co. v. Carr, 161 P. 203, 61 Okl. 290.

[2] Bellevue Gas & Oil Co. v. Carr, 161 P. 203, 61 Okl. 290.

§ 2748. Duty of one selling gas to prevent injuries therefrom to customers

I instruct you that a corporation or person furnishing natural gas to the stoves, heaters, burners, pipes, pipe lines, machinery, or apparatus of another, to be used for the purpose of domestic heating, for fuel in a dwelling house, storeroom, office, or shop, is bound to exercise such care, skill, and diligence in all its operations as is called for by the delicacy, difficulty, and dangerousness of the nature of its business, in order that injury may not be done to others; that is to say, if the danger, delicacy, or difficulty is extraordinarily great, extraordinary skill and diligence is required.[3]

I instruct you that natural gas is a dangerous, explosive, inflammable, and deadly substance, and the person or corporation who furnishes it, for a valuable consideration, to heat the stoves, service pipes, heaters, burners, or apparatus of another for the purpose of fuel for domestic heating, must use such care, skill, attention, and diligence, so that no greater amount of pressure thereon shall be furnished than is proper to be furnished, in order to prevent injury to the person and property of others; and in such case care, skill, attention, and diligence must be used in proportion to the danger of such substance and business, and, unless such corporation uses such care, skill, attention, and diligence, it is guilty of actionable negligence.[4]

I instruct you that if you believe from the evidence that, at the time of the alleged injury and burning of plaintiffs' property mentioned in the complaint, the defendant, for a valuable consideration, was furnishing natural gas to the service pipe, mixer, burner, and stove of the plaintiffs, to be by them used for the purpose of fuel in their said stove, and the defendant negligently and carelessly suffered and permitted a greater amount of pressure of such gas to be furnished than was proper for such purpose, and that by reason thereof, and without fault or negligence on the part of the plaintiffs or their agents contributing thereto, the plaintiffs' said building and property was destroyed by fire, then the jury should find for the plaintiffs, and assess their damages occasioned by said burning in such sum as is proper under the evidence and the law as given you by the court, if you find that the plaintiffs have been damaged by the burning of the property mentioned in the complaint.[5]

[3] Citizens' Gas & Oil Min. Co. v. Whipple, 69 N. E. 557, 32 Ind. App. 203.

[4] Citizens' Gas & Oil Min. Co. v. Whipple, 69 N. E. 557, 32 Ind. App. 203.

[5] Citizens' Gas & Oil Min. Co. v. Whipple, 69 N. E. 557, 32 Ind. App. 203.

§ 2749. Liability of gas company for injuries caused by explosion

§ 2749(1). Massachusetts

You are instructed that there are conditions upon which persons suffering injury to their property may recover damages of the gas company. Those conditions are that the plaintiff, who seeks to recover the damages shall show affirmatively, the burden of proof being upon him, that the injury was occasioned by the negligence of the servants of the defendant company, and that in no material degree did the negligence of the tenant of the plaintiff contribute to that injury, and if those two facts are established upon the whole evidence, by a fair preponderance of the evidence, the plaintiff has a right to recover; if not, he has not.[6]

Starting with that principle, then, we come to these questions, and the law, then, is, in regard to this part of the case, thus: If the defendant's servants, the officers of the company, did not know, and by the use of due care could not ascertain, that the gas was escaping into the plaintiff's house, or had reasonable cause to believe that it was not, and no notice was given by the inmates of the house to them that gas was in the house, the defendant is not liable. But if the defendant's servants did know, or if, with their knowledge of the condition of the street, they had reasonable cause to suspect, that the gas had entered into or under the plaintiff's house in dangerous quantities, or was then entering into the plaintiff's house in such quantities, and gave no notice to the inmates, and made no request to be admitted into the house for the purpose of examining, the company is liable in damages, if the plaintiff's tenant was in the exercise of due care.[7]

§ 2749(2). West Virginia

The jury is instructed that it was the duty of the defendant, as it is of all incorporated companies which are invested for their own profit and advantage with the great and important privilege of supplying a community with natural gas for private habitation, to be used as fuel and domestic heating, to exercise such care, diligence, and skill in the conduct of its business as is proportioned to the danger or risk to the property of others.[8]

The jury is instructed that a corporation or person furnishing natural gas to the stoves, heaters, burners, pipes, lines of pipe, machinery, or apparatus of another, to be used for the purpose of domestic heat and fuel in a dwelling house, is bound to exercise such care, skill, and diligence in all its operations as is called for by the delicacy, difficulty, and dangerousness of the nature of its business,

[6] Bartlett v. Boston Gaslight Co., 122 Mass. 209.

[7] Bartlett v. Boston Gaslight Co., 122 Mass. 209.

[8] Barrickman v. Marion Oil Co., 32 S. E. 327, 45 W. Va. 634, 44 L. R. A. 92.

in order that injury may not be occasioned to others; that is to say, if the danger, delicacy, and difficulty is extraordinarily great, extraordinary skill and diligence is required.[9]

The jury is instructed that if they believe from the evidence that natural gas is a very dangerous, volatile, and explosive substance, then the person or corporation who furnishes it for valuable consideration to the stoves, heaters, burners, pipes, lines of pipe, machinery, or apparatus of another, for the purpose of fuel for domestic heat, must use such care, skill, attention, and diligence in order that no greater amount or pressure thereof shall be so furnished than is proper to be furnished, and in order to prevent injury to the person or property of others, as is proportioned to the danger of such substance.[10]

§ 2750. Duty to provide appliances for controlling pressure

§ 2750(1). Indiana

I instruct you that if you find from the evidence that the defendant, at the time that plaintiffs' property was burned, if you find it was burned, was, for a valuable consideration, furnishing to the plaintiffs natural gas to be used for fuel for domestic purposes, and that said defendant at the time of said burning negligently failed to provide such appliances, regulators, and machinery, and watch and care for the same, as were reasonably necessary to control the amount of pressure of said gas so furnished, and, on account of the defendant failing so to do, the plaintiffs' property was destroyed by fire, occasioned by an overheated stove, caused by said failure to so regulate the pressure of said gas, then the defendant would be liable to the plaintiffs for such damage to their property as was the direct result of such negligence, unless you should further find that the plaintiffs, or their agents, were also guilty of negligence which contributed to the destruction of said property.[11]

§ 2750(2). West Virginia

The court instructs the jury that, if the jury believe from the evidence that natural gas is an extremely dangerous substance, and that the defendant, at the time of the burning alleged in the declaration, was furnishing, for a valuable consideration, such gas to the heaters, burners, stoves, grates, pipes, lines of pipe, machinery, or apparatus of the plaintiff, for the purpose of using such gas as fuel for domestic heat in and about the dwelling house mentioned in the declaration at the time of such burning, then it was the duty of the defendant under the law to use such care, diligence, and skill,

[9] Barrickman v. Marion Oil Co., 32 S. E. 327, 45 W. Va. 634, 44 L. R. A. 92.

[10] Barrickman v. Marion Oil Co., 32 S. E. 327, 45 W. Va. 634, 44 L. R. A. 92.

[11] Citizens' Gas & Oil Min. Co. v. Whipple, 69 N. E. 557, 32 Ind. App. 203.

in providing proper machinery, regulators, and apparatus, work, labor, and attention, in order to control such gas, and the amount of pressure furnished to such dwelling house, as is in due proportion to the nature of the substance used.[12]

§ 2751. Negligence of gas company as proximate cause of injury to consumer

The jury is instructed that if they believe from the evidence that the defendant was guilty of the negligence or carelessness charged in the declaration, and that the injury complained of was the natural consequence of such negligence or carelessness, and such as might have been foreseen and reasonably anticipated as the result of such negligence or carelessness, then such carelessness or negligence should be regarded by the jury as the proximate or direct cause of the injury, in the absence of intervening negligence.[13]

§ 2752. Contributory negligence of consumer

§ 2752(1). Massachusetts

The court instructs the jury that, if they are satisfied that the tenant, having discovered the presence of gas in unusually large quantity in the house, or in a room of the house, did not take reasonable means and precautions to remove and exclude the gas, or, not knowing what such precautions were, did not notify the servants of the defendant that gas was escaping, or make some reasonable effort to notify them that gas was escaping, into the house, and if he recklessly brought the flame of the candle into contact with the gas and air of the room, his want of care will prevent recovery on the part of the plaintiff in this case, although the jury may believe that the defendant was negligent.[14]

§ 2752(2). West Virginia

The jury is instructed that the negligence on the part of the plaintiff, in order to defeat of itself his recovery, must be a proximate cause of the injury.[15]

The jury is instructed that the negligence of the plaintiff, or his tenant, in this case, which precludes a recovery, is where, in the presence of a seen danger, he omits to do what prudence requires to be done under the circumstances for the protection of his property, or does some act inconsistent with its preservation. Where the danger is not seen, but merely anticipated, or dependent upon future events, such as the future continuance of the defendant's neg-

[12] Barrickman v. Marion Oil Co., 32 S. E. 327, 45 W. Va. 634, 44 L. R. A. 92.

[13] Barrickman v. Marion Oil Co., 32 S. E. 327, 45 W. Va. 634, 44 L. R. A. 92.

[14] Bartlett v. Boston Gaslight Co., 122 Mass. 209.

[15] Barrickman v. Marion Oil Co., 32 S. E. 327, 45 W. Va. 634, 44 L. R. A. 92.

ligence, plaintiff is not bound to guard against it by refraining from his usual course, being otherwise a prudent one, in the management of his property and business.[16]

The court instructs the jury that, if the jury believe from the evidence that the plaintiff and his tenant, ———, or either of them, had knowledge some time prior to the burning of the plaintiff's house that the pressure of gas in the defendant's lines was uneven and variable,—greater at some times than at others,—and if, by reason of such uneven and variable pressure, it was dangerous to use the gas from said line for lighting and heating the dwelling house owned by the plaintiff and occupied by ———, then the plaintiff was guilty of negligence in permitting the same to be used therein; and if the jury believe that the fire which destroyed said house was caused by an uneven and variable pressure of gas, he cannot recover damages against the defendant for the injuries sustained.[17]

The court instructs the jury that if the jury believe from the evidence that at the time of the fire which destroyed plaintiff's house there was an unusual pressure of gas, as described in the declaration, and that said gas, with unusual force, came into the pipe and appliances and to the burners, valves, and fittings on the plaintiff's premises, and thus increased the quantity of gas where the same was to be consumed, yet the plaintiff cannot recover if the jury further believe from the evidence that the pipe, valves, fittings, and appliances placed on the plaintiff's premises for the purpose of conducting said gas from the defendant's line to said house were not in good order and repair, and were at the time of the fire unsafe for the use and consumption of said gas, and that by reason thereof the said gas escaped, or the quantity thereof being burned was increased, and caused the destruction of said house.[18]

The court instructs the jury that, if the jury believe from the evidence that the plaintiff's tenant, ———, was guilty of negligence in the placing or maintaining on said leased premises the pipe, valves, fittings, and appliances which made the connection to conduct said gas from defendant's main into the house on said leased premises in an unsafe condition, and in not keeping and maintaining said pipe, valves, fittings, and appliances in good order and repair, and in proper and safe condition for the use and consumption of the gas, and that by reason of which unsafe condition of said pipe, valves, fittings, and appliances said house was set on fire,

[16] Barrickman v. Marion Oil Co., 32 S. E. 327, 45 W. Va. 634, 44 L. R. A. 92.

[17] Barrickman v. Marion Oil Co., 32 S. E. 327, 45 W. Va. 634, 44 L. R. A. 92.

[18] Barrickman v. Marion Oil Co., 32 S. E. 327, 45 W. Va. 634, 44 L. R. A. 92.

and destroyed, by means of an explosion of said gas, or by means of increased heat or the escape of gas, occasioned, in whole or in part, by such unsafe and defective pipe, valves, fittings, and appliances, the negligence of the tenant, ———, should prevent the plaintiff from recovering in this action, and the jury should find for the defendant.[19]

The court instructs the jury that, if they believe from the evidence that, at the time of the fire which destroyed the plaintiff's house, ———, the plaintiff's tenant, was guilty of negligence in not keeping and maintaining pipes, valves, fixtures, and appliances placed on the premises of the said plaintiff for the purpose of conducting the said gas from the defendant's main into the said dwelling house on said premises in good order and repair, and if the said negligence of the said tenant, in whole or in part, caused or occasioned the injury complained of and described in the declaration in this cause, the plaintiff cannot recover, and the jury should find for the defendant.[20]

The court instructs the jury that, if they believe from the evidence that the house of the plaintiff, described in the declaration, was by the defendant furnished and supplied with gas on the application of ———, the plaintiff's tenant, and that such gas was conducted from the defendant's main or gas line to said house by means of pipe, valves, fittings, and appliances laid and furnished by said tenant, with the consent of the plaintiff, and pursuant to a promise made by said tenant that he, said tenant, would keep and maintain said pipe, valves, fittings, and appliances necessary and proper for the safe use and consumption of said gas in good order, and repair, and that the fire which consumed the plaintiff's house was caused by an explosion of the gas in said house, or by any other means resulting from the escape or leakage of said gas, or the negligent manner of taking care of or using the same after leaving the defendant's main, the plaintiff cannot recover, and the jury should find for the defendant.[21]

The court instructs the jury that, if they believe from the evidence that the house of the plaintiff described in the declaration was by the defendant furnished and supplied with gas upon the application of the plaintiff's tenant, ———, and that such gas was conducted from the defendant's main or gas line to the said house by means of pipe, valves, fittings, and appliances laid and furnished by the said tenant with the consent of the plaintiff, and that such

[19] Barrickman v. Marion Oil Co., 32 S. E. 327, 45 W. Va. 634, 44 L. R. A. 92.

[20] Barrickman v. Marion Oil Co., 32 S. E. 327, 45 W. Va. 634, 44 L. R. A. 92.

[21] Barrickman v. Marion Oil Co., 32 S. E. 327, 45 W. Va. 634, 44 L. R. A. 92.

gas was furnished upon the promise of the said tenant that he would keep and maintain said pipe, valves, fittings, and appliances in good order and repair, then the jury is instructed that it was the duty of the plaintiff, or his tenant, ———, to see that the pipe, valves, fittings, and appliances and fixtures on the premises of the plaintiff described in the declaration, and which conducted the gas from the defendant's gas line to the premises of the plaintiff, were kept in good order and repair, and in proper and safe condition for the use and consumption of gas on the premises and in the house of the plaintiff; and if the jury believes from the evidence that such pipes, valves, fittings, and appliances which made the connections necessary to conduct said gas from the defendant's gas line to said premises were not, at the time of the burning of the plaintiff's house, in good order and repair and safe condition for the consumption of such gas, and that the fire which destroyed the plaintiff's house was caused from gas, and that such fire was caused by escape or leakage of such gas, or the negligent manner of taking care of or using the same after leaving the defendant's main or gas line, the plaintiff cannot recover, even if the defendant was negligent as claimed by the plaintiff in his declaration.[22]

§ 2753. Presumptions and burden of proof

§ 2753(1). Massachusetts

You are instructed that the case stands, under the general principle which I have stated, in this way: That the plaintiff in this case must offer to show, and must satisfy you, upon the whole evidence, by a fair preponderance of the evidence, that he was in the exercise of due care, of such care as a prudent man might reasonably be expected to exercise under the circumstances, and that the explosion was caused by the negligence of the defendant.[23]

§ 2753(2). West Virginia

The jury is instructed that the burden of proving contributory negligence rests with the defendant, but the jury may look to all the evidence offered by both parties to determine the question of contributory negligence.[24]

The jury is instructed that in this case negligence is the ground of the plaintiff's action, and that it therefore rests upon the plaintiff to trace the fault of his injury to the defendant, by proving negligence upon the part of the defendant, and for this purpose he must show the circumstances under which the injury occurred; and if

[22] Barrickman v. Marion Oil Co., 32 S. E. 327, 45 W. Va. 634, 44 L. R. A. 92.

[23] Bartlett v. Boston Gaslight Co., 122 Mass. 209.

[24] Barrickman v. Marion Oil Co., 32 S. E. 327, 45 W. Va. 634, 44 L. R. A. 92.

from these circumstances so proved by the plaintiff, and from all the evidence, including the evidence of the defendant, it appears that the fault of the injury was mutual, or, in other words, that the negligence is fairly imputable to the plaintiff or his tenant, the plaintiff cannot recover.[25]

B. Contracts to Furnish or Take Gas

§ 2754. Liability for breach of contract to take gas

You are instructed that this is an action brought by ———, plaintiff against the ——— Company, a corporation, defendant, to recover the sum of $———, which the plaintiff claims is due and owing from the defendant for gas furnished to the defendant and marketed by the defendant to its customers, under and pursuant to the agreement attached to plaintiff's petition, and which agreement has been introduced in evidence; and for damages sustained by the plaintiff for breach of contract by defendant in disconnecting from the gas on or about ———, to on or about ———.[26]

You are instructed that if you find, under this instruction, that the defendant company purchased the contract between ——— and ———, then in determining the amount of the actual and compensatory damages that plaintiff may recover from defendant for disconnecting its pipe line and failing to furnish its customers with gas while the rock pressure was above ——— pounds, you should take into consideration the reasonable amount of gas the well would furnish from the time the defendant disconnected from said well, to wit, on ———, until on or about ———, and the plaintiff should recover for such amount of damages as you believe he is fairly entitled to receive, based upon the evidence in this case, not exceeding the amount claimed in his petition, to wit, the sum of $———, for actual damages.[27]

[25] Barrickman v. Marion Oil Co., 32 S. E. 327, 45 W. Va. 634, 44 L. R. A. 92.

[26] Laurel Oil & Gas Co. v. Anthony, 162 P. 203, 62 Okl. 94.

[27] Laurel Oil & Gas Co. v. Anthony, 162 P. 203, 62 Okl. 94.

CHAPTER CLVII

GIFTS

§ 2755. Definition.
2756. Requisites.
2756(1). Arkansas.
2756(2). Illinois.
2757. Mental capacity of donor.
2758. Intention to make gift.
2759. Presumptions—From delivery by parent to child.
2760. Sufficiency of evidence.
2760(1). Arkansas.
2760(2). Kansas.

§ 2755. Definition

You are instructed that a gift is the act by which the owner of a thing voluntarily transfers the title and possession of the same to another without consideration.[1]

§ 2756. Requisites

§ 2756(1). Arkansas

You are instructed that, in order for you to find that C. made a valid gift of the certificate in question, you must find, first, that C. was at the time of the alleged gift of sound mind—that is, that he knew and understood the effect of his act and intended that effect; second, that he actually delivered the certificate in question to Mrs. ———; third, that by such act he intended to pass title to said certificate in question to Mrs. ——— to take effect immediately; and, fourth, that Mrs. ——— actually accepted said certificate as a gift.[2]

§ 2756(2). Illinois

The jury are instructed that, if you find from the evidence that the deceased, Mrs. ———, did own the money mentioned in the evidence, and that she gave and delivered it to her husband before she died, and that she delivered the possession of it to him with the intention of vesting in him the title and ownership of said money, then plaintiff cannot recover, without proof that the husband afterwards gave it back and delivered it to her with a like intention.[3]

§ 2757. Mental capacity of donor

You are instructed that neither sickness nor infirmity will disqualify one for making a gift if sufficient mind remains; and if the jury believe from the evidence that ——— delivered the certificate of deposit in controversy to Mrs. ——— with the intent of making it a gift to her, and that he made any declarations with reference

[1] Fidelity Trust Co. v. Rector (Tex. Civ. App.) 190 S. W. 842.

[2] Lowe v. Hart, 125 S. W. 1030, 93 Ark. 548.

[3] Marsh v. Prentiss, 48 Ill. App. 74.

thereto, the jury may consider these things in connection with all the other evidence in determining the mental capacity of ——— and if they believe from all the evidence before them that he knew what he was doing at the time and intended by such delivery and declaration to make a gift of the certificate to Mrs. ———, they will find a verdict sustaining the gift.[4]

§ 2758. Intention to make gift

You are instructed that, in determining whether, at the time of the alleged delivery of the certificate to Mrs. ———, C. intended to make a gift of it to her you may take into consideration all the facts and circumstances surrounding the transaction; the acts and declarations of the deceased at the time and before and after the alleged gift; the relationship existing between C. and Mrs. ———, or her family, whether friendly or otherwise, and his mental condition.[5]

§ 2759. Presumptions—From delivery by parent to child

You are instructed that the delivery of personal property by a parent into the exclusive possession of a child living separate from the parent creates a presumption of a gift to the child. This presumption can be rebutted by evidence of an actual contract of lending, or from circumstances from which such a contract may be inferred.[6]

§ 2760. Sufficiency of evidence

§ 2760(1). Arkansas

You are instructed that the burden of proof is upon the plaintiff to establish by a preponderance of the evidence a valid gift of the certificates in question by ——— to her, so if, from a consideration of the entire case, you find the evidence equally balanced for and against the alleged gift it will be your duty to find for the interpleader and against the plaintiff.[7]

§ 2760(2). Kansas

You are instructed that, while less positive proof is required to establish a parol gift of land from father to son than between persons not so related, you are not warranted in inferring a gift from slight circumstances. The proof must be by a preponderance of the evidence, and must be of such a clear nature and quality as satisfies your mind that the gift was actually made.[8]

[4] Lowe v. Hart, 125 S. W. 1030, 93 Ark. 548.

[5] Lowe v. Hart, 125 S. W. 1030, 93 Ark. 548.

[6] Hawkins v. Davie, 71 S. E. 873, 136 Ga. 550.

[7] Lowe v. Hart, 125 S. W. 1030, 93 Ark. 548.

[8] Cook v. Cook, 161 P. 625, 99 Kan. 351.

CHAPTER CLVIII

GOOD WILL

§ 2761. What constitutes breach of contract for sale of good will.
2762. Damages for breach of contract.

§ 2761. What constitutes breach of contract for sale of good will

The court instructs the jury that the language of the contract, to wit, "The said ——— agrees to relinquish his office for the practice of medicine and surgery to the said ———, party of the second part," simply means that he was to vacate said office and leave the same to the use of the defendant, ———, if he chose to occupy it, and if the jury believe from the evidence that said ——— was able, ready, and willing to so relinquish, then the law is for the plaintiff, and the jury will so find.[1]

§ 2762. Damages for breach of contract

The jury are instructed that, if they find for the plaintiff, they may fix the amount of damages from all the testimony and facts and circumstances appearing in evidence, at such sum as will compensate the plaintiffs for all the damages or loss actually suffered by them, if any, by reason of the defendant's again engaging in the clothing or boot and shoe business either directly or indirectly or concerning himself in conducting or carrying on such business in the city of ———.[2]

[1] Wallingford v. Aitkins, 72 S. W. 794, 24 Ky. Law Rep. 1995.

[2] Bauwens v. Goethals, 187 Ill. App. 563.

CHAPTER CLIX

GUARANTY

§ 2763. Elements of cause of action on guaranty.
2764. Consideration.
2765. Sufficiency of notice to guarantor of acceptance of guaranty.
2765(1). Missouri.
2765(2). South Dakota.
2766. Guaranty of payment of notes signed by persons not of well-known responsibility.
2767. Conditions precedent to enforcing liability of guarantor—Duty to pursue principal debtor.
2768. Release of guarantor—Departure by creditor from terms of guaranty.
2769. Presumption and burden of proof.
See, also, Indemnity; Principal and Surety.

§ 2763. Elements of cause of action on guaranty

The court instructs the jury that if you believe from all the evidence in the cause that the defendant executed the guaranty filed herein, and that within a reasonable time thereafter plaintiff notified defendant of the acceptance thereof, and you further find from the evidence that plaintiff, relying on said guaranty, thereafter sold and delivered the goods mentioned in the account attached to the petition to ———, and that said ——— failed to pay for said goods, and that within a reasonable time thereafter plaintiff notified defendant thereof, then your verdict should be for the plaintiff for such sum as you may find from the evidence was the reasonable market value of said goods, with interest thereon at the rate of ——— per cent. from ———.[1]

§ 2764. Consideration

The court instructs the jury that a mere naked promise in writing (not under seal) to pay or guarantee the payment of an existing debt of another, made without any valuable consideration for such promise, is not binding; and though the jury should believe from the evidence that the defendant signed the writing stamped on the back of the notes, intending thereby to guarantee payment of the same, yet if the jury further believe from the evidence that the original indorsements were not made by the defendant or by his authority, and that such guarantee was made or signed without any valuable consideration either expressly or impliedly agreed on at the time, as an inducement for such guaranty, the defendant cannot be held liable by reason of the words "payment guaranteed," and the jury must find for the defendant on that issue.[2]

[1] N. O. Nelson Mfg. Co. v. Shreve, 68 S. W. 376, 94 Mo. App. 518.

[2] Bowman v. First Nat. Bank of Broadway, 80 S. E. 95, 115 Va. 463.

The jury are instructed that, where the consideration for the promise of one party is the promise of another party, there must be absolute mutuality of engagement, so that each party has the right to hold the other to a positive agreement. Both parties must be bound or neither is bound. And if the jury believe from the evidence that there was no promise on the part of the bank at the time the stamped indorsements on the notes sued on were signed by the defendant, which could be enforced by the defendant, such as delay in the enforcing the collection of said notes, then they must find for the defendant as to his liability as guarantor.[3]

§ 2765. Sufficiency of notice to guarantor of acceptance of guaranty

§ 2765(1). Missouri

You are instructed that, if the guaranty was in fact accepted by the plaintiff, and knowledge of such acceptance of it was in fact brought home to the defendant, it is sufficient without proof of notice from the guarantee. If the jury find that defendant had knowledge of the acceptance, if any, of the guaranty, no special notice of the acceptance of the guaranty or the offer of guaranty was necessary.[4]

§ 2765(2). South Dakota

You are instructed that this man ——— as an agent possessed sufficient authority under all the circumstances to accept this guaranty if he saw fit, absolutely and unqualifiedly, on behalf of the plaintiff. So if you reach that question you will determine whether or not in the first instance ——— accepted this guaranty on and in behalf of the plaintiff. If he formally accepted it from defendant, then that would be a sufficient acceptance of the proposition of guaranty. Under our law a guaranty or proposition for a guaranty, proposal to guaranty a debt of another is not binding upon the guarantor unless it is accepted by the guarantee and some sort of notice given to him of such acceptance. If this agent did accept it formally and defendant was informed of that fact by him, then of course that would be a sufficient acceptance. If, however, the agent did not accept it on behalf of the plaintiff, then the next question arises, Did the plaintiff itself accept it? It is contended by the plaintiff that on ——— it wrote a letter and mailed it to the defendant. This letter (Exhibit ———), which you have before you, upon its face would be a sufficient acceptance as far as form is concerned. The question arises with reference to the mailing of it and the receipt of it by the defendant. Now what is mailing a letter? Modern business affairs have much changed the method of han-

[3] Bowman v. First Nat. Bank of Broadway, 80 S. E. 95, 115 Va. 463.

[4] N. O. Nelson Mfg. Co. v. Shreve, 68 S. W. 376, 94 Mo. App. 518.

dling and mailing letters to what it was many years ago. The ordinary business firm to-day has such an abundance of mail matter, the mailing facilities are so different from what they used to be, that the older rules of law that a letter must be carried and deposited in the post office can hardly be said to apply at the present time. If in the due course of business a letter is prepared and signed by the proper person of the firm, and it is sealed and placed in the mail box, or placed upon a desk, or placed where in the ordinary and usual course of business it gets into the hands of the post office authorities at the post office, or into the hands of a mail carrier for the purpose of transmission, it is a sufficient mailing. So you will take all of the evidence and determine for yourselves whether this letter (Exhibit ———) in the ordinary and usual course of business came into the hands of a mail carrier or a person authorized to deliver it to the post office authorities for the purpose of transmission. if it did, then that is a sufficient mailing so far as the law of the case is concerned, and as I say if the relations of the parties were such and the nature of the transaction was such that it was naturally and reasonably to be expected that communication should be by letter, then, of course, the deposit in the mail would be a sufficient notice no matter whether the defendant received it or not. But if you think that the transaction was such that the natural inference from the situation of the parties, their relation to each other, and the subject-matter, would be that it was reasonably to be expected that notice should be personally given, then such notice must be given in order to bind the defendant.[5]

§ 2766. Guaranty of payment of notes signed by persons not of well-known responsibility

You are instructed that if, at the time any of said notes were given, the maker or makers were in fact persons of well-known responsibility, but since became insolvent, such insolvency would not render the defendants liable for the redemption of such notes.[6]

§ 2767. Conditions precedent to enforcing liability of guarantor—Duty to pursue principal debtor

The court instructs the jury, under the terms of guaranty set out in plaintiff's petition, the plaintiff was not required by law to first endeavor to collect the note guaranteed by the defendant when due from the maker thereof; and the plaintiff was not required by law to endeavor to collect the amount of said note from the chattel property mortgaged to secure the same. The said guaranty is what is known in law as an absolute guaranty, and any failure on the

[5] M. E. Smith & Co. v. Kimble, 162 N. W. 162, 38 S. D. 511.

[6] Aultman, Miller & Co. v. Roemer, 84 N. W. 668, 112 Iowa, 651.

part of the plaintiff to attempt to collect the note so guaranteed from said maker, or any negligence or failure on the part of the plaintiff to follow up and take the property mortgaged to secure the same, is no defense in this action, and in arriving at your verdict in this case you will entirely disregard any evidence tending to show a failure on the part of the plaintiff to attempt to collect said note from said maker or out of said mortgaged property.[7]

§ 2768. Release of guarantor—Departure by creditor from terms of guaranty

You are instructed that, if you find from the evidence that the plaintiff failed to consign said coal to the proper point of destination, as authorized by the defendant, and that said coal was afterwards delivered to a common carrier, and that said common carrier carried to a destination not authorized by said defendant, and that the said defendant was thereby prevented from obtaining possession of said coal, then you will find for the defendant.[8]

§ 2769. Presumption and burden of proof

You are instructed that it is admitted by the pleadings, and appears conclusively by the evidence and pleadings, that F., during his lifetime, signed the guaranty set forth in the complaint. You should therefore take that as a conceded fact. If the name of the said F. was written on the back of the instrument set up in the complaint after its delivery to the holder thereof, then the said F. would not be liable thereon, unless he should have received some new consideration therefor, and there should be no recovery against him. But where the guaranty imports and recites a consideration, it raises a presumption of consideration, and would be sufficient to authorize a recovery until overcome by proof; and the burden of proof would be upon the defendant to establish by a preponderance of the testimony that it was made without consideration.[9]

[7] Home Savings Bank of Fremont v. Shallenberger, 146 N. W. 993, 95 Neb. 593.

[8] Amarillo Grain & Coal Co. v. Knight (Tex. Civ. App.) 150 S. W. 318.

[9] Rattlemiller v. Stone, 68 P. 168, 28 Wash. 104.

CHAPTER CLX

HAWKERS AND PEDDLERS

§ 2770. Liability for peddling without license—Exemption of products of own farm.

§ 2770. Liability for peddling without license—Exemption of products of own farm

The court instructs you, gentlemen of the jury, that if you find or are satisfied beyond a reasonable doubt from the evidence in this case that the defendant did butcher and bring upon the market in ——— and sell at retail along the streets of the city fresh beef from time to time between the last of ——— and the latter part of ——— of last year, and that he failed to pay the license tax as required by the ordinance, when it was demanded of him, it would be your duty to find him guilty in this case, unless at the same time you are satisfied that the meat that he sold was the product of his own farm or that it was meat, that is to say, beef that was killed by him and put upon the market from cattle that were owned by him there on the farm in the ordinary course of his business and used there in good faith as a part of the property and products of his farm. I have tried to explain that to you before. I have said I think that would include calves or steers which were born or dropped upon his farm, where the mother belonged to him or was one that he had purchased, or more than one that he had purchased, if he had purchased it in the ordinary course of business, as I told you before, to milk or use or to eat up the surplus products of the farm, grass, grain, or whatever it may be or things of that sort. But if, on the other hand, you find from the evidence, gentlemen of the jury, that the cattle or some of the cattle that were marketed here as beef by the defendant were purchased by him with a view to reselling for beef, in other words, if they were cattle that he was procuring and later on was slaughtering in the nature and character of a butcher for commercial purposes, as distinguished from his ordinary work as a farmer, why then, as to such cattle, he would not fall within the exemption of the statute; and if you find that he was engaged in that kind of business as charged by the state, it would be your duty to find him guilty.[1]

[1] State v. Smith, 92 S. E. 325, 173 N. C. 772.

CHAPTER CLXI

HOMESTEAD

§ 2771. Essentials of right to claim property as homestead.
2772. Valuation of land.
2773. Effect of omissions from schedule of personalty.
2774. Conveyance—Necessity of wife joining.
2775. Contract to convey—Right of wife to retract.
2776. Validity of mortgage of homestead.
2777. Abandonment—What constitutes.
2777(1). Missouri.
2777(2). Texas.
2778. Same—Burden of proof.
2779. Same—Effect.
2780. Right of wife to convey on abandonment by husband.

§ 2771. Essentials of right to claim property as homestead

The court instructs the jury that, in order to find that the property in controversy was part of the plaintiffs' homestead, it is necessary for the proof to show that at the time it was levied upon it was used by them for the purpose of a homestead. In this connection you are charged that the mere fact that means realized from the use of property separate from that upon which the residence is situated are used in supporting the family will not of itself fix a homestead character upon the property so separated.[1]

You are instructed that, if you believe from the evidence that the premises described in the petition of the plaintiff as the homestead of himself and wife was in fact used, occupied, and enjoyed by said plaintiff and his said wife as their homestead up to the death of the wife, then and in that case the plaintiff is entitled to recover, and your verdict will be for the plaintiff as to the homestead.[2]

§ 2772. Valuation of land

I charge you that the applicant would have nothing to do with the value of the land. The law requires the surveyor to survey the land, and to value it, under oath, and, if that was done, and the caveators were dissatisfied, then appraisers should be appointed to appraise the land. The applicant could have nothing to do with putting a value on it.[3]

§ 2773. Effect of omissions from schedule of personalty

I further charge you, gentlemen of the jury, that if you find that articles omitted from the schedule, if any were omitted, were not fraudulently left out, and such omissions were not made to defraud

[1] Roberts v. Cawthorne, 26 Tex. Civ. App. 477, 63 S. W. 332.
[2] Hector v. Knox, 63 Tex. 613.
[3] Wood v. Collins, 36 S. E. 423, 111 Ga. 32.

creditors, but were made in the utmost good faith on the part of the applicant, they would not void the application for exemptions. It is for you to say whether or not it was intended to defraud creditors, if you find anything was left out.[4]

§ 2774. Conveyance—Necessity of wife joining

You are instructed that a conveyance of homestead property by the husband alone, if his wife be living, passes no title to the property so conveyed. The law requires both the husband and wife to unite in such conveyance. Even an innocent purchaser for value acquires no right whatever to a homestead so conveyed to him by the husband alone.[5]

§ 2775. Contract to convey—Right of wife to retract

You are instructed that, when a man and wife contract to sell their homestead, the wife has the right up to the last moment before her privy acknowledgment is completed to retract said sale or conveyance of her homestead, and thereby defeat the sale.[6]

§ 2776. Validity of mortgage of homestead

You are instructed that the plaintiff is also entitled to a foreclosure upon the land described in its petition, unless such land was the homestead of ——— and his family at the time the same was mortgaged to plaintiff. The undisputed evidence shows that at one time, prior to the execution by ——— and wife of the mortgage to plaintiff, said land was the homestead of said ——— and his family. Now, if you find and believe from the evidence that said ——— and his family were occupying said farm as their homestead at the time of the execution of the mortgage to plaintiff, then and in such event you will find for defendant as to lien on the land.[7]

§ 2777. Abandonment—What constitutes

§ 2777(1). Missouri

You are instructed that, if you believe from all the evidence in this case that, when ——— left the premises in controversy and went to the ——— Hotel, she had the intention to return to said premises which she left, and that she, at all times thereafter until she sold said premises to her father, had the intention to return thereto and make the same her home, then she did not abandon the same in the sense of the law.[8]

[4] Wood v. Collins, 36 S. E. 423, 111 Ga. 32.

[5] Bunting v. Saltz, 24 P. 167, 84 Cal. 168.

[6] London v. Crow, 102 S. W. 177, 46 Tex. Civ. App. 190.

[7] Building & Loan Ass'n of Dakota v. Guillemet, 40 S. W. 225, 15 Tex. Civ. App. 649.

[8] Keeline v. Sealy, 165 S. W. 1088, 257 Mo. 498.

§ 2777(2). Texas

You are instructed that, if you find and believe from the evidence that at the time the mortgage on the land in question was executed the said ——— and family did not then reside upon said land, but had removed to ——— and rented such land to another, then you must decide whether such removal was permanent, or only temporary. If ——— and wife left such land with the intention of finally abandoning the same as their homestead, then you will find for plaintiff for foreclosure on said land; but if you find that ——— and wife left said land and rented the same only temporarily, and then intended to again return to the same and occupy it as their homestead, then and in such event you will find for defendant on the question of lien on the land.[9]

§ 2778. Same—Burden of proof

You are instructed that the burden of proof is upon plaintiffs to show the abandonment by defendant of his homestead, but this proof may be made by the plaintiffs by facts and circumstances, or by circumstances alone, if in your opinion the same are sufficiently strong and cogent to show that, at the time said defendant removed from the said premises, he did so with the intention of not returning thereon as his homestead.[10]

§ 2779. Same—Effect

You are instructed that, if you believe from the evidence that defendant had abandoned the lot in controversy for home use, and appropriated it for other than home purposes, then you will find for plaintiff, unless you believe that at the time of the levy the defendant had reappropriated said lot for homestead purposes, and was using and occupying the same, with the intention of permanently using and occupying the same as a home; then, in that event, you will find for defendant. If you believe from the evidence that defendant had abandoned the lot in controversy for the purpose of a home, and that at the time of the levy he was using and occupying it as a sham and pretext to shield it from his creditors, then you will find for plaintiff.[11]

You are instructed that, if you believe from the evidence that the plaintiff abandoned his wife, and left her to shift for herself, and that he failed to support his wife, and that he voluntarily and without cause left the premises used and occupied as a homestead, and that he absented himself from said house and continued said

[9] Building & Loan Ass'n of Dakota v. Guillemet, 40 S. W. 225, 15 Tex. Civ. App. 649.

[10] Gaar, Scott & Co. v. Burge, 110 S. W. 181, 49 Tex. Civ. App. 599.

[11] Milburn Wagon Co. v. Kennedy, 13 S. W. 28, 75 Tex. 212.

abandonment up to the death of his said wife, then and in that event you will find your verdict in favor of the defendant.[12]

§ 2780. Right of wife to convey on abandonment by husband

You are instructed that, if the jury believe from the evidence that the plaintiff totally abandoned his wife, or left her for a number of years to discharge the duties and meet the responsibility of a feme sole, or the head of the community, she acquired thereby the right to manage, control and dispose of the homestead in controversy, which is admitted to have been her separate property; and if you believe, under such circumstances, that said wife conveyed the property in question to the defendant, you will find for the defendant.[13]

[12] Hector v. Knox, 63 Tex. 613.

[13] Hector v. Knox, 63 Tex. 613.

CHAPTER CLXII

HEALTH INSURANCE

§ 2781. Risks covered—Time of contracting disease.

§ 2781. Risks covered—Time of contracting disease

The jury are instructed that, if they find from the evidence that the sickness for which the plaintiff claims indemnity was contracted after ——— days from 12 o'clock noon on ———, then the plaintiff is entitled to recover in this case.[1]

[1] Pennsylvania Casualty Co. v. Mitchell, 48 So. 78, 157 Ala. 589.

CHAPTER CLXIII

HOMICIDE

A. In General

§ 2782. What constitutes homicide and the different grades thereof.
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2782(2). Oklahoma.
2782(3). South Carolina.
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2786. Insanity as defense.
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2787. Irresistible impulse.
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2789. Moral and emotional insanity.
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2790. Insane delusions.
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2791. Effect of dazed condition caused by sudden blow.
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§ 2793. Consideration of insanity on question of degree of crime.
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2796. Same—Temporary frenzy brought on by voluntary drunkenness.
2797. Effect of intoxication as bearing on intent and degree of offense.
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C. Act or Omission of Defendant as Cause of Death

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2798(5). Louisiana.
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2800. Negligence of deceased in caring for wounds as co-operating cause of death.
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2801. Absence of medical care as contributory cause of death.
2802. Negligence or lack of skill of physician as proximate cause of death.
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2805(6). Iowa.
2805(7). Kentucky.
2805(8). Michigan.
2805(9). Missouri.
2805(10). North Carolina.
2805(11). Oklahoma.
2805(12). Texas.
2805(13). Virginia.
2806. What constitutes aiding and abetting.
2806(1). Oklahoma.
2806(2). Virginia.
2807. Liability of one not actually present at scene of homicide or attempted homicide.
2808. Prosecution of joint defendants on theory that crime alleged was result of conspiracy.
2809. Concealment of crime.
2810. Homicide, subsequent to robbery, by accomplice of defendant in robbery.
2811. Conviction of principal and accessory of different degrees of crime.
2812. Principals in second degree.
2812(1). Georgia.
2812(2). Virginia.
2812(3). West Virginia.
2813. Right to convict one not present at time and place of killing and not indicted as an accessory before the fact.

E. Murder

1. *In General*

2814. Elements of crime.
2814(1). Alabama.
2814(2). Colorado.
2814(3). Illinois.
2814(4). Indiana.
2814(5). Kentucky.
2814(6). Missouri.
2814(7). Oklahoma.
2814(8). Texas.
2814(9). Virginia.
2815. Distinction between murder and other species of homicide.
2816. Definition of certain terms, such as "willfully," "feloniously," "deliberately," etc.
2816(1). Alabama.
2816(2). Kentucky.
2816(3). Missouri.
2816(4). Washington.
2817. Presence of malice as essential or distinguishing characteristic of murder.
2817(1). Alabama.
2817(2). Delaware.
2817(3). Texas.

§ 2818. What constitutes malice.
2818(1). Alabama.
2818(2). Georgia.
2818(3). Illinois.
2818(4). Indian Territory.
2818(5). Iowa.
2818(6). Missouri.
2818(7). Montana.
2818(8). South Carolina.
2818(9). Texas.
2818(10). Washington.
2818(11). West Virginia.
2819. Malice aforethought or premeditated malice.
2819(1). United States.
2819(2). California.
2819(3). Colorado.
2819(4). Delaware.
2819(5). Illinois.
2819(6). Indiana.
2819(7). Iowa.
2819(8). Kentucky.
2819(9). Missouri.
2819(10). New Mexico.
2819(11). North Carolina.
2819(12). Oklahoma.
2819(13). Texas.
2819(14). Washington.
2820. Implied malice.
2820(1). Massachusetts.
2820(2). New Mexico.
2820(3). Texas.
2821. Premeditated design.
2821(1). Alabama.
2821(2). Georgia.
2821(3). New York.
2821(4). Oklahoma.
2821(5). Texas.
2821(6). Washington.
2822. Deliberate design executed under influence of sudden passion or excitement.
2822(1). Oklahoma.
2822(2). Texas.
2823. Killing from motives of revenge.
2823(1). Colorado.
2823(2). Oklahoma.
2824. Killing one interfering to prevent defendant from committing another crime.
2825. Killing because of refusal of deceased to sign note.
2826. Killing paramour for suspected unfaithfulness.
2827. Killing one with intent to kill another.
2828. Killing in pursuance of unlawful conspiracy.
2828(1). Indian Territory.
2828(2). Kentucky.
2829. Killing officer to escape arrest.
2830. Killing, with malice, officer seeking to arrest without warrant.
2831. Murder by lying in wait.
2831(1). Alabama.
2831(2). North Carolina.
2831(3). Oklahoma.
2832. Same—Revenging illicit intercourse with defendant's wife.
2833. Murder by poison.
2834. Permitting one to perish through exposure to weather.

§ 2835. Homicide in committing another offense.
2835(1). Arkansas.
2835(2). California.
2835(3). Indiana.
2835(4). Kentucky.
2835(5). Missouri.
2835(6). Nebraska.
2835(7). Oklahoma.
2835(8). Texas.
2835(9). Utah.
2836. Killing in the commission of, or attempt to commit, rape.
2837. Killing occurring in general mêlée.
2837(1). Louisiana.
2837(2). Texas.
2838. Shooting to alarm.
2839. Use of deadly weapon.
2839(1). United States.
2839(2). Illinois.
2839(3). Missouri.
2839(4). Nebraska.
2839(5). Texas.

2. *Degrees of Murder*

2840. Murder in first degree.
2840(1). Alabama.
2840(2). Arkansas.
2840(3). Delaware.
2840(4). Missouri.
2840(5). Montana.
2840(6). Pennsylvania.
2840(7). Virginia.
2840(8). West Virginia.
2841. Premeditation and deliberation as necessary elements of murder in first degree.
2841(1). Arkansas.
2841(2). Colorado.
2841(3). Idaho.
2841(4). Indiana.
2841(5). New Jersey.
2841(6). Texas.
2841(7). Virginia.
2841(8). West Virginia.
2841(9). Wisconsin.
2842. What constitutes deliberate and premeditated killing.
2842(1). Alabama.
2842(2). Iowa.
2842(3). Montana.
2842(4). Nebraska.
2842(5). New Jersey.
2842(6). North Dakota.
2842(7). Pennsylvania.
2843. Killing in heat of passion as murder in first degree.
2844. Distinction between intent to kill and premeditated design.
2845. Murder in second degree.
2845(1). Alabama.
2845(2). California.
2845(3). Delaware.
2845(4). Michigan.
2845(5). Missouri.
2845(6). Montana.
2845(7). North Carolina.
2845(8). North Dakota.

2845(9). Pennsylvania.
2845(10). Texas.
§ 2846. Same—Killing in passion without adequate cause.
2846(1). Missouri.
2846(2). New York.
2846(3). Texas.
2846(4). Virginia.
2847. Same—Killing person other than one intended.
2848. Same—New-born babe dying because of assault on mother while pregnant with the child.
2849. Same—Implied malice.
2849(1). Delaware.
2849(2). Texas.

F. MANSLAUGHTER

In General

2850. What constitutes.
2850(1). Arkansas.
2850(2). Colorado.
2850(3). Delaware.
2850(4). Florida.
2850(5). Illinois.
2850(6). Indiana.
2850(7). Iowa.
2850(8). Michigan.
2850(9). Mississippi.
2850(10). North Carolina.
2850(11). South Carolina.
2850(12). Texas.
2850(13). Washington.

2. *Voluntary Manslaughter*

2851. Elements of voluntary manslaughter.
2851(1). Delaware.
2851(2). Kentucky.
2851(3). Montana.
2851(4). Texas.
2851(5). West Virginia.
2852. Absence of malice.
2852(1). Arkansas.
2852(2). Delaware.
2852(3). Oklahoma.
2853. Intention to kill.
2854. Killing different person from one intended.
2855. Advising, in heat of passion, to kill another.
2856. Sudden passion inspired by sufficient provocation.
2856(1). Alabama.
2856(2). California.
2856(3). Delaware.
2856(4). South Carolina.
2856(5). Texas.
2857. Character or force of passion.
2858. Necessity of adequate cause for provocation.
2859. What constitutes adequate cause for provocation.
2859(1). United States.
2859(2). Colorado.
2859(3). Illinois.
2859(4). Missouri.
2859(5). South Carolina.
2859(6). Texas.
2860. Looks, gestures, or words as constituting provocation.
2860(1). Alabama.

2860(2). California.
2860(3). Delaware.
2860(4). Georgia.
2860(5). Illinois.
2860(6). Indiana.
2860(7). Kansas.
§ 2861. Assault, or assault and battery, as cause for provocation.
2861(1). Alabama.
2861(2). Delaware.
2861(3). Missouri.
2861(4). Texas.
2862. Killing in quarrel originally provoked by defendant.
2863. Mutual combat.
2863(1). Alabama.
2863(2). Florida.
2863(3). Georgia.
2863(4). Illinois.
2863(5). North Carolina.
2863(6). Oklahoma.
2863(7). Texas.
2863(8). Virginia.
2863(9). West Virginia.
2864. Renewal of prior contest by mutual consent.
2865. Killing officer attempting to arrest defendant without warrant.
2866. Insulting conduct towards defendant's wife.
2866(1). Oklahoma.
2866(2). Texas.
2867. Assault on wife of defendant.
2868. Adultery by deceased with wife of defendant.
2869. Insults to female relatives of defendant.
2870. Insulting words towards female friend of defendant.
2871. Provocation by assault upon relative.
2872. Trespass on premises of another as provocation.
2872(1). Delaware.
2872(2). Massachusetts.
2873. Condition of defendant's mind at time of killing.
2873(1). Texas.
2873(2). Virginia.
2873(3). Washington.
2874. Killing under immediate influence of sudden passion.
2875. Cooling time.
2875(1). California.
2875(2). Colorado.
2875(3). New Jersey.
2876. Consideration of prior circumstances in determining sufficiency of provocation.
2877. Same—Consideration of effect of intoxication.
2878. Effect of coexistence of malice and suddenly aroused passion.
2878(1). Alabama.
2878(2). Oklahoma.
2879. Mutual agreement to commit suicide.
2880. Shooting at party offering provocation and killing another.
2881. Killing by wanton and reckless firing of pistol.
2882. Killing in procuring, or attempt to procure, an abortion.
2883. Killing through gross negligence in medical treatment.

3. *Involuntary Manslaughter*

2884. Elements of offense.
2884(1). Arkansas.
2884(2). Delaware.
2884(3). Illinois.

2884(4). Indian Territory.
2884(5). Montana.
§ 2885. Unintentional killing while doing unlawful act.
2885(1). Connecticut.
2885(2). Michigan.
2885(3). Oklahoma.
2885(4). Texas.
2886. Killing in assault with intent to inflict merely bodily injury.
2887. Homicide occurring while pointing a pistol at another in violation of statute.
2887(1). Alabama.
2887(2). Delaware.
2887(3). Georgia.
2888. Criminal negligence.
2889. Same—Killing through explosion of boiler.
2890. Same—Careless handling of firearms.
2890(1). Kentucky.
2890(2). Oklahoma.
2891. Reckless and heedless firing of gun.
2891(1). Arkansas.
2891(2). Iowa.
2892. Negligence in driving automobile.
2892(1). Arkansas.
2892(2). Connecticut.
2892(3). Delaware.
2892(4). Rhode Island.
2893. Homicide caused by driving automobile while intoxicated.

4. *Degrees of Manslaughter*

2894. Manslaughter in first degree.
2894(1). Alabama.
2894(2). Oklahoma.
2895. Manslaughter in second degree.
2896. Manslaughter in third degree.
2896(1). Missouri.
2896(2). Wisconsin.
2897. Manslaughter in fourth degree.
2897(1). Kansas.
2897(2). Missouri.
2898. Conviction of aggravated assault and battery.

G. Assault with Intent to Murder or Kill

2899. Elements of offense.
2899(1). Alabama.
2899(2). Arkansas.
2899(3). Delaware.
2899(4). Georgia.
2899(5). Illinois.
2899(6). Indiana.
2899(7). Kansas.
2899(8). Missouri.
2899(9). Texas.
2900. Same—What constitutes assault.
2900(1). Oklahoma.
2900(2). Oregon.
2901. Same—Necessity that defendant might have been prosecuted for murder had death ensued.
2902. Same—Intent to kill and murder as essential element of offense.
2902(1). Colorado.

2902(2). Georgia.
2902(3). New Mexico.
2902(4). Texas.
2902(5). Washington.
§ 2903. Same—Intent to kill unless certain demands are complied with.
2904. Same—Malice, premeditation, and deliberation as essential elements of offense.
2904(1). Colorado.
2904(2). Delaware.
2904(3). Florida.
2905. Acting under influence of passion aroused by adequate provocation.
2906. Necessity of showing ability to kill.
2907. Sudden affray.
2908. Shooting at one and wounding another.
2909. Accidental shooting.
2910. Self-defense.
2910(1). Florida.
2910(2). Illinois.
2910(3). Indiana.
2910(4). Missouri.
2910(5). New Mexico.
2910(6). Oklahoma.
2910(7). Oregon.
2910(8). Texas.
2911. Same—Provocation by defendant.
2911(1). Alabama.
2911(2). Indiana.
2911(3). Kentucky.
2912. Same—Duty to retreat.
2912(1). Alabama.
2912(2). Indiana.
2912(3). Texas.
2913. Renewal of combat by defendant after attack by prosecuting witness has ceased.
2914. Defending against assault made by prosecuting witness to prevent defendant from seeing his child.
2915. Insulting words as justification.
2916. Fight by mutual consent.
2916(1). Indiana.
2916(2). Texas.
2917. Defending against intrusion into room or resisting arrest.
2918. Resistance by defendant of arrest in ignorance of official capacity of person making arrest.
2919. Wounding one while defending against assault by another.
2920. Shooting to alarm.
2921. Conviction of included offense.
2921(1). Kansas.
2921(2). Missouri.
2922. Conviction of aggravated assault.
2923. Conviction of common assault.
2923(1). Delaware.
2923(2). Missouri.
2923(3). Texas.

H. Justifiable or Excusable Homicide

1. *In General*

2924. What constitutes.
2924(1). Oklahoma.
2924(2). South Carolina.
2924(3). Virginia.

2. Accidental Homicide or Homicide by Misadventure

§ 2925. Nonliability for accidental killing.
2925(1). Alabama.
2925(2). Pennsylvania.
2925(3). Texas.
2925(4). West Virginia.
2926. What constitutes.
2926(1). Delaware.
2926(2). Kentucky.
2926(3). Oklahoma.
2926(4). Pennsylvania.
2926(5). Texas.
2926(6). Washington.
2927. Firing gun without intending to do so.
2927(1). Texas.
2927(2). West Virginia.
2928. Gun fired during struggle for its possession.
2928(1). Mississippi.
2928(2). Missouri.
2928(3). New Mexico.
2929. Accidental killing while attempting to compel deceased to leave defendant's premises.
2930. Firing gun to alarm trespasser or supposed trespasser.
2930(1). Delaware.
2930(2). Texas.
2931. Accidentally killing one person while defending against another.
2931(1). Kentucky.
2931(2). Texas.
2932. Killing with instrument not calculated to produce death.

3. Killing in Exercise of Authority or Duty

2933. Killing by officer in execution of legal process.
2933(1). Alabama.
2933(2). Oklahoma.
2934. Killing by officer in attempt to arrest deceased.
2934(1). Alabama.
2934(2). Kentucky.
2934(3). New Mexico.
2934(4). Oklahoma.
2934(5). South Carolina.
2935. Same—Duty of officer to give notice of purpose to arrest.
2936. Same—Duty of officer not to use unnecessary force.
2937. Killing by defendant while assisting in execution of legal process.
2938. Assault made by deceased while resisting arrest for breach of the peace.
2939. Killing of escaping prisoner by officer.
2940. Killing by officer of person attempting to rescue prisoner.
2940(1). Kentucky.
2940(2). North Carolina.
2941. Killing by private citizen while attempting to arrest deceased.

4. Killing in Self-Defense.

2942. General rule.
2942(1). United States.
2942(2). Alabama.
2942(3). Arizona.
2942(4). Arkansas.
2942(5). California.
2942(6). Delaware.
2942(7). Idaho.
2942(8). Illinois.
2942(9). Iowa.

2942(10). Kansas.
2942(11). Kentucky.
2942(12). Missouri.
2942(13). Nebraska.
2942(14). Ohio.
2942(15). Oklahoma.
2942(16). Oregon.
2942(17). South Carolina.
2942(18). South Dakota.
2942(19). Texas.
2942(20). West Virginia.

§ 2943. Right to kill in self-defense as based upon the law of necessity.
2943(1). Illinois.
2943(2). Missouri.
2943(3). South Carolina.
2943(4). Texas.

2944. Provocation of difficulty or aggression by defendant as affecting right to set up self-defense.
2944(1). Alabama.
2944(2). Arkansas.
2944(3). Florida.
2944(4). Georgia.
2944(5). Illinois.
2944(6). Kentucky.
2944(7). Louisiana.
2944(8). Missouri.
2944(9). New Mexico.
2944(10). Oklahoma.
2944(11). South Carolina.
2944(12). Tennessee.
2944(13). Texas.
2944(14). Virginia.
2944(15). Washington.

2945. Same—Seeking out deceased in his own home.

2946. Provoking of difficulty by defendant without intent to do serious bodily injury.

2947. Withdrawal by defendant after aggression.
2947(1). Arkansas.
2947(2). Georgia.
2947(3). Kentucky.
2947(4). Louisiana.
2947(5). Mississippi.
2947(6). Tennessee.

2948. Assault by deceased preceded by mutual insults.

2949. Duty not to choose path which is likely to lead to an anticipated combat.

2950. Killing in an attempt to secure an apology from deceased for insulting wife of defendant.

2951. Arming by defendant to protect himself against another than deceased.

2952. Killing in mutual combat.
2952(1). Alabama.
2952(2). Arkansas.
2952(3). Georgia.
2952(4). Kentucky.
2952(5). Texas.
2952(6). West Virginia.

2953. Killing in sudden brawl or quarrel.
2953(1). Arkansas.
2953(2). California.
2953(3). Kentucky.

§ 2954. Killing in mutual combat pursuant to previously formed design.
2955. Killing in quarrel provoked by defendant for such purpose.
2955(1). Georgia.
2955(2). Illinois.
2956. Provoking combat with design to use deadly weapon in emergency.
2957. Abandonment of mutual combat by defendant.
2957(1). Illinois.
2957(2). Texas.
2958. Homicide occurring in attempt by defendant to eject trespasser from his land.
2959. Right of one sought to be arrested to resist use of excessive force by officer.
2960. Killing in resisting excessive use of force to prevent defendant from committing a felony.
2961. Nature of assault by deceased and imminence of danger.
2961(1). United States.
2961(2). Alabama.
2961(3). Arkansas.
2961(4). Idaho.
2961(5). Illinois.
2961(6). Iowa.
2961(7). Kentucky.
2961(8). Mississippi.
2961(9). Missouri.
2961(10). Oklahoma.
2961(11). Oregon.
2961(12). Tennessee.
2961(13). Texas.
2961(14). Washington.
2962. Same—Assault with hand or fist.
2963. Right to kill to avoid great bodily harm.
2964. Fear of bodily injury less than felony.
2965. Belief by defendant in danger and reasonable cause for such belief as justification for killing.
2965(1). Alabama.
2965(2). Arkansas.
2965(3). Colorado.
2965(4). Delaware.
2965(5). Illinois.
2965(6). Indiana.
2965(7). Kentucky.
2965(8). Louisiana.
2965(9). Mississippi.
2965(10). Missouri.
2965(11). Nebraska.
2965(12). New Mexico.
2965(13). North Carolina.
2965(14). Oklahoma.
2965(15). Oregon.
2965(16). Pennsylvania.
2965(17). Texas.
2965(18). Washington.
2965(19). West Virginia.
2966. Necessity of belief of defendant in danger.
2966(1). Missouri.
2966(2). Texas.
2967. Necessity that belief in danger, and not spirit of revenge, should actuate defendant.
2967(1). Arizona.
2967(2). Georgia.
2967(3). Illinois.

§ 2968. Necessity of reasonable ground to apprehend danger to life.
2968(1). Alabama.
2968(2). Arkansas.
2968(3). Colorado.
2968(4). Connecticut.
2968(5). Delaware.
2968(6). Florida.
2968(7). Georgia.
2968(8). Idaho.
2968(9). Iowa.
2968(10). Michigan.
2968(11). Mississippi.
2968(12). Missouri.
2968(13). Montana.
2968(14). Nebraska.
2968(15). North Dakota.
2968(16). Ohio.
2968(17). Oklahoma.
2968(18). Oregon.
2968(19). South Carolina.
2968(20). Tennessee.
2968(21). Texas.
2968(22). Virginia.
2969. Necessity of overt act indicative of danger.
2969(1). Oklahoma.
2969(2). Virginia.
2969(3). West Virginia.
2970. Appearance of circumstances to defendant at time of killing as test of danger.
2970(1). Alabama.
2970(2). Arkansas.
2970(3). Kansas.
2970(4). Kentucky.
2970(5). Mississippi.
2970(6). Missouri.
2970(7). North Carolina.
2970(8). Oklahoma.
2970(9). South Carolina.
2970(10). South Dakota.
2970(11). Texas.
2970(12). Utah.
2970(13). Vermont.
2970(14). West Virginia.
2971. Condition of defendant's mind at very time of homicide.
2972. Matters considered in determining reasonableness of apprehension of defendant.
2972(1). Colorado.
2972(2). Delaware.
2972(3). Kentucky.
2972(4). Texas.
2973. Same—Effect of hostile demonstrations of companion of deceased.
2974. Same—Character of deceased for violence.
2974(1). Alabama.
2974(2). Missouri.
2974(3). Oklahoma.
2975. Same—Relative size and strength of parties.
2976. Prior difficulties with deceased and threats by him as bearing on reasonableness of apprehension of danger.
2976(1). Arkansas.
2976(2). Delaware.
2976(3). Georgia.
2976(4). Mississippi.

2976(5). Missouri.
2976(6). Oklahoma.
2976(7). Texas.
§ 2977. Same—Threats in presence of defendant.
2978. Same—Threats communicated by others.
2978(1). Missouri.
2978(2). Texas.
2979. Same—Communication of alleged threats not actually made.
2979(1). Texas.
2979(2). Virginia.
2980. Duty to retreat.
2980(1). Alabama.
2980(2). Arkansas.
2980(3). California.
2980(4). Colorado.
2980(5). Delaware.
2980(6). Iowa.
2980(7). Kansas.
2980(8). Louisiana.
2980(9). North Carolina.
2980(10). Oklahoma.
2980(11). Oregon.
2980(12). South Carolina.
2980(13). South Dakota.
2980(14). Texas.
2980(15). Vermont.
2980(16). Wisconsin.
2981. Same—Duty as dependent on whether peril will be increased.
2982. Duty to retreat where one attacked in his own home or on his own premises.
2982(1). Alabama.
2982(2). Connecticut.
2982(3). Florida.
2982(4). Oklahoma.
2982(5). South Carolina.
2982(6). West Virginia.
2983. Right to arm in anticipation of attack.
2983(1). Mississippi.
2983(2). Missouri.
2983(3). Oklahoma.
2983(4). Texas.
2984. Right to strike in anticipation of attack.
2985. Duty not to use greater force to repel attack than reasonably appears to be necessary.
2985(1). Arkansas.
2985(2). California.
2985(3). Colorado.
2985(4). Delaware.
2985(5). Iowa.
2985(6). Kansas.
2985(7). Louisiana.
2985(8). Missouri.
2985(9). Ohio.
2985(10). Oklahoma.
2985(11). Texas.
2985(12). Washington.
2985(13). West Virginia.
2986. Same—Continuing combat after disabling deceased.
2986(1). Arkansas.
2986(2). Texas.

§ 2987. Right of pursuit in self-defense.
2987(1). California.
2987(2). Texas.
2988. Killing of one coming to assistance of another who is attacking defendant.
2989. Commission of other offense as affecting right of self-defense.
2990. Consistency of defenses of insanity and of self-defense.

5. *Killing in Defense of Another*

2991. Right to kill in defense of another.
2991(1). Kentucky.
2991(2). Nevada.
2991(3). Texas.
2992. Defense of relative or member of family.
2992(1). Arkansas.
2992(2). Kentucky.
2992(3). Michigan.
2992(4). Oklahoma.
2992(5). Texas.
2993. Defense of wife.
2993(1). Iowa.
2993(2). Oklahoma.
2994. Defending against rape of female relative.
2995. Killing by another in defense of defendant at advice of latter.
2996. Killing by defendant pursuant to previously formed design.
2997. Necessity of reasonable apprehension of danger to person defended.
2998. Matters considered in determining necessity of killing.
2999. Same—Threats of deceased.
3000. Assault provoked by person defended.
3001. Duty to use no more force than necessary.

6. *Other Matters Excusing or Justifying Homicide*

3002. Defense of home or dwelling house.
3002(1). Arkansas.
3002(2). Florida.
3002(3). Illinois.
3002(4). Kentucky.
3002(5). Minnesota.
3002(6). Missouri.
3002(7). South Carolina.
3002(8). Texas.
3002(9). Washington.
3002(10). West Virginia.
3003. Same—What constitutes home or dwelling house.
3004. Killing in attempt to eject deceased from premises of defendant.
3004(1). Iowa.
3004(2). Texas.
3005. Killing in attempt to prevent commission of crime.
3006. Killing to prevent theft.
3007. Right to kill in defending against attempted rape.
3008. Taking life in preservation of peace in place of business of defendant.
3009. Killing of deceased in resisting his attempt to enter home of another to see child of deceased.
3010. Killing to escape arrest.
3011. Resistance by accused of arrest without warrant.
3011(1). Alabama.
3011(2). West Virginia.
3012. Killing in defense of property or in resisting attempted trespass by deceased.
3012(1). Mississippi.

3012(2). Oklahoma.
3012(3). Texas.
§ 3013. Homicide in defending rightful possession of land.
3014. Killing under erroneous belief that deceased is stealing property of defendant.
3015. Bad reputation of deceased or character of deceased for violence.
3015(1). Alabama.
3015(2). Georgia.
3015(3). Oklahoma.
3016. Threats of deceased as justification for killing.
3016(1). Alabama.
3016(2). Missouri.
3016(3). West Virginia.
3017. Provocation as justifying or excusing homicide.
3018. Insulting words and conduct.
3018(1). Missouri.
3018(2). Nevada.
3018(3). Oklahoma.
3019. Unfaithfulness of deceased as wife of defendant.
3020. Justification on ground of duress.

I. Pleading and Proof

3021. Proof of name of deceased as alleged.
3022. Included offenses.
3022(1). Alabama.
3022(2). Louisiana.
3022(3). Nebraska.
3022(4). Oregon.

J. Evidence

3023. Presumptions and burden of proof—Perpetrator of crime.
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A. IN GENERAL

§ 2782. What constitutes homicide and the different grades thereof

§ 2782(1). Colorado

You are instructed that the prisoner at the bar is charged in the indictment with murder of ——— on the ——— day of ——— last, in this county. Under this indictment you may find the prisoner guilty of murder as charged in the indictment, which will subject him to imprisonment in the penitentiary for and during his natural life; or you may find him guilty of murder with premeditation and deliberation, the penalty of which is death. If the evidence will not warrant a verdict of murder you may find him guilty of manslaughter, the punishment for which offense is imprisonment in the penitentiary for a term not exceeding ——— years; or if you find the prisoner acted in necessary self-defense you may find him not guilty. Your verdict, whatever it shall be, must be the result of a careful consideration and comparison of all the evidence before you, and an intelligent and conscientious application of the facts to the law of the case.[1]

§ 2782(2). Oklahoma

You are instructed that homicide is the killing of one human being by another. Homicide is either murder, manslaughter in the first degree, manslaughter in the second degree, excusable homicide, or justifiable homicide. You are instructed that there is no evidence in this case showing, or tending to show, that the homicide in this case is manslaughter in the second degree, and that degree of homicide will not be defined to you, further than to say that it is certain kinds of negligent, but unintentional, killings. You are further instructed that there is no evidence in this case showing, or tending to show, that the homicide in this case was excusable homicide, and that degree of homicide will not be defined to you further than to say that it is a certain kind of accidental killings.[2]

[1] May v. People, 6 P. 816, 8 Colo. 210.

[2] McDaniel v. State, 127 P. 358, 8 Okl. Cr. 209.

§ 2782(3). South Carolina

The court instructs the jury that in every homicide the first inquiry is, of course, Did the deceased party come to his or her death at the hand of the party charged? Sometimes this is a matter of painful investigation, but in this instance you are relieved from any further inquiry into that fact, because it is not denied that the deceased came to his death at the hands of the defendant, the prisoner at the bar. Then your inquiry will be, What was the nature of that killing? A man has been killed, a citizen has had his life taken, and you are called upon to inquire what was the nature of that killing. Was it a crime? If it was not a crime, the defendant will go acquitted at your hands. If it was a crime, what was the nature of that crime? Every homicide is either justifiable, excusable, or felonious.[3]

You are instructed that the only kind of homicide that the law punishes is called felonious, and that is of two classes; one is murder, and the other manslaughter. Murder is the killing of a person with malice aforethought, expressed or implied. Manslaughter is the unlawful killing of a person without malice—without malice expressed or implied. It is also defined to be a killing upon sudden heat and passion and upon provocation. That is a familiar definition of manslaughter.[4]

§ 2782(4). West Virginia

The court instructs the jury that in the indictment in this case there is charged murder of the first degree, murder of the second degree, voluntary manslaughter, involuntary manslaughter, and assault and battery. Murder of the first degree is punished in this state by death or confinement in the penitentiary for life. Murder of the second degree is punished by confinement in the penitentiary not less than ——— nor more than ——— years. Voluntary manslaughter is punished by confinement in the penitentiary not less than ——— nor more than ——— years. Involuntary manslaughter and assault and battery are misdemeanors, and punished by confinement in jail, or fine, or both.[5]

§ 2783. Intent to kill

§ 2783(1). Indiana

The jury are instructed that, if you find from the evidence that the defendant, administered to the deceased cantharides for the purpose of exciting her sexual passions, and thereby and by means thereof enabling him more easily to have sexual intercourse with her, and death resulted from such administration, and such drug

[3] State v. Bodie, 11 S. E. 624, 33 S. C. 117.

[4] State v. Bodie, 11 S. E. 624, 33 S. C. 117.

[5] State v. Dodds, 46 S. E. 228, 54 W. Va. 289.

was so administered by said defendant without any intention or purpose to kill the said deceased, then, under that state of facts, you cannot find the defendant guilty of murder.[6]

§ 2783(2). Texas

You are instructed that, in all cases of homicide, the law requires as an element of guilt an intent to kill; and if, in this case you find that defendant did not, when he struck ——— (if you find he did strike him), intend to kill him, then you should acquit him of all grades of homicide, and inquire only as to whether he is guilty of an aggravated assault.[7]

§ 2784. Necessity of showing motive

§ 2784(1). United States

You are instructed that by the term "implied malice" is meant that in the case charged the evidence shows that the party charged committed the act, and that it was intentional and unlawful, that is, without justifiable excuse, and the evidence fails to reveal the motive why the person committed the act. In that state of case the law attaches or implies malice to the nature of the act done; that is, the taking of human life without justifiable excuse. Where the evidence fails to show that it was done upon express malice, yet it shows that the party charged intentionally did the act without lawful excuse, malice is inferred, although the evidence may not disclose any motive whatever, and therefore if the killing was intentional and without justifiable excuse, although no motive is shown for it, the party would be guilty of murder and should be convicted therefor, unless excused upon the ground of insanity or the want of mental capacity to form a criminal intent. Therefore in this case it is not material, so far as the question of guilt or innocence is concerned, that the evidence fails to show any motive for the killing, because if the killing was intentional and was not justifiable, the law implies the criminal intent, and, unless rebutted by testimony, would justify a conviction, provided the evidence shows that the party charged had sufficient mental ability to be held responsible for his acts.[8]

§ 2784(2). California

You are instructed that the evidence or nonevidence of a motive for the commission of the crime charged in this case is an important question of fact which must be considered by you with all of the evidence in this case as a circumstance tending to show the guilt or innocence of the accused. The failure of a proof of motive, if

[6] Bechtelheimer v. State, 54 Ind. 128.

[7] Danforth v. State, 69 S. W. 159, 44 Tex. Cr. R. 105.

[8] Hotema v. U. S., 22 S. Ct. 895, 186 U. S. 413, 46 L. Ed. 1225.

there has been such a failure in this case, is a circumstance in favor of the innocence of the defendant; and, if you find upon a careful examination of all the evidence that it fails to show any motive, cause, or reason on the part of the defendant for the killing of the deceased, ———, if you find beyond a reasonable doubt that the said ——— was killed, then you must consider that fact in determining the guilt or innocence of the defendant. In criminal cases the proof of the moving cause is permissible, and oftentimes valuable, but it is never essential. Where the perpetration of the crime has been brought home to the defendant, the motive for its commission becomes unimportant. Evidence of motive is sometimes of assistance in removing doubt and completing proof which might otherwise be unsatisfactory, and that motive may be shown by positive evidence or gleaned from the facts and surroundings of the act. Then proof of the motive becomes a circumstance, but nothing more than a circumstance, to be considered by the jury, and its absence is equally a circumstance in favor of the accused, to be given such weight as the jury deems proper. But proof of motive is never indispensable in a criminal case.[9]

The jury are instructed that, if you are satisfied to a moral certainty and beyond a reasonable doubt that the crime of murder has been committed, and there is evidence sufficient to satisfy you to a moral certainty and beyond a reasonable doubt that defendant is guilty thereof, then the motive for its commission is unimportant and not material.[10]

§ 2784(3). Colorado

You are instructed that it is not indispensable to a conviction that a motive for the crime appear.[11]

§ 2784(4). Missouri

You are instructed that while, in a case of homicide, the jury may properly consider the motives which prompted the commission of the act itself, or the want of motive, if none be shown, and while want of motive in such a case is a circumstance in favor of defendant's innocence, to be considered by the jury, yet if you find in this case that no motive was shown, and you further find and believe beyond a reasonable doubt that the defendant shot and killed ———, then you should find the defendant guilty according to the instructions characterizing the various degrees of homicide hereinbefore set out, regardless of any want of proof of motive.[12]

You are instructed that, if you believe and find from the evi-

[9] People v. Wilson, 146 P. 1048, 26 Cal. App. 336.

[10] People v. Petruzo, 110 P. 324, 13 Cal. App. 569.

[11] Keady v. People, 74 P. 892, 32 Colo. 57, 66 L. R. A. 353.

[12] State v. Webb, 205 S. W. 187.

dence that it fails to show any motive on the part of the defendant to commit the crime charged against him, then this is a circumstance in favor of his innocence which you ought to consider in connection with all the other evidence in making up your verdict. And in order to ascertain a motive you should take into consideration all the evidence in reference to the associations and relations between the said ——— and the defendant, and their deportment toward each other, together with their surroundings, and all the other evidence in the case. But if, upon consideration of all the evidence, you believe and find that the defendant has committed the crime charged, then you should find him guilty, no matter whether any motive for the deed be apparent or not.[13]

The jury are instructed that while, in a case of homicide, the jury may properly consider the motive which prompted the commission of the act itself, or the want of motive, if none be shown, and while the want of motive, in such case, is a circumstance in favor of defendant's innocence, to be considered by the jury, yet if you find in this case that no motive was shown, and you further find and believe, beyond a reasonable doubt, that the defendant shot and killed his wife, as charged, then you should find the defendant guilty, regardless of any proof of motive.[14]

§ 2785. Subjects of homicide—Killing of new born babe

§ 2785(1). Florida

You are instructed that, the unlawful killing of a human being, when perpetrated from and with a premeditated design to effect the death of the person killed, is murder in the first degree. Upon the birth of a living child, that is, one that breathes and lives after its birth, it becomes and is a human being within the meaning of the law of murder, and it is as much a crime to kill a person that has just begun to live as to kill one that has lived for many years.[15]

You are instructed that if you believe from the evidence in this case beyond a reasonable doubt that the defendant was with child, and that on ———, or at any other time prior to the finding of the indictment, she was delivered of and gave birth to a child, and that such child was born, and that it lived for some period of time, no matter how short, and that the defendant, in this county and state, by and with her hands, by a choking, strangling, and pressure, killed the child, from and with a premeditated design to effect the death of said child, and that from and as a result of such choking, strangling, and pressure the child died, and not otherwise, then you should find the defendant guilty of murder in the first degree.[16]

[13] State v. Barrington, 95 S. W. 235, 198 Mo. 23.

[14] State v. Duestrow, 38 S. W. 554, 137 Mo. 44.

[15] Robinson v. State, 68 So. 649, 69 Fla. 521, L. R. A. 1915E, 1215, Ann. Cas. 1917D, 506.

[16] Robinson v. State, 68 So. 649, 69 Fla. 521, L. R. A. 1915E, 1215, Ann. Cas. 1917D, 506.

§ 2785(2). Texas

You are instructed that homicide is the destruction of the life of one human being by the act, agency, procurement, or culpable omission of another. The person upon whom homicide is alleged to have been committed must be in existence by actual birth; that is to say, the child must have been completely expelled from the body of the mother, and must thereafter have been alive, before the infliction of the injury alleged to have caused its death. As a preliminary inquiry in a case of this class, the jury must find (1) that the child in question was totally expelled alive from its mother's body; (2) that it lived in an independent existence after such expulsion; and (3) that its death was caused by violence inflicted upon its person by some other person after the commencement of such independent existence. If all these propositions are not found to be true beyond a reasonable doubt, then no further inquiry need be made.[17]

You are instructed that if you believe from the evidence, beyond a reasonable doubt, that E. K., in ——— county, state of ———, on or about the ——— day of ———, did give birth to a child; that said child, if any, was born alive, and in existence, by actual and complete birth, as explained to you in the foregoing paragraphs of this charge; and if you believe from the evidence, beyond a reasonable doubt, that the said E. K. did, on or about said time, in said county of ———, state of ———, with express malice aforethought, and after said birth, if any, with a sedate and deliberate mind and formed design to kill by strangling, smothering, or suffocating, kill said child; and if you further believe from the evidence, beyond a reasonable doubt, that the defendant was then and there present, and knew the unlawful intent of said E. K., if her intent was unlawful, and did then and there aid by acts or encourage by words or gestures the said E. K., in taking the life of said child, if she did take it—then you will find the defendant guilty of murder in the first degree, and so state in your verdict, and assess his punishment at death, or by confinement in the penitentiary for life, at your discretion.[18]

B. Capacity to Commit Crime

§ 2786. Insanity as defense

Matters considered in determining issue of sanity, see post, § 3059.
Expert testimony on issue of sanity, see post, § 3060.

§ 2786(1). Arkansas

Gentlemen of the jury, counsel for defendant interposes the defense of insanity, and this is a defense which the law recognizes.

[17] Cordes v. State, 112 S. W. 943, 54 Tex. Cr. R. 204.

[18] Red v. State (Cr. App.) 53 S. W. 618.

Where an accused is on trial for murder in the first degree and the state proves the killing under circumstances that would constitute murder in the first degree, if the homicide was committed by a sane person, then if the killing is admitted and insanity is interposed as a defense, such defense cannot avail, unless it appears from a preponderance of the evidence: First, that at the time of the killing the defendant was under such a defect of reason from disease of the mind as to not know the nature and quality of the act he was doing; or, second, if he knew it, that he did not know he was doing what was wrong; or, third, if he knew the nature and quality of the act and knew it was wrong, that he was under such distress of mental disease as to be incapable of choosing between right and wrong as to the act done, and unable, because of the disease, to resist the doing of the wrong act, which act was the result solely of his mental disease.[19]

§ 2786(2). Florida

The jury are instructed that the true test of criminal responsibility, when the defense of insanity is interposed, is whether the accused had sufficient use of his reason to understand the nature and consequences of the act with which he is charged, and to understand that it was wrong for him to commit it; that, if this was the fact, he was criminally responsible for it, whatever peculiarity may be shown about him in other respects. On the other hand, if his reason was so defective, in consequence of mental disorder, that he could not understand what he was doing, or that what he was doing was wrong, he ought to be treated as an irresponsible person, and acquitted.[20]

§ 2786(3). Georgia

The jury are instructed that, if a man has capacity and reason sufficient to enable him to distinguish right and wrong as to the particular act in question, if he has knowledge and consciousness that the act he is doing is wrong, and will deserve punishment, he is, in the eye of the law, of sound mind and memory, and therefore criminally responsible for his acts.[21]

§ 2786(4). Illinois

The jury are instructed that if, from all the evidence in the case, you believe beyond a reasonable doubt that the defendant committed the crime of which he is accused in manner and form as charged in the indictment, and that at the time of the commission of such crime the defendant knew that it was wrong to commit it, and was mentally capable of choosing either to do or not to do the act or

[19] Diggs v. State, 190 S. W. 448, 126 Ark. 455.

[20] Davis v. State, 32 So. 822, 44 Fla. 32.

[21] Humphreys v. State, 45 Ga. 190.

acts constituting such crime, and of governing his conduct in accordance with such choice, then it is your duty under the law to find him guilty, even though you should believe from the evidence that at the time of the commission of the crime he was not entirely and perfectly sane, or that he was greatly excited or enraged, or under the influence of intoxicating liquor.[22]

§ 2786(5). Iowa

The jury are instructed that the nature, character, and degree of insanity which exonerates a party from criminal responsibility is not easily explained or understood. It is not necessary that it should be shown by the evidence that the defendant, at the time of the commission of the act, did not know right from wrong, as to her acts in general. The inquiry must be directed to the act charged. If you believe from the evidence that the defendant's act in shooting ——— (if she did shoot him) was caused by mental disease or unsoundness, which dethroned her reason and judgment with respect to that act, which destroyed her power rationally to comprehend the nature and consequences of the act, and which, overpowering her will, inevitably forced her to its commission, then she is not in law guilty of any crime, and your verdict as to her should be, "Not guilty." But if you believe, from all the evidence and circumstances in the case, that she was in the possession of a rational intellect or sound mind, and from some real or fancied injury she allowed her passion to escape control, then, though passion or revenge may, for the time, have driven reason from its seat and usurped it, and urged the defendant, with a force at the moment irresistible, to desperate acts, she cannot claim for such acts the protection of insanity, and she is guilty. The practical question for you to determine from all the evidence is whether passion and revenge, or insanity, was the ruling force and controlling agency which led to the commission of this act. If you believe that the shooting was the direct result or offspring of insanity, you should acquit; if of passion or revenge, you should convict. You should indulge in no prejudice against the defense, but give it thoughtful, thorough, and dispassionate consideration, and yet the interests of society and the welfare of the state demand that this defense ought not to be regarded as sufficient to exculpate, unless you believe from the evidence that the propensity to commit the act existed in such violence as to subjugate the intellect, control the will, and render it impossible for the defendant to do otherwise than to yield to the insane impulse. In other words, it should appear, not only that the mind of the accused was insane, but

[22] Dunn v. People, 109 Ill. 635.

that the act for which she is indicted was the direct offspring of such insanity. This being shown, responsibility is annulled, but not otherwise.[23]

§ 2786(6). Kentucky

You are instructed that, if you believe from the evidence that at the time defendant shot and killed ——— he was without sufficient mind or reason to know what he was doing, or had not sufficient mind or reason to know right from wrong, or that as a result of mental unsoundness he had not then sufficient will power to govern his actions by reason of some insane impulse which he could not resist or control, you will find the defendant not guilty, because of insanity. The law, however, presumes every man sane until the contrary is shown by the evidence, and before the defendant can be excused on the ground of insanity, you must believe from the evidence that the defendant, at the time of the killing of ———, was without sufficient mind or reason to know what he was doing, or had not sufficient mind or reason to know right from wrong, or that as a result of mental unsoundness he had not then sufficient will power to govern his actions by reason of some insane impulse which he could not resist or control.[24]

The court instructs the jury that, although they may believe from the evidence, beyond a reasonable doubt that the defendant shot and killed the deceased, ———, yet, if they further believe from the evidence that at the time of the killing the defendant was of unsound mind, then they should acquit him.[25]

The court further instructs the jury that the law presumes every man sane until the contrary is shown by the evidence, and before the defendant can be excused on the grounds of insanity the jury must believe from the evidence that the defendant at the time of the killing was without sufficient reason to know what he was doing, or had not sufficient reason to know right from wrong, or that, as the result of mental unsoundness, he had not then sufficient will power to govern his action by reason of some insane impulse which he could not resist or control.[26]

§ 2786(7). Maine

The jury are instructed that, to establish the proposition that he was insane in the legal sense, and therefore not criminally responsible, the respondent must prove that at the time of doing the act he was afflicted with mental disease of such character or extent that he had not then the mental capacity sufficient to distinguish

[23] State v. Stickley, 41 Iowa, 232.

[24] Hall v. Commonwealth, 159 S. W. 1155, 155 Ky. 541.

[25] Miracle v. Commonwealth, 146 S. W. 1136, 148 Ky. 453.

[26] Mathley v. Commonwealth, 86 S. W. 988, 120 Ky. 389, 27 Ky. Law Rep. 785; Abbott v. Commonwealth, 55 S. W. 196, 107 Ky. 624, 21 Ky. Law Rep. 1372.

between right and wrong as to the particular act he was doing; or, in other words, that he had not knowledge, consciousness, or conscience enough to know that the act he was doing was wrong and criminal, and one for which he would be liable to punishment; or, in still other words, that he was so afflicted by mental disease as not to know the nature and quality of the act he was doing, or, if he did know that much, he yet did not know that the act was unlawful and wrong. If he does prove that much, it establishes the proposition that he was legally unsound; insane, in the legal sense.[27]

The jury are instructed that, whatever was the character or extent of his mental disease, if any he had, if he yet had sufficient mental capacity to understand and know the situation, to understand and remember the nature and quality of the act he was doing, that it was unlawful and wrong, he was not then "insane," in the legal sense of that term.[28]

The jury are instructed that he must show, then, first, the existence at that time of some mental disease; secondly, that the disease was of such character or extent that it deprived him at that time of the usual mental capacity necessary to understand the nature and quality of the act he was doing, its character and consequences; in other words, the mental capacity to distinguish between right and wrong as to that particular act. He must show the connection between a mental disease, if there was one, and this unhappy result by the reduction of his mental capacity to the state which I have described. If both are shown, namely, the existence of the mental disease and its extent to the point I have described, then he was insane in the legal sense, and the killing was simply the unfortunate result of mental disease; otherwise, the killing must be held to be the result of the man's vicious acts, for which he is responsible.[29]

§ 2786(8). Michigan

The jury are instructed that, if you find that the respondent on the night of the shooting was laboring under such a defect of mind and reason as not to know the nature and quality of the acts he was doing, and was incapable of forming a criminal intent, he cannot be convicted of the offense charged.[30]

§ 2786(9). Missouri

The jury are instructed that insanity is a physical disease located in the brain, which disease so perverts and deranges one or more of the mental and moral faculties as to render the person

[27] State v. Knight, 50 A. 276, 95 Me. 467, 55 L. R. A. 373.

[28] State v. Knight, 50 A. 276, 95 Me. 467, 55 L. R. A. 373.

[29] State v. Knight, 50 A. 276, 95 Me. 467, 55 L. R. A. 373.

[30] People v. Muste, 100 N. W. 455, 137 Mich. 216.

suffering from this affliction incapable of distinguishing right from wrong in reference to the particular act charged in the indictment, and incapabe of understanding at the time the particular act in question was a violation of the laws of God and society; wherefore the court instructs the jury that if they believe and find from the evidence that at the time the defendant killed the deceased, if they find he did kill him, as charged in the indictment, the defendant was so perverted and deranged in one or more of his mental or moral faculties, or was so afflicted with imbecility or weakness of mind, as to be incapable of understanding, at the moment of said killing, that such killing was wrong, and that he, the said defendant, at the time, was incapable of understanding that this act of killing was a violation of the laws of God and man, if the jury find he was so afflicted they should find him not guilty.[31]

You are instructed that insanity is interposed by the counsel of the defendant as an excuse for the charge set forth in the indictment. This defense, when established, is one the law recognizes; and should insanity be proven, by the evidence in the case, to the reasonable satisfaction of the jury, it would be the duty of the jury, in that event, to acquit the defendant altogether. Insanity is a physical disease, located in the brain, which disease so prevents and deranges one or more of the mental and moral faculties, so far as to render the person suffering from this affliction incapable of distinguishing right from wrong in reference to the particular act charged against him, and incapable of understanding that the particular act in question was the violation of the law of God and of society. Wherefore the court instructs the jury that, if they believe and find from the evidence that at the time he did the killing charged in the indictment the defendant was so perverted and deranged in one or more of his mental and moral faculties as to be incapable of understanding at the moment he killed ——— that such killing was wrong, and that he (the defendant) at the time was incapable of understanding that this act of killing was a violation of the laws of God and of society, if the jury find he was so insane, they should find him not guilty. Insanity is either partial or general. General alienations always excuse. Partial insanity does not always excuse. One may be partially insane, and yet be responsible for his criminal act. The law does not excuse unless the derangement is so great that it actually renders the person incapable, at the time of its commission, of distinguishing between right and wrong in the particular act charged and proved against him.[32]

[31] State v. Palmer, 61 S. W. 651, 161 Mo. 152.

[32] State v. Duestrow, 38 S. W. 554, 137 Mo. 44.

The court further instructs you that you must determine from all the facts and circumstances proven in the case whether or not the defendant was sane or insane at the time of the killing of his wife. If you find from all the evidence that the defendant, at the time of the killing, had the capacity to distinguish between right and wrong, as to the particular act with which he stands charged; that he knew his act was criminal and wrong, and would deserve punishment,—then, in law, he had a criminal intent, and is not so far insane as to be exempt from responsibilities. On the other hand, if you find that at the time of the killing of his wife the defendant was insane, or of unsound mind, from any disease or disorder of mind, and by reason thereof was not conscious of what he was doing when he fired the pistol at his wife; that he did not know the nature of the act he was about to commit, when he fired the pistol; that he did not know the act was criminal and would subject him to punishment; that he had no capacity to distinguish right from wrong, as to the act with which he is charged, or that he was impelled by an insane impulse, and his powers were so impaired by disease that he could not refrain from doing the act—then the defendant is not responsible in law, and you should find him not guilty.[33]

§ 2786(10). Montana

You are instructed that if, from all the evidence in the case, you believe beyond a reasonable doubt that the defendant committed the crime of which he is accused in manner and form as charged in the information, and that at the time of the commission of such crime the defendant knew that it was wrong to commit such crime, and was mentally capable of choosing either to do or not to do the act or acts constituting such crime, and of governing his conduct in accordance with such choice, then it is your duty, under the law, to find him guilty, even though you should believe from the evidence that at the time of the commission of the crime he was not entirely and perfectly sane.[34]

§ 2786(11). Nebraska

You are instructed that the defendant in this case interposes the defense of insanity, or an aberration of the mind claimed to arise from overheating or sunstroke or epilepsy. Such a defense

[33] State v. Duestrow, 38 S. W. 554, 137 Mo. 44. The last clause in the above instruction, with respect to an "insane impulse," is perhaps subject to criticism, in that it seems to imply that, if defendant was unable, because of the impairment of his powers through disease, to refrain from doing the alleged criminal act, he would not be responsible therefor, although he might know it to be wrong, and this doctrine does not obtain in this jurisdiction. See State v. Riddle, 150 S. W., 1044, 245 Mo. 451, 43 L. R. A. (N. S.) 150, Ann. Cas. 1914A, 884.

[34] State v. McGowan, 93 P. 552, 36 Mont. 422.

is a legal and proper one, one recognized by the law, and the evidence relating thereto should be viewed by the jury and weighed the same as any other evidence should be which tends to establish any other defense known to and recognized by the law. If the accused in this case was at the time of the act charged laboring under an aberration of the mind to such a degree that he was unconscious of his acts, so much so that his intellectual powers were obliterated to that extent that he had no will, no purpose, no consciousness of right or wrong in respect to the particular act charged, then a great wrong would be done him to find him guilty of the offense charged; on the other hand, if he had will, purpose, intelligence, consciousness of right and wrong in respect to the particular act charged, and such is established by the evidence, as well as his guilt of the offense charged, then you should convict defendant.[85]

§ 2786(12). Oklahoma

You are instructed that the law presumes every person to be sane and of sound mind, and able to distinguish right from wrong as applied to any particular act, and to understand the nature and consequences of such act, until a reasonable doubt of his or her sanity is raised by competent evidence, and that it is an essential ingredient of crime that a person, to be guilty of a crime, must have, at the time of its commission, sufficient mental capacity and reason to enable him to distinguish between right and wrong as applied to the particular act that he or she is then about to do. Although one may be in a diseased or unsound condition of mind brought about by any condition, such as brooding over wrongs done to him, either real or imaginary, or produced by any other cause, if at the time he commits a crime he knows and understands the nature and character of such act and its consequences, and at that time knows that it is wrong and criminal to commit such act, and has sufficient mind to apply that knowledge to his own acts, and to know that if he does commit such acts he will do wrong, and subject himself to punishment, then and in that event such diseased or unsound condition of mind is not sufficient to exempt or exonerate him from criminal liability. So in this case, although the jury may believe from the evidence beyond a reasonable doubt that at the time of the commission of the crime charged in the information, if they believe and find she did commit it as charged, still if they further find and believe from the evidence beyond a reasonable doubt that at the time said crime was committed the defendant had sufficient mind and reason to know and distinguish right from wrong, and that if she did commit such crime it would be

[85] Hamblin v. State, 115 N. W. 850, 81 Neb. 148, 16 Ann. Cas. 569.

in violation of the law and subject her to punishment, and to know and realize the consequences of such an act, and had mind sufficient to apply that knowledge to the consequences of her own act, then and in that event she cannot escape criminal liability under her plea of insanity, and the jury should find her guilty as charged in the information and fix her punishment accordingly.[36]

The jury are instructed that homicide committed by one who has not sufficient knowledge and understanding to understand right from wrong, and to comprehend and understand the consequences of his act, is excusable for any act in reference to which his mind is in such weakened condition. But it is not every derangement of the mind that will excuse one for the commission of crime. If one has sufficient mind and understanding to know right from wrong regarding the particular act, and is able to comprehend and understand the consequences of such act, the law recognizes him as sane, and holds him responsible for such acts; and, in this connection, if you should find beyond a reasonable doubt that the defendant took the life of ———, as charged in the indictment, and that at the time of such homicide he knew and understood that it was wrong to take her life, and was able to comprehend and understand the consequences of such act, then and in that event it will be your duty to find the defendant guilty of murder, as charged in the indictment. But on the other hand, if you should find that he was not able to know that the act of taking her life was wrongful, and was not able to comprehend and understand the consequences of such act, then you should find the defendant not guilty.[37]

§ 2786(13). Oregon

The jury are instructed that, where the commission of the act charged as a crime is proven, and the defense sought to be established is the insanity of the defendant, the same must be proven beyond a reasonable doubt. If a party, notwithstanding some disease or infirmity, still has reason enough to know the act which he proposes to commit is wrong and unlawful, and knows its nature and quality, and has left the power of deliberation and premeditation, and the power to do or refrain from doing the act charged as a crime, such mental disease will not avail as a defense. In other words, while the law will not punish a man for an act which is the result of or produced by mental weakness, it will punish him for an unlawful act, not the result of, or produced or influenced by, mental disease, even though some mental unsoundness is shown to have existed.[38]

[36] Roe v. State (Cr. App.) 191 P. 1048.

[37] Queenan v. Territory, 71 P. 218, 11 Okl. 261, 61 L. R. A. 324.

[38] State v. Branton, 56 P. 267, 33 Or. 533.

§ 2786(14). Texas

You are instructed that one of the defenses relied on in this case is that of insanity, and upon this issue you are instructed as follows: The law does not hold a man responsible for an act committed by him when insane, and it is not necessary that the insanity should be permanent or that the person should have been a raving maniac at the time of the commission of the act in order to absolve the party from the punishment prescribed by law. It is sufficient to absolve such person if it is shown that he was insane at the time of the commission of the act, though it may be shown that such person was at other times sane. On the other hand, the fact that a person may at times have been insane, or may have had an impaired mind, is not sufficient to absolve such person from the punishment prescribed by law for the commission of an act, if it was committed by him during a lucid interval. Again, the law does not require, as the condition on which criminal responsibility shall follow the commission of crime, the possession of one's faculties in full vigor or a mind unimpaired by disease or infirmity. The mind may be weakened or impaired, and yet the person be criminally responsible for his acts. He can discharge himself from responsibility only by proving that his intellect was so disordered that at the time he committed the act he did not know the nature and quality of the act he was doing and that it was an act which he ought not to do. On the other hand, if at the time of the commission of the act he had sufficient intelligence to know what he was doing and the will power to do or not to do same, in contemplation of the law he is responsible for the act he has committed. In other words, to free a person from criminal responsibility for an act committed by him on the ground of insanity, his mind at the time of the commission of the act must be in such an impaired and unsound state as to create an uncontrollable impulse to do the act by overriding the reason and judgment and obliterating the sense of right and wrong, and depriving such person of the powers of choosing between right and wrong as to the particular act done. A man may be laboring under partial insanity, but, if he still understands the nature and character of his act and its consequences, if he has a knowledge that it is wrong and criminal, and mind sufficient to apply that knowledge to his own case, and know that if he does the act he will do wrong and will receive punishment, such partial insanity is not sufficient to exempt him from responsibility for his criminal act. Where, in a criminal case, the defendant relies upon insanity as a defense, the burden of proof is upon him to establish by a preponderance of the evidence that at the very time of the commission of the act he was insane to the degree set forth in the preceding instructions, as every person is presumed to be sane until the contrary is shown. Therefore, if you believe from

the evidence beyond a reasonable doubt that the defendant did kill ——— by shooting him with a pistol as charged in the indictment, but if you further believe from a preponderance of the evidence that at the very time he committed the act the defendant's mind was in an impaired and unsound state to such a degree that for the time being it overwhelmed the reason, conscience, and judgment, and that the defendant in killing said ——— acted from an uncontrollable and irresistible impulse produced by such impaired and unsound condition of his mind that deprived him of a knowledge of the right and wrong as to the killing, you will find him not guilty, and, if you acquit him on the ground of insanity, you will so state in your verdict, the form of which should be: "We, the jury, acquit the defendant on the ground of insanity." [39]

§ 2786(15). Wisconsin

The jury are instructed that insanity means such a perverted and deranged condition of the mental and moral faculties as to render a person incapable of distinguishing between right and wrong, or not conscious at the time of the nature of the act which he is committing.[40]

§ 2787. Irresistible impulse

§ 2787(1). Alabama

The court instructs the jury that if, by a preponderance of the evidence, the jury are satisfied that, at the time of the fatal encounter, defendant was afflicted with a mental disease, and that by reason of the duress of such mental disease he had so far lost the power to choose between right and wrong (although he may have known right from wrong as applied to the killing), and the alleged killing was so connected with such mental disease in the relation of cause and effect as to have been the product of it solely, the jury should acquit the defendant.[41]

The court instructs the jury that, if you believe from the evidence that defendant, at the time he fired the fatal shot, was acting under duress of a mental disease which destroyed his free agency, so that his power to resist killing ——— was at the time lost, and the killing was the offspring of such mental disease solely, you should acquit the defendant.[42]

§ 2787(2). California

I instruct you that the doctrine that in some forms of insanity the patient or sufferer knows the nature of his act fully, but at the

[39] Sartin v. State, 103 S. W. 875, 51 Tex. Cr. R. 571.

[40] Oborn v. State, 126 N. W. 737, 143 Wis. 249, 31 L. R. A. (N. S.) 966; Lowe v. State, 96 N. W. 417, 118 Wis. 641.

[41] Mizell v. State, 63 So. 1000, 184 Ala. 16.

[42] Mizell v. State, 63 So. 1000, 184 Ala. 16.

same time cannot prevent it, through paralysis of the will power, and which is sometimes known as uncontrollable or irresistible impulse, has no legal standing in this state, and is not a legal defense to crime.[43]

§ 2787(3). Georgia

The jury are instructed that if you find, from the evidence, that the mind of the defendant at the time of the assault was diseased, that by reason of such mental disease his will power was then impaired, that by reason of such impairment so caused he did not then have sufficient will power to refrain from committing the act, and that the act was the product of such mental disease, he was not responsible for the act, and it would be your duty to acquit him.[44]

§ 2787(4). Kentucky

The jury are instructed that if the defendant did shoot ———, but at the time he shot her the defendant did not have mental capacity sufficient to enable him to know and understand that it was wrong to shoot said ———, the defendant was of unsound mind; or, if the defendant did shoot said ———, but at the time he shot her the defendant was prompted to do such shooting by an impulse resulting from a diseased mind, of such violence that it overcame the will of the defendant, and constrained him to shoot said ——— when he did not wish to shoot her, the defendant was of unsound mind.[45]

The jury are instructed that, if the defendant did shoot ———, but at the time he did so the defendant had mental capacity sufficient to enable him to know right from wrong, and if at the time he had will power sufficient to enable him to choose between shooting and refraining from shooting said ———, the defendant was of sound mind; and if the defendant did shoot ———, but at the time he did so the defendant had mental capacity sufficient to enable him to know right from wrong, and if his mind was free from disease, then no impulse to shoot said ———, no matter how violent, and no matter how completely it dominated the will of the defendant, was unsoundness of mind.[46]

§ 2787(5). Michigan

The jury are instructed that if defendant knew right from wrong, and at the time of the act she had by mental disease so far lost the power to choose between right and wrong that her free will agency was at that time destroyed, and the criminal act was so connected with such mental disease as to have been the sole cause of it, then

[43] People v. McCarthy, 46 P. 1073, 115 Cal. 255.

[44] Wilson v. State, 70 S. E. 1128, 9 Ga. App. 274.

[45] McCarty v. Commonwealth, 71 S. W. 656, 114 Ky. 620.

[46] McCarty v. Commonwealth, 71 S. W. 656, 114 Ky. 620.

the respondent would not be responsible, and your verdict should not be guilty because of insanity. So, gentlemen, the question is not whether the respondent's mind was natural or unnatural. It is not whether her mental faculties were impaired or unimpaired. The only question is, if she administered morphine to those children with intent to cause their death, did she, at the time of doing it, know it was wrong to so kill them, and could she have refrained from doing it if she had chosen to do so? Now, evidence has been introduced here tending to show that the father and brother of this respondent committed suicide. Suicide, of itself alone, is not evidence of insanity. It may be considered together with other facts and circumstances in determining the question of sanity, and the question of insanity is to be considered in determining the question of responsibility for crime. A person may inherit from his ancestors a kind of insanity which would deprive him of the power to choose between right and wrong; and, if such a person is charged with crime, it is of the very greatest importance to ascertain such inherited tendency, to determine whether the person is responsible for the crime. On the other hand, a person may inherit from his ancestors an exceedingly gloomy, despondent temperament and disposition, and a tendency to fits of despondency and melancholy so deep and so protracted as to naturally lead to suicide; and such inherited tendency, though affecting the mind, and rendering it abnormal, would not, of itself, be evidence that the person did not know right from wrong, and was not responsible for taking the life of another. Now, if the respondent in this case, by reason of an abnormal desire to commit suicide, inherited from her ancestors, was unable to resist the impulse to do so, with knowledge of the wrong she was committing by killing the children, took their lives voluntarily because she did not wish to leave them living at her death, then she cannot avoid the responsibility because the crime was brought about by an inherited tendency to suicide.[47]

§ 2787(6). Pennsylvania

You are instructed that, in order to excuse one who has committed the crime of murder, on the ground of insanity, it must be shown by fairly preponderating evidence that at the time when he committed the act his mind was so affected by disease that he did not know the nature and consequence of his act, or if he did know the nature and consequence of it, then he did not know that was wrong and would be punished by law, or that he was so impelled by an impulse that he had no power whatever of resisting, and the burden of proof is upon him.[48]

[47] People v. Quimby, 96 N. W. 1061, 134 Mich. 625.

[48] Commonwealth v. Calhoun, 86 A. 472, 238 Pa. 474.

§ 2788. Temporary insanity

The jury are instructed that it is claimed by the defendant that in the first altercation between defendant and the ——— the defendant received blows on his head, thereby affecting his mental condition and rendering him irrational, and that during the time when the defendant went to his house and armed himself with the gun and returned to the barn with the gun in his hands and shot the deceased such irrational condition still existed, and that the defendant was laboring under mental aberration to such an extent that he did not realize what he was doing, and is therefore not responsible for his acts, and defendant was incapable of forming an intent. The law presumes mental capacity and responsibility unless the fact is proved otherwise by a preponderance of the evidence. If you believe from the evidence that the defendant, at the time the gun was discharged, was laboring under mental aberration to such an extent that he did not realize or comprehend his acts and was incapable of forming an intent, it is a defense for an act committed while in that condition, and in such event, if you so find, the defendant would not be guilty; but if you find from the evidence that the defendant knew and realized what he was doing, and was capable of forming an intent, then the defendant will be held responsible for his acts.[50]

§ 2789. Moral and emotional insanity

§ 2789(1). Arkansas

You are instructed that one who, in the possession of a sound mind, commits a criminal act under the impulse of passion or revenge, which may temporarily dethrone his reason, or for the time control his will, cannot be shielded from the consequences of his act by the plea of insanity; that insanity will only excuse the commission of a criminal act when it is made to appear affirmatively, by evidence fairly preponderating, that the person committing the act was insane.[51]

§ 2789(2). California

You are instructed that in our courts of law there is no such doctrine established or recognized as moral insanity distinguished from mental derangement, as an excuse for crime, and as an exemption from punishment therefor. There is no such type of insanity recognized in our courts, as, for instance, that a person may steal your property, burn your dwelling, murder or attempt to murder you, and know at the time that the deed is a criminal act, and wrong in itself, and deserves punishment, having the ability to correctly

[50] State v. Mitchell, 107 N. W. 804, 130 Iowa, 697.

[51] Diggs v. State, 190 S. W. 448, 126 Ark. 455.

reason on the subject, and yet be held guiltless, and not punishable, on the ground solely of a perversion of the moral sense.[52]

§ 2789(3). District of Columbia

The jury are instructed that, whatever may be the cry of scientific experts, the law does not recognize, but condemns the doctrine of emotional insanity; that a man may be sane up until a moment before he commits a crime, insane while he does it, and sane again soon afterwards. Such a doctrine would be dangerous in the extreme. The law does not recognize it, and a jury cannot, without violating their oaths.[53]

§ 2789(4). Wisconsin

You are instructed that moral or emotional insanity does not exempt a person from criminal responsibility. Mere moral insanity, or temporary frenzy or passion, arising from excitement or anger, and not from any mental disease, is not an excuse for crime.[54]

§ 2790. Insane delusions

§ 2790(1). United States

You are instructed that there is evidence in this case tending to show that defendant believed in witches, and that that was taught by the Bible, and had the belief that his people and tribe were being affected by witches, and that the deaths that were occurring in the neighborhood were due to the evil influence of witches, and that the party he slew was a witch. Upon this phase of the case you are instructed that if the evidence shows that the defendant believed in witches, and that it was the result of his investigation and belief as to what the Scriptures taught, and that he acted upon that belief, thinking he had the right to kill the party he is charged with killing, because he thought she was a witch, but at the time he knew it was a violation of human law and that he would be punished therefor, in that event it would not be an insane delusion upon the part of defendant, but would be an erroneous conclusion, and, being so, would not excuse him from the consequences of his act. And, also, if you further believe that he came to the conclusion from his investigation and understanding of the Scriptures that this party was a witch, and that the defendant also used spirituous liquors, and these two combined were the cause or causes that led him to the commission of the act, and that either or both of these were the sole inducement that caused him to do the act, he would not be guiltless and would be responsible therefor. Upon

[52] People v. McCarthy, 46 P. 1073, 115 Cal. 255.

[53] Taylor v. United States, 7 App. D. C. 27.

[54] Lowe v. State, 96 N. W. 417, 118 Wis. 641.

the other hand, I charge you that if you should find from the evidence in this case that the defendant believed that there were witches, and that he had a right to kill them, and if you further find that such belief was the product of a diseased brain, or if you have a reasonable doubt that such condition of brain existed at the time of the homicide, and that his act was the result of such diseased brain, you will acquit him. In this case you are to determine the following questions: (1) Was the defendant at the time he committed the homicide charged laboring under an insane delusion produced by an impaired brain, and did it go to the extent for the time being of controlling his will power, reflection, reason, and judgment, and was the homicide committed by reason of such insane delusion? If the proof has shown beyond a reasonable doubt that such was not the case, you will convict the defendant, but if there is a reasonable doubt as to such mental condition, you will resolve such doubt, in favor of the defendant, and acquit him. (2) Did defendant commit the homicide, not laboring under an insane delusion, but believing that by teachings of the Bible he had right to kill the party he did kill because he thought she was a witch, and at the time of such killing he performed the same solely upon such belief, and was not laboring under an insane delusion? If you believe this state of case existed, and so believe it beyond a reasonable doubt, you will find the defendant guilty as charged in this indictment, but if you have a reasonable doubt in regard thereto, you will acquit the defendant.[55]

§ 2790(2). Arkansas

The court instructs the jury that, even though you should believe from the evidence that the defendant was suffering from a delusion that his wife was too friendly with other men, and that defendant acted upon this delusion when he fired the fatal shot, yet this delusion would not justify the defendant in taking the life of his wife, nor excuse him from criminal responsibility, unless you further find from a preponderance of the evidence that the defendant at the time of the act was under such a defect of reason from disease of the mind as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know he was doing what was wrong, or if he knew the nature and quality of the act and knew that it was wrong, that he was under such duress of mental disease as to be unable because of the disease to resist the doing of the wrong act, which was the result solely of his mental disease.[56]

[55] Hotema v. U. S., 22 S. Ct. 895, 186 U. S. 413, 46 L. Ed. 1225.

[56] Hankins v. State, 201 S. W. 832, 133 Ark. 38, L. R. A. 1918D, 784.

§ 2790(3). Texas

You are instructed that, if the defendant entertained the insane delusion that the deceased had an "immediate design upon his life, or the life of his mother or brother, and acting under any such delusion killed the deceased, in the belief that it was necessary to save his own life, or the life of his mother or brother, he would not be guilty under the law, and in this case, unless the state has shown by evidence beyond a reasonable doubt that he did not entertain any such insane delusion at the time he killed the deceased (if he did kill her), you will find the defendant not guilty.[57]

§ 2791. Effect of dazed condition caused by sudden blow

You are instructed that, if you believe from the evidence that, at the time of the killing, the defendant was in pain and suffering from a painful injury inflicted upon his head a few minutes before by a blow received from a heavy club, sufficient to produce a dazed condition of mind, and impairing the reasoning faculties, judgment, and powers of perception of the defendant, then you should take such condition of the facts and circumstances into consideration in determining whether the defendant was guilty of murder or any criminal offense at the time he fired the shot resulting in the death of the deceased.[58]

§ 2792. Effect of insanity at time of trial

§ 2792(1). California

You are instructed that you are not to consider whether or not the defendant is insane at the present time, but you are to consider him as now sane. A person charged with crime cannot be legally tried for such crime unless he be sane at the time of the trial. The defendant has presented the issue to you that at the very time of the alleged commission of the homicide he was insane. As I have already told you, the burden of proving his insanity at that time rests upon him, because the law presumes he was then sane.[59]

§ 2792(2). Missouri

You are instructed that, if you find that the defendant was insane, and irresponsible from any disease or disorder of the mind, as explained in these instructions, when he committed the homicide, then you will find him not guilty; but, if you find at the time of the shooting he was not insane, but responsible for his acts, as explained in these instructions, and that he committed the crime as charged, then you will find him guilty, even though you may be-

[57] Witty v. State, 171 S. W. 229, 75 Tex. Cr. R. 440.

[58] People v. Worthington, 55 P. 396, 122 Cal. 583.

[59] People v. Donlan, 67 P. 761, 135 Cal. 489; People v. McCarthy, 46 P. 1073, 115 Cal. 255.

lieve and find from the evidence that he has become insane since the homicide and that he is now insane.[60]

§ 2793. Consideration of insanity on question of degree of crime

§ 2793(1). New Jersey

You are instructed that the insanity of the defendant cannot be used for the purpose of reducing his crime from murder in the first degree to murder in the second degree. If responsible at all in this respect he is responsible in the same degree as a sane man, and if he is not responsible at all, he is entitled to an acquittal in both degrees.[61]

§ 2793(2). Pennsylvania

Counsel suggest, or at least did in their opening—counsel for the prisoner—that they intended to give evidence on the question of the mental condition of the defendant, with the view of reducing the grade of the offense. It is difficult for me to see how it could properly have that effect. If, at the time this act was committed, the prisoner was insane, if he was in the condition of mind that would excuse the man because he was not conscious of the nature of the act, it would be then your duty to acquit him on that ground. It would be your duty to say that you did acquit him on that ground, because, if his mind was in the condition that he was not responsible for what he was doing, he would not be responsible for manslaughter any more than he would be for murder. The important thing for you, however, gentlemen, is to determine whether this prisoner, at the time he committed this offense, did it willfully, deliberately, and premeditately. If he did, he was guilty of murder in the first degree, unless you find that the state of his mind was such that at that time he was not conscious of the nature of the act, and therefore irresponsible. As we have already attempted to explain to you, gentlemen, if this prisoner was of unsound mind to such an extent that he was not conscious of the nature of the act he was committing, then you ought to acquit him on the ground of insanity.[62]

§ 2794. Effect of intoxication of accused

§ 2794(1). United States

Upon this matter you are instructed that the recent use of whisky would not be a defense in this case, and you are to take the evidence as a whole, not by piecemeal, but all the evidence introduced in this case upon both sides, and it is legitimate for you to consider the evidence above referred to in determining the question of wheth-

[60] State v. Crane, 100 S. W. 422, 202 Mo. 54.

[61] State v. Maioni, 74 A. 526, 78 N. J. Law, 339, 20 Ann. Cas. 204.

[62] Commonwealth v. Hollinger, 42 A. 548, 190 Pa. 155.

er or not defendant was insane at the time the homicide was committed, or whether he was impelled and caused to perform the act by reason of the liquor he had drunk, if any. What I intend for you to understand is this: If the evidence as a whole fails to show, beyond a reasonable doubt, that defendant was of sound brain, or at least to that extent that he knew right from wrong, and was capable of forming and carrying into execution a criminal intent, he would be entitled to be acquitted, no matter what amount of whisky he had drunk; but, in arriving at that conclusion, the jury are to look to all the evidence, and if, from all the evidence, they are satisfied that he slew ——— by reason of the whisky he had drunk, and not as a result of an insane delusion above referred to, in that event it would be your duty to convict the defendant; but if you have a reasonable doubt with regard to this matter, you will resolve it in favor of the defendant and acquit him.[63]

§ 2794(2). Illinois

The jury are instructed that, although it is the law in this state that a criminal offense consists in a violation of a public law, in the commission of which there must be a union or joint operation of act and intention, or criminal negligence, yet where, without intoxication, the law will impute to the act a criminal intent, as in the case of wanton killing without provocation, voluntary drunkenness is not available to disprove such intent.[64]

The jury are instructed that, if you believe from the evidence beyond a reasonable doubt each of the following propositions, to wit: That at about ——— hours before the alleged homicide defendant was sane, and had the power to abstain from drinking alcohol; that defendant then knew that the drinking of alcohol by him would have the effect to render him insane or crazy; that defendant, so knowing the effect of alcohol upon him, and being sane, and having the power to abstain from taking alcohol, did then and there voluntarily drink alcohol; that the alcohol so drank by defendant did then and there make him insane or crazy; that while insane or crazy from the effect of such alcohol, defendant committed the act charged in the indictment at the time and place and in the manner and form therein charged—then you should find defendant guilty.[65]

The jury are instructed that voluntary drunkenness is no excuse for crime.[66]

[63] Hotema v. U. S., 22 S. Ct. 895, 186 U. S. 413, 46 L. Ed. 1225.
[64] Upstone v. People, 109 Ill. 169.
[65] Upstone v. People, 109 Ill. 169.
[66] Kennedy v. People, 40 Ill. 488.

§ 2794(3). Indiana

The jury are instructed that a man with ordinary will power, which is unimpaired by disease, is required by law to govern and control his passions. If he yields to wicked passions, and purposely and maliciously slays another, he cannot escape the penalty prescribed by law, upon the ground of mental incapacity. That state of mind caused by wicked and ungovernable passions, resulting, not from mental lesion, but solely from evil passions, constitutes that mental condition which the law abhors, and to which the term "malice" is applied. The condition of mind which usually and immediately follows the excessive use of alcoholic liquors is not the unsoundness of mind meant by our law. Voluntary drunkenness does not even palliate or excuse.[67]

§ 2794(4). Iowa

The court instructs the jury that if the liquor which the defendant claims to have drank had merely inflamed his passion and caused him to be quarrelsome and abusive, while, at the same time, he was able to distinguish right from wrong, and knew at the time he was doing wrong, if he did assault ———, then drunkenness would be no defense.[68]

§ 2794(5). Kansas

You are further instructed that voluntary intoxication is no excuse for crime as long as the offender is capable of conceiving an intelligent design. If the case is otherwise made out beyond a reasonable doubt, he will be presumed to have intended the natural and probable consequence of his own act. Hence, in this case, if you find the defendant guilty of an assault with intent to kill as charged in the information, and that at the time he did so he was in a state of intoxication, caused by his voluntary action, he is guilty as charged, unless you further find that such intoxication was so extreme as to prevent his mind from the exercise of deliberation or premeditation, and from entertaining the intent and malice aforethought required by section ———, referred to in the instructions; and, if you find such to have been the condition of his mind, you cannot convict him of any offense higher than that defined by section ———, referred to in this instruction, and only then unless you believe him guilty beyond a reasonable doubt under said section ———, as defined more fully by other instructions herein.[69]

§ 2794(6). Kentucky

The court further instructs the jury that, although they may believe from the evidence that the defendant at the time of the killing

[67] Guetig v. State, 66 Ind. 94, 32 Am. Rep. 99.

[68] State v. Yates, 100 N. W. 1005, 132 Iowa, 475.

[69] State v. McCullough, 152 P. 766, 96 Kan. 453.

of ——— was without sufficient power to govern his action by reason of some impulse which he could not resist or control, yet if they further believe from the evidence that such lack of reason to know right from wrong, or such insufficient will power to govern his actions or to control his impulses, arose alone from voluntary drunkenness, but not from unsoundness of mind, they should not acquit the defendant on the grounds of insanity.[70]

§ 2794(7). Missouri

You are instructed that, if you believe and find from the evidence that the defendant, from any cause whatsoever had become insane and irresponsible, in law, as explained in the foregoing instructions, and that he was so insane and irresponsible at the time of the killing, by reason of any mental disease or disorder arising from any cause whatsoever, then you will find the defendant not guilty, although you may believe that the defendant killed his wife while he was intoxicated or drunk. Drunkenness is a species of insanity, and is attended with a temporary loss of reason and power of self-control. Drunkenness, however, is voluntary, brought on by the act of the party, while insanity proper is an affliction of Providence, for which the party affected is not responsible. Such insanity is a full and complete defense to a criminal charge. Drunkenness is none. Therefore, if you believe from the evidence that the defendant voluntarily made himself intoxicated, and, while so intoxicated, killed his wife in a fit of drunkenness or temporary insanity which was the result of that intoxication, then he is responsible, in law, for such killing, and you should so find.[71]

§ 2794(8). Nevada

The jury are instructed that, if you find that the defendants unlawfully and with malice aforethought, as already defined to you, killed the person designated as ———, it is murder and if such killing was willful, deliberate, and premeditated, or was done in the perpetration or attempts to perpetrate robbery, it is murder of the first degree, otherwise it is murder of the second degree; and in determining the degree, any evidence tending to show the mental status of the defendants is proper for the consideration of the jury. The fact, if it be a fact, that the defendants were drunk, does not render the act less criminal, and in that sense it is not available as an excuse, but there is nothing in this to exclude it as evidence upon the question as to whether the act was deliberate and premeditated or was committed in the carrying out of an intent to rob. Presumptively, every killing is murder, but so far as the degree is con-

[70] Mathiley v. Commonwealth, 86 S. W. 988, 120 Ky. 389, 27 Ky. Law Rep. 785; Wright v. Commonwealth, 72 S. W. 340, 24 Ky. Law Rep. 1838.

[71] State v. Duestrow, 38 S. W. 554, 137 Mo. 44.

cerned, no presumption arises from the mere fact of killing, considered separately and apart from the circumstances under which the killing occurred. The question is one of fact to be determined by the jury from the evidence in the case, and it is not a mere legal conclusion, and drunkenness, as evidence of a want of premeditation or of an intent to rob, is not within the rule which excludes it as an excuse. Drunkenness neither excuses the offense nor avoids the punishment which the law inflicts, when the character of the offense is ascertained and determined; but evidence of drunkenness is admissible solely with reference to the question of premeditation, or where there is evidence tending to show that a murder has been committed in the perpetration or attempt to perpetrate a robbery, as to the question of the existence of the felonious intent to steal which is an essential element of robbery. In cases of premeditated murder, the fact of drunkenness is immaterial. A man who is drunk may act with premeditation as well as a sober one, and is equally responsible for the consequences of his act. In murder of the first degree, it is necessary to prove the killing was premeditated or was committed in the perpetration or attempt to perpetrate robbery or one of the other felonies already enumerated, which involves, of course, an inquiry into the state of mind under which the party committed it, and in prosecution of such an inquiry, his condition as drunk or sober is proper to be considered. The weight to be given it is a matter for the jury to determine, and it should be received with great caution and carefully examined in connection with all the circumstances and evidence in the case. You should discriminate between the conditions of mind merely excited by intoxicating drink and yet capable of forming a specific and deliberate intent to take life, and such a prostration of the faculties as renders a man incapable of forming the intent, or of deliberation or premeditation. If an intoxicated person has the capacity to form the intent to take life, and conceives and executes such intent, it is no ground for reducing the degree of his crime that he was induced to conceive it, or to conceive it more suddenly by reason of his intoxication.[72]

§ 2794(9). Oklahoma

You are instructed in this case that voluntary intoxication is no defense in a criminal case, but in your deliberations on the question of whether or not the defendants shot the deceased with the intent to kill him or to do him serious bodliy harm, you may take into consideration the question of whether or not they were intoxicated to such an extent that they were incapable of forming an intent. And in this case if you find and believe from the evidence, or if you

[72] State v. Johnny, 87 P. 3, 29 Nev. 203.

entertain a reasonable doubt thereof from all the facts and circumstances in evidence in this case, that the defendants at the time of the homicide were in such an intoxicated condition that they were incapable of forming an intent, and that they did not intend to kill and murder the deceased, then you are instructed that you should find the defendants not guilty of the crime of murder.[73]

§ 2794(10). Pennsylvania

The jury are instructed that they must bear in mind that it is only the effect the intoxication in this case had upon the prisoner's mind, in regard to his ability to design, deliberate, and meditate upon, and fully comprehend, the act he did, previous to its performance, which is material. The fact of intoxication making him nervous, irritable, and quarrelsome, is no excuse, if he acted more irritably and recklessly than he would have done if he had been sober. The mere fact that the man, being drunk, or in the habit of getting drunk, is more irritable, and more likely to take offense, and more disposed to do mischief, than he would otherwise be, is no excuse for any offense he may commit under those circumstances. If he knew what he was about, and fully comprehended the situation, when he fired the fatal shot, it makes no difference how drunk he may have been at the time.[74]

§ 2794(11). Virginia

The court further instructs the jury that drunkenness or voluntary intoxication is no excuse for crime, although such drunkenness may be the result of long-continued and habitual drinking without any purpose to commit crime, and may have produced a temporary insanity, during the existence of which the criminal act is committed; in other words, a person, whether he be an habitual drinker or not, cannot voluntarily make himself so drunk as to become on that account irresponsible for his conduct during such drunkenness.[75]

The jury are instructed that, if the jury believe from the evidence, beyond a reasonable doubt, that the prisoner, though intoxicated at the time of throwing the brick which caused the death of the deceased, was capable of knowing the nature and consequence of his act, and, if he did know, then that he knew he was doing wrong, and that, so knowing, he threw the brick at the deceased with the willful, deliberate, and premeditated purpose of killing her, then, they will find the prisoner guilty of murder in the first degree.[76]

[73] Tubby v. State, 178 P. 491, 15 Okl. Cr. 496.

[74] Commonwealth v. McGowan, 42 A. 365, 189 Pa. 641, 69 Am. St. Rep. 836.

[75] Longley v. Commonwealth, 37 S. E. 339, 99 Va. 807.

[76] Boswell v. Commonwealth, 20 Grat. (Va.) 860.

§ 2794(12). West Virginia

The court instructs the jury that ———, the prisoner at the bar, whether he be a habitual drinker or not, cannot voluntarily make himself so drunk as to become on that account irresponsible for his conduct during such drunkenness. He may be perfectly unconscious of the killing of ———, and yet he is responsible. He may be incapable of express malice, but the court instructs the jury that the law implies malice in such a case from the weapon used, the absence of provocation, and other circumstances under which the act is done.[77]

§ 2794(13). Wisconsin

The jury are instructed that drunkenness is no excuse for crime and cannot reduce the degree of a homicidal offense below that of murder in the first degree, if, notwithstanding the condition of drunkenness, the wrongdoer was capable of forming a deliberate intent to commit the homicide.[78]

§ 2795. Insanity caused by excessive use of liquor

§ 2795(1). Missouri

You are instructed that, if you believe and find from the evidence that at the time the defendant shot his wife his mental faculties had become and were so perverted and deranged as to render him incapable of distinguishing between right and wrong, and of knowing the right from wrong of that particular act, then it is immaterial what caused such condition of his mind—whether the same was brought on by hereditary disease, or was the result of the excessive use of alcoholic beverages and stimulants, or of any disease or other cause, or combination of causes. And though you should believe from the evidence that such perverted and deranged mental faculties of the defendant were the result of continued drunkenness, or the excessive or continued use of intoxicants, such deranged and perverted condition of mind is entitled to the same consideration as a diseased and unsound condition of mind from any other cause, and entitles the defendant to an acquittal at your hands, if shown and proven to your reasonable satisfaction.[79]

§ 2795(2). Virginia

The jury are instructed that, if you believe from the evidence that, at the time of throwing the brick the blow from which caused the death of deceased, the defendant was laboring under such a defect of reason, from disease of the mind remotely produced by previous habits of gross intemperance, as not to know the nature

[77] State v. Hertzog, 46 S. E. 792, 55 W. Va. 74. This should be accompanied by an instruction that intoxication may be considered on the question of intent.

[78] Hempton v. State, 86 N. W. 596, 111 Wis. 127.

[79] State v. Duestrow, 38 S. W. 554, 137 Mo. 44.

and possible consequences of his act, or, if he did know, then that he did not know that he was doing what was wrong, you will find defendant not guilty.[80]

§ 2796. Same—Temporary frenzy brought on by voluntary drunkenness

The jury are instructed that voluntary drunkenness is neither an excuse for crime nor a mitigation of crime. If you find and believe from the evidence that the defendant, at the time of the homicide, had not become insane and irresponsible, as explained in these instructions, either from the continued excessive use of intoxicating drinks, or from any other cause or causes, but that the defendant had been voluntarily addicted to the use of intoxicants for a long period prior to the homicide, and that shortly or immediately before the homicide the defendant voluntarily drank large quantities of intoxicating stimulants or beverages, and that, being under the influence of such intoxicants, he shot and killed his wife, while laboring under temporary frenzy or madness, and while being unconscious of the nature of the act, and that such temporary frenzy or madness and such unconsciousness was then and there the immediate result of alcoholic liquor or liquors voluntarily drunk by the defendant, then such temporary frenzy or madness and such unconsciousness afford neither justification, mitigation, nor excuse for the shooting of his wife by defendant, nor can you consider it in determining whether the defendant acted willfully, deliberately, and premeditately, and he is equally guilty, under the law, as if he had been sober or sane at the time of the shooting; and in such case, as in the case of a sober and sane man, the intent to kill and malice may be presumed from the intentional use of a deadly weapon upon a vital part of the body, in a manner likely to produce death, and premeditation and deliberation may be inferred from the facts and circumstances of the killing, where there was sufficient time to consider, and in the absence of justification or just provocation, and need not be shown by direct and positive proof. Therefore, if you believe and find from the evidence that the defendant, under the circumstances, and while being in the condition aforesaid, and by the means and in the manner charged in the indictment, and explained by instructions Nos. ———, ———, and ——— herein, shot and killed his wife, then you will find the defendant guilty of murder in the first degree, and so state in your verdict.[81]

[80] Boswell's Case, 20 Grat. 860.

[81] State v. Duestrow, 38 S. W. 554, 137 Mo. 44.

§ 2797. Effect of intoxication as bearing on intent and degree of offense

See, also, ante, § 2794(5, 9).

§ 2797(1). Alabama

The jury are instructed that, if they find that defendant was so drunk that he was incapable of volition, incapable of voluntarily doing anything, and incapable of forming malice or entertaining malice, then defendant could not be convicted of anything more than manslaughter in the second degree.[82]

The jury are instructed that if they believe that defendant, at the time he is said to have shot ———, was so drunk that he was incapable of forming the purpose to do a voluntary act, then he cannot be convicted of any offense higher than manslaughter in the second degree.[83]

The jury are instructed that the presumption in this case is that the defendant is innocent until the state has proved beyond all reasonable doubt that he is guilty; and, if the jury have a reasonable doubt growing out of the evidence as to whether he was sufficiently sober to form a specific intent to take life, then the jury cannot find the defendant guilty of murder in the first degree.[84]

You are instructed that, if you believe that the defendant, at the time he is said to have shot his wife, was so drunk that he was incapable of forming the purpose to do a voluntary act, then he cannot be convicted of any offense higher than manslaughter in the second degree.[85]

The court charges the jury that drunkenness is no excuse for crime. That in this case there is no conflict in this evidence that E. killed ———, and before the jury can find this defendant guilty, the jury must be satisfied beyond all reasonable doubt that this defendant conspired with E. with the intent to commit an unlawful act, and unless the jury believe beyond all reasonable doubt that this defendant was sufficiently sober to form the specific intent to do an unlawful act you must acquit this defendant.[86]

§ 2797(2). Arkansas

The court instructs the jury that, if you find and believe from the evidence that the defendant was intoxicated to the extent that he was not conscious of what he was doing, being drunk to the extent that he could have no specific intent to kill, under the law he would not be guilty of murder in the first degree.[87]

[82] Hill v. State, 64 So. 163, 9 Ala. App. 7.

[83] Hill v. State, 64 So. 163, 9 Ala. App. 7.

[84] Granberry v. State, 62 So. 52, 182 Ala. 4.

[85] Heninburg v. State, 43 So. 959, 151 Ala. 26.

[86] McLeroy v. State, 25 So. 247, 120 Ala. 274.

[87] Pless v. State, 145 S. W. 221, 102 Ark. 506.

§ 2797(3). California

The jury are instructed that any act committed by a person while in a state of voluntary intoxication is not less criminal by reason of his having been in such a condition; but whenever the actual existence of any particular purpose, motive, or intent is a necessary element to constitute any particular offense or degree of crime, the jury may take into consideration the fact that the accused was intoxicated at the time, in determining the motive or intent with which he committed the act.[88]

§ 2797(4). Colorado

The court instructs the jury that, while it is a general rule of law that voluntary drunkenness is no excuse for a crime perpetrated under its influence, still in cases of this kind intoxication, if proved, may sometimes be considered by the jury, for the purpose of determining whether the accused at the time of the alleged offense was capable of forming a willful, deliberate, and premeditated design to take life; and in this case, although the jury may believe from the evidence beyond a reasonable doubt that the defendant killed the deceased, still, if you further believe from the evidence that before and at the time the defendant fired the shot he was so under the influence of intoxicating drink as to be incapable of forming in his mind a design deliberately and premeditatedly to do the act, then such killing would only be murder in the second degree.[89]

You are instructed that, in determining the grade of the offense, you may take into consideration all the facts and circumstances in proof attending the commission of the offense charged; and while drunkenness is no excuse for any crime or misdemeanor, unless occasioned by the fraud, contrivance, or force of some other person, for the purpose of causing the perpetration of an offense, yet, if it be a fact appearing in the evidence, it is to be considered by the jury in connection with all other facts in determining the degree of guilt. The fact that the prisoner was drunk, if proved, does not render his act any the less criminal, and, in this sense, is not available as an excuse; but upon the question whether the act was deliberate or premeditated, it is proper to be considered; and only for this purpose. It neither excuses the offense nor avoids the punishment which the law inflicts when the character of the offense is ascertained.[90]

§ 2797(5). Connecticut

You are instructed that, where a specific intent is a necessary element of a crime as the specific intent to kill is in the crime of

[88] People v. Kloss, 47 P. 459, 115 Cal. 567.
[89] Brennan v. People, 86 P. 79, 37 Colo. 253.
[90] May v. People, 6 P. 816, 8 Colo. 210.

murder in the first degree, the fact of intoxication, if it existed, should, of course, be taken into consideration; and, if an accused person had so far lost his reason from intoxication that he was unable to have and entertain such intent, and so did not have such intent, such person should not be convicted of such offense where such specific intent is necessary.[91]

§ 2797(6). Florida

You are instructed that it is a general principle of law that intoxication is no excuse for crime, but this general principle has this important qualification or modification, so far as it relates to murder in the first degree: A particular or specific intent is absolutely essential in the commission of this crime, and if the mind of the person doing the killing is unable, because of intoxication, at the time of the killing, to form this particular or specific intent, there can be no murder in the first degree, unless the person doing the killing became voluntarily intoxicated for the purpose of killing while intoxicated.[92]

§ 2797(7). Illinois

The jury are instructed that, if you believe from the evidence beyond a reasonable doubt that the defendant, when voluntarily intoxicated, committed the homicide charged in the indictment under such circumstances as would have constituted such an act by one not intoxicated murder, then such intoxication would not reduce the crime of the defendant from murder to manslaughter, nor would such intoxication be any excuse or defense to the act.[93]

§ 2797(8). Indiana

The jury are instructed that while voluntary intoxication is no excuse or palliation for any crime actually committed, yet if, upon the whole evidence in this cause, you shall have such reasonable doubt whether, at the time of the killing—if you should find from the evidence accused did kill B.—he had sufficient mental capacity to deliberately think upon and rationally to determine so to kill deceased, then you cannot find him guilty of murder in the first degree, although such inability was the result of intoxication.[94]

§ 2797(9). Minnesota

The jury are instructed that an act committed by a person in a state of voluntary intoxication is not less criminal by reason of such condition, but that such intoxication is to be taken into consideration in all cases where the intent with which the act was done is an essential element of the alleged crime or any degree thereof;

[91] State v. Cabaudo, 76 A. 42, 83 Conn. 160.

[92] Cook v. State, 35 So. 665, 46 Fla. 20.

[93] Upstone v. People, 109 Ill. 169.

[94] Aszman v. State, 24 N. E. 123, 123 Ind. 347, 8 L. R. A. 33.

that if the defendant was so intoxicated at the time of the killing as to be incapable of entertaining a premeditated design to effect the death of the deceased, he cannot be convicted of murder in the first degree; and that if he was so intoxicated that he was incapable of entertaining any design to kill the deceased he cannot be convicted of murder in the second degree, and such a finding will reduce the offense to manslaughter in the first degree, and the verdict of the jury should so state.[95]

§ 2797(10). Nevada

You are instructed that in order to find the defendants or either of them guilty of murder in the first degree you must find from the evidence beyond all reasonable doubt that the murder was perpetrated by means of poison, or lying in wait, or torture, or by any other willful, deliberate, and premeditated killing, or in the perpetration or attempt to perpetrate robbery. This ingredient of deliberate premeditated killing must be clearly shown and proven beyond all reasonable doubt. It is not sufficient that you think that the killing was deliberate and premeditated, the evidence must convince you of that fact to an abiding certainty and beyond all reasonable doubt. The evidence of deliberation and premeditation must be such as to convince you that the deliberate premeditated design and purpose to murder was knowingly and intentionally formed and considered in the mind of each defendant and meditated upon before the fatal blow was struck; and, in considering whether such a design was formed in the minds of each of the defendants, you should consider the evidence, if any, of drunkenness. If the defendants were drunk at the time, and were too much intoxicated to form such a deliberate and premeditated purpose, they cannot be found guilty of murder in the first degree. It is true that drunkenness is no excuse for the commission of an offense, but nevertheless the jury must consider the evidence of drunkenness and determine whether it was sufficient to so cloud the minds of the defendants as to interfere with the formation of deliberate and premeditated purpose to kill. If the drunkenness was sufficient to create a reasonable doubt in your minds as to the existence of such a deliberate premeditated purpose you cannot find the defendants guilty of murder in the first degree.[96]

§ 2797(11). Oklahoma

The court instructs the jury that, should you find from the evidence in this case or have a reasonable doubt thereof that the defendant at the time he committed the crime complained of in the information was intoxicated to such an extent that he was not able

[95] State v. Corrivau, 100 N. W. 638, 93 Minn. 38.

[96] State v. Johnny, 87 P. 3, 29 Nev. 203.

to form within his mind the criminal design to effect the death of the deceased, then, in that event, should you find from the evidence that he did kill the deceased, it will be your duty to find the defendant guilty of manslaughter in the first degree, and acquit him of the charge of murder.[97]

§ 2797(12). South Dakota

The jury are instructed that there has been some evidence introduced in this case tending to show that the defendant in this case, at the time of the alleged assault, was intoxicated or drunk. The statutes of this state provide as follows: "No act committed by a person while in a state of voluntary intoxication shall be deemed less criminal by reason of his having been in such condition. But whenever the actual existence of any particular purpose, motive or intent is a necessary element to constitute any particular species or degree of crime, the jury may take into consideration the fact that the accused was intoxicated at the time in determining the purpose, motive or intent with which he committed the act." I charge you that this is competent evidence for you to consider in determining beyond a reasonable doubt whether or not, at the time of making that assault, his mind was in condition to form an intent of any kind or form an intent to kill; or, in other words, whether his mind was in such condition that he knew right from wrong or the probable consequences or result of his acts; and, in this case, in considering the evidence in reference to the intoxicated condition of the defendant, you have the right also to consider his evidence given on the stand here as to the circumstances and facts and the conditions which existed and took place at the time of the alleged assault, in determining whether or not his mind was in such condition at the time that he was capable of forming an intent as charged in this information.[98]

§ 2797(13). Virginia

The jury are instructed that, if the jury believe from the evidence that the prisoner threw a brick at the deceased, which caused her death, and that, at the time of so doing, he was in such a condition of drunkenness as to render him incapable of a willful, deliberate, and premeditated purpose, and that he did not so throw it out of any reckless wickedness of heart or purpose, then they will find the prisoner guilty of voluntary manslaughter.[99]

§ 2797(14). Washington

I instruct you that voluntary drunkenness is not an excuse for crime, but as you must determine the degree of the crime of which

[97] Tubby v. State, 178 P. 491, 15 Okl. Cr. 496.

[98] State v. Kapelino, 108 N. W. 335, 20 S. D. 591.

[99] Boswell v. Commonwealth, 20 Grat. (Va.) 860.

the defendant is guilty, if he is guilty at all, it becomes necessary for you to inquire as to the state of mind under which he acted; and in the prosecution of such inquiry his condition, as drunk or sober, is proper to be considered, inasmuch as the degree of the offense, if any has been committed, depends upon the question whether the killing was willful, deliberate, and premeditated; and upon that question it is proper for you to consider evidence of intoxication, if such there be, not upon the ground that drunkenness renders a criminal act less criminal, or can be received in extenuation or excuse, but upon the ground that the condition of the defendant's mind at the time that the act was committed must be inquired after in order to justly determine the question whether his mind was capable of that deliberation or premeditation or purpose which, according as they are absent or present, determine the degree of the crime, or the guilt or innocence of the defendant. But I charge you, gentlemen, that in dealing with such a condition you ought to use great caution not to give immunity to persons who commit crime when they are inflamed by intoxicating drink. You must discriminate between the conditions of mind merely excited by intoxicating drink, and yet capable of forming a specific intent to take life, and such a prostration of the faculties as renders a man incapable of forming the intent, or of deliberation or premeditation. If an intoxicated person has the capacity to form an intent to take life, and conceives and executes such intent, it is no ground for reducing the degree of his crime that he was induced to conceive it, or to conceive it more suddenly, by reason of his intoxication.[1]

§ 2797(15). West Virginia

You are instructed that, where a statute establishes degrees of the crime of murder, and provides that all willful, deliberate, and premeditated killing shall be murder in the first degree, the evidence given on the trial tending to prove that the accused was intoxicated at the time of the killing is competent for the consideration of the jury upon the question whether the accused was in such a condition of mind as to be capable of deliberation and premeditation.[2]

§ 2797(16). Wisconsin

The jury are instructed that, if you find from the evidence that defendant fired the shot which killed his wife, and if when he did so he was in such a condition from the use of spirituous liquors that he was not capable of forming a premeditated intent to kill her, then you should consider the question of intoxication and you

[1] State v. Hawkins, 63 P. 258, 23 Wash. 289.

[2] State v. Hertzog, 46 S. E. 792, 55 W. Va. 74.

cannot convict him of murder in the first degree. But if he was able to form that intent to kill, willfully, deliberately and premeditatedly, when he fired the shot, then you must have nothing more to do with the question of his drinking and you should give it no further thought or consideration in the case, for then it cuts no further figure.[3]

You are instructed that, if you shall find from the evidence in the case that this defendant, at the time he struck the blow, was in such a condition from the use of spirituous liquors that he was incapable of forming an intent to kill, then you may consider the question of intoxication. The question simply is, in short, Was he at the time in such a condition mentally as to be incapable of forming this premeditated design to effect the death?[4]

C. Act or Omission of Defendant as Cause of Death

§ 2798. In general

§ 2798(1). Georgia

In the indictment, gentlemen, the state charges that the killing was done by a blow on the head with a brickbat or a rock, and by knocking the deceased in a ditch. Now, if you believe from the evidence that the defendant made a felonious attack on the deceased, and with a brickbat or rock knocked the deceased into a ditch, and that she broke her neck, or if you believe from the evidence that the defendant made such felonious and unlawful attack on the deceased, and in an effort to escape such felonious and unlawful attack she fell into a ditch and broke her neck, still, if the felonious attack was the primary cause of her death, the defendant would still be guilty.[5]

§ 2798(2). Indiana

The jury are instructed that, if the blows which caused the death of ——— were given in self-defense, and other blows, not mortal, were afterwards given, not in self-defense, you should find the defendant not guilty.[6]

§ 2798(3). Iowa

The jury are instructed that if the jury believe from the evidence, that the defendant and others, formed the design of taking the life of the said ———, whether by hanging or otherwise; that in pursuance of such design, the defendant and others went in a body to the house of said ———, armed, and resolved, and prepared to resist all opposition; that they obtained possession, by

[3] Hampton v. State, 86 N. W. 596, 111 Wis. 127.

[4] Bernhardt v. State, 51 N. W. 1009, 82 Wis. 23.

[5] Thornton v. State, 33 S. E. 673, 107 Ga. 683.

[6] Miller v. State, 37 Ind. 432.

force, or otherwise, of the body of said ———, and bound the arms of the said ———, so as to render him helpless; that after they had so obtained possession of the said ———, the said defendant, and those then engaged with him, or any of them in the presence and hearing of the said ———, avowed their purpose to take the life of the said ——— by hanging or otherwise; that they forced the said ——— into a hack, while thus bound, and started to the timber with him; that while on the road to the timber, and when on the bank of the ——— river, they cast the said ———, while thus bound, into said river, from said hack, or compelled the said ———, by threats or otherwise, to jump from said hack into said river, and they then and there permitted him to drown, while standing by, and made no effort to rescue the said ———, if by reasonable efforts they might have done so, then the said defendant is guilty of murder in the first degree.[7]

§ 2798(4). Kentucky

The court instructs the jury that, though the wound inflicted on ——— by the defendant, if he inflicted any, may not have been sufficient of itself to produce death, yet if you believe beyond a reasonable doubt, from the evidence, that such wound, owing to her condition, produced her death, when, but for the wound, she would not then have died, the wound is, in law, the cause of her death, and you should so find.[8]

§ 2798(5). Louisiana

The court instructs the jury that if you believe from the evidence that the deceased died from the effects of wounds caused by falling against a door or against the floor, or from a tumor, or from a fall on the sidewalk, or the jolting in a dray, or from general neglect, or from any or all of the above causes, then you are bound to acquit the accused. But I charge you, in connection therewith, that if you find from the evidence that he [the deceased] died from wounds, or a wound inflicted by ——— when defendant was acting in concert with him, then they are both guilty; that is to say, defendant is equally guilty as if he had himself dealt the fatal blow, if he was at the time present aiding and abetting ——— in the giving of the blow from which the deceased came to his death.[9]

§ 2798(6). Massachusetts

The jury are instructed that, if you are satisfied on the evidence that defendant, as alleged in the indictment, committed an assault and battery on his wife, the deceased, while she was suffering with a fatal illness, by striking her with his hands and feet, and that

[7] State v. Shelledy, 8 Iowa, 477.
[8] Clark v. Commonwealth, 63 S. W. 740, 111 Ky. 443.
[9] State v. Favre, 25 So. 93, 51 La. Ann. 434.

thereby the death of his wife was hastened, so that it took place sooner by reason of the assault and battery than it would have occurred in consequence of her sickness alone, then the assault and battery was the efficient cause of her death. In weighing the evidence on this part of the case, the jury, in order to convict the defendant, must be satisfied from the evidence beyond a reasonable doubt that the death of his wife at the time it occurred would not have happened, but for the assault and battery by him as charged in the indictment. If it is left in doubt on the evidence whether the death of the wife, when it happened, was caused by the disease or the violence inflicted on her by defendant, he is entitled to an acquittal.[10]

§ 2798(7). New York

The jury are instructed that if the deceased died from fright, and if the fright was caused by the violence of the prisoner, he is as responsible, and can as properly be convicted under this indictment of murder in the first degree, as if the immediate result of his act was suffocation.[11]

The defendant claims that he did not kill this girl. That is a question of fact which the jury have to determine. I will say this to you, gentlemen: That if that shooting was the cause of a miscarriage, and if the result of the miscarriage was death, even though there may have intervened some disease, like blood poisoning, then, if that relation of cause and effect is traceable from the shooting of this girl right up to the point of her death, it caused her death in the eyes of the law. That is a question of fact. The responsibility of determining that question of fact rests upon you. If the chain of cause and effect runs from the shots right up to the death, then, although there may have been subsidiary causes due to the pregnant condition of this woman, such as blood poisoning resulting from a miscarriage which was produced by the wound, then, even though those subsidiary causes existed, the defendant is responsible in the eyes of the law for all the consequences of his act. If the woman was pregnant and was peculiarly susceptible to injury from a gunshot wound, he cannot take refuge behind that. Of course, in order to find his responsibility, you must find that the gunshot wound caused her death. In other words, you must find, either that the gunshot wound directly caused her death, or that the gunshot wound was the cause of the miscarriage and the miscarriage caused her death. If that relation of cause and effect existed, then he is responsible for her death. When one person wounds another in a part of the body in which the wound may

[10] Commonwealth v. Fox, 73 Mass. (7 Gray) 585.

[11] People v. Kane, 107 N. E. 655, 213 N. Y. 260, L. R. A. 1915F, 607, Ann. Cas. 1916C, 685; Cox v. People, 80 N. Y. 500.

result in serious injury, and death follows, it becomes a question of fact whether, under all the circumstances, the death is the result of that wound. I am going to leave that question to you, gentlemen.[12]

§ 2798(8). South Carolina

You are instructed that, if your inquiry leads you to the belief that the death of the deceased was produced by some other cause than by the gunshot wound, he could not be convicted. But I charge you that, if he died from some disease brought on by that gunshot wound, he should be held liable for it. If the gunshot hastened his death, but for a minute, he would be responsible for the death. If a man receives a wound by which death is produced, the party inflicting it is liable for the consequences, although the deceased might have recovered by the exercise of more care and prudence, or with better treatment.[13]

§ 2798(9). Tennessee

You are instructed that, if you believe from the proof that the clot of blood formed on the brain of the deceased was produced by the use of stimulants and intemperance, and that this, and not the unlawful act of the defendant, caused his death, or if you have a reasonable doubt as to how this is, you should acquit the defendant.[14]

You are instructed that, if you find from the proof that the deceased, when on ——— street, of his own accord, and not by the wrongful or unlawful act of the defendant, overbalanced himself, and staggered and fell to the pavement, and that his death was thereby caused, or if you have a reasonable doubt as to how this was, you should acquit the defendant.[15]

§ 2798(10). Texas

You are further instructed that, before you can convict the defendant in this case, the state must prove by competent testimony, to your entire satisfaction, and beyond a reasonable doubt, not only that the defendant shot the deceased, but that the shot was the actual cause of his death. And if you believe that the state has failed to make such proof, or if you have a reasonable doubt of such fact, then you must acquit the defendant.[16]

§ 2799. Failure of defendant to call aid after inflicting injury

The jury are instructed that, if the person inflicting the injury which makes it necessary to call aid in preserving the life of the

[12] People v. Kane, 107 N. E. 635, 213 N. Y. 260, L. R. A. 1915F, 607, Ann. Cas. 1916C, 685.

[13] State v. Foote, 36 S. E. 551, 58 S. C. 218.

[14] Wooten v. State, 41 S. W. 813, 99 Tenn. 189.

[15] Wooten v. State, 41 S. W. 813, 99 Tenn. 189.

[16] Vela v. State, 137 S. W. 120, 62 Tex. Cr. R. 361.

person injured shall willfully fail or neglect to call such aid, he shall be deemed equally guilty as if the injury were one which would inevitably lead to death.[17]

§ 2800. Negligence of deceased in caring for wounds as co-operating cause of death

§ 2800(1). Illinois

The jury are instructed that, if the jury believe, from the evidence, beyond a reasonable doubt, that the defendant cut the deceased in the arm with a knife, or other instrument capable of inflicting a similar wound, as charged in the indictment, it is no excuse to say that the deceased would not have died if he had taken proper care of himself, or that neglect, or the want of proper applications to the wound had brought on blood poisoning, and of that he died, provided you believe from the evidence, beyond a reasonable doubt, that the wound was the primary or principal cause of his death.[18]

§ 2800(2). Texas

You are instructed that homicide is the destruction of the life of one human being by the act, agency, or procurement of another. The destruction of life must be complete by such act, agency, or procurement; but, although the injury which caused death might not under other circumstances have proved fatal, yet, if such injury be the cause of death without its appearing that there has been any gross neglect or manifestly improper treatment of the person injured, it is homicide. Such gross neglect or improper treatment has reference to the acts of some person other than him who inflicts the first injury and would include the acts of the person injured as well as of the physicians, nurse, or other attendants. Now, if you find that the defendant cut or stabbed deceased with a knife in the neck or throat thereby inflicting wounds, which were not in themselves necessarily fatal, but from the effects of which deceased did thereafter die, then, unless the deceased died from some gross neglect of herself such as a failure or refusal to obey the instructions of her attending physician, the defendant would be guilty of some degree of homicide as before defined in this charge, but if you believe the deceased was guilty of gross neglect such as above mentioned, and that such neglect operating in conjunction with the wounds caused the death of deceased which would not probably have resulted but for such neglect, or if you have a reasonable doubt as to whether or not such are the facts of the case, you will find the defendant not guilty of any degree of homicide, but will then

[17] Lee v. State, 72 S. W. 195, 44 Tex. Cr. R. 460.

[18] Duncan v. People, 24 N. E. 765, 134 Ill. 110.

consider further whether or not he is guilty of assault with intent to murder or aggravated assault under the following instructions.[19]

§ 2801. Absence of medical care as contributing cause of death

The jury are instructed that, if you believe from the evidence beyond a reasonable doubt that the defendant unlawfully inflicted upon the deceased a wound not necessarily fatal, but which might by timely and skillful medical care have been cured, and that the death of the deceased resulted probably because of the absence of such medical care, yet, if no cause of death intervened other than the absence of such medical attention and care, the defendant is liable to the same extent as though death had resulted from the wounds immediately inflicted by him.[20]

§ 2802. Negligence or lack of skill of physician as proximate cause of death

§ 2802(1). Arkansas

The jury are instructed that, when one willfully and unlawfully inflicts upon another a wound which is not within itself mortal, yet if, by improper treatment of such wound by the physician in charge, it becomes mortal, and the person so wounded dies from such wound, and the erroneous treatment of the same by such physician, the person inflicting such wound is originally responsible for the death.[21]

You are instructed that, if you find from the evidence in this case that the defendants inflicted upon ——— a mortal or dangerous wound with a knife, and you also find that said wound was erroneously treated by the physician, and that said ——— died from said wound, and such erroneous treatment of the same, you will find the defendants guilty of murder or manslaughter, according as the evidence may show.[22]

§ 2802(2). Missouri

The court instructs the jury that if they believe and find from the evidence in this cause that at the county of ——— and state of ———, on ———, defendant, who is indicted herein as ———, did willfully strike one ——— upon the body with a knife having a blade ——— inches in length, and that such knife was a dangerous weapon, and that said blow was struck in the heat of passion, without a design to effect death, and the said ——— died from the effect of said wound on ———, in said ——— county, then you will find the defendant guilty of manslaughter in the third degree, notwithstanding you may also find and believe from the testimony that unskilled medical treatment aggravated such wound,

[19] Pettis v. State, 150 S. W. 790, 68 Tex. Cr. R. 221.

[20] Rigsby v. State, 91 N. E. 925, 174 Ind. 284.

[21] Sharp v. State, 10 S. W. 228, 51 Ark. 147, 14 Am. St. Rep. 27.

[22] Sharp v. State, 10 S. W. 228, 51 Ark. 147, 14 Am. St. Rep. 27.

and that deceased might have recovered if greater care and skill had been employed in treating him.[23]

§ 2802(3). Texas

You are instructed that, if you believe from the evidence that the defendant, at the time and place as alleged in the indictment, with a pistol did shoot the said ———, as charged, but you further find from the evidence that there has been gross neglect or manifestly improper treatment of said ——— by any one or more of the physicians or persons attending him between the inflicting of the wound and his death, which improper treatment or neglect, if any, caused the death of said ———, then you cannot find the defendant guilty of taking the life of the said ———.[24]

D. Parties to Offense

§ 2803. In general

The court charges the jury that if they believe from the evidence that the fatal shot which took the life of ——— was fired by ———, and without the knowledge, connivance, or assent of this defendant, then the jury must find this defendant not guilty.[25]

The court charges the jury that if the jury believe from all [the] evidence that ——— and ——— shot and killed ———, and that defendant did no more than try to keep peace, the night of the shooting, then the defendant is not guilty, and the jury ought to acquit the defendant.[26]

§ 2804. Persons liable as principals

You are instructed that all persons who are guilty of acting together in the commission of an offense are principal offenders, and may be prosecuted and convicted as such.[27]

You are instructed that, if you should find and believe beyond a reasonable doubt that an unlawful conspiracy to slay ——— had been formed between ——— and ——— at the time of or before the defendant entered the saloon of the said ——— and ——— then, in that event, before this defendant could be convicted, he must have had knowledge of the conspiracy, if any, and aided and abetted therein, as charged in the main charge.[28]

§ 2805. Liability as principal of one aiding or encouraging killing

§ 2805(1). Alabama

The jury are instructed that the testimony in this case shows that defendant did not fire the shot that took the life of the deceas-

[23] State v. Strong, 55 S. W. 78, 153 Mo. 548.

[24] Sartin v. State, 103 S. W. 875, 51 Tex. Cr. R. 571.

[25] Ferguson v. State, 37 So. 448, 141 Ala. 20.

[26] Nicholson v. State, 23 So. 792, 117 Ala. 32.

[27] Cecil v. State (Tex. Cr. App.) 100 S. W. 390.

[28] Renner v. State, 65 S. W. 1102, 43 Tex. Cr. R. 347.

ed, but that it was fired by another; and the defendant could not be convicted for the killing, unless the jury are satisfied beyond a reasonable doubt that defendant, by word, act, or deed, aided, abetted, assisted, encouraged, or induced ——— to fire the shot that killed the deceased. If the jury believe beyond a reasonable doubt that the defendant, just before the shooting, handed ——— the gun, and at the time said something to ———, and that the words so spoken by the defendant caused or induced ——— to fire the fatal shot, then the defendant would be guilty, if he would have been guilty, had he fired the shot himself.[29]

The jury are instructed that, whether defendant fired into the house or not, if you believe beyond a reasonable doubt, from the evidence, that he was one of the party, some of whom did fire into the house of ——— with the intent to murder him, and that was his purpose in going there, then you are authorized to find defendant guilty, whether he fired one of the shots or not.[30]

§ 2805(2). Arkansas

You are instructed that the theory and contention of the state is that the defendant and ——— and ———, with a common and unlawful purpose, sought out the said ——— and assaulted him. If you find the facts so to be, and that during the progress of the assault they were all present participating in it, and aided and abetted each other, or that being present they were ready and consenting to assist, aid, advise, or encourage the assault, then all persons so participating are guilty of the same offense, whatever you may find that to be, and in that event, if you find the facts so to be, then each is responsible for the others' acts, and it will not be necessary for you to consider and determine the part each of the assailants, respectively, took in the assault.[31]

§ 2805(3). California

You are instructed that the distinction between an accessory before the fact and a principal in case of a felony is abrogated in this state, and all persons concerned in the commission of a felony, whether they directly commit the act, constituting the offense or aid and abet in its commission, though not present, shall be prosecuted, tried, and punished as principals. You are further instructed that, if you believe from the whole evidence beyond a reasonable doubt that this defendant, together with ———, at the time and place alleged in the information, made an assault on the person of the deceased, and in the furtherance of a common purpose to assault said deceased inflicted injuries which caused his death, then

[29] Henderson v. State, 47 So. 76, 156 Ala. 1.

[30] Hicks v. State, 26 So. 337, 123 Ala. 15.

[31] Dickerson v. State, 150 S. W. 119, 105 Ark. 72.

you are instructed that it is immaterial, if you find that there was more than one injury inflicted of a character to produce death, which of said injuries it was, in fact, that produced the death of the deceased. It is sufficient that any one or more of said injuries was of a character to, and did in fact, produce the death of the deceased.[32]

The court instructs the jury that if they are satisfied beyond a reasonable doubt that deceased was killed by the inflicting of a gunshot wound, and that, immediately prior thereto, defendant and his brother "reached an understanding that they two together would commit a felonious assault upon said ——— and would kill and murder him, and that, in pursuance of said understanding, said defendant and his brother, ———, did make such assault upon ———, with the defendant and his brother aiding and abetting each other therein, and during such assault ——— was shot, killed, and murdered by one of said assailants according to a common, prior understanding, then, under such circumstances, the court instructs you that no matter which of the two named assailants fired the alleged fatal shot, both are equally guilty under the law.[33]

§ 2805(4). Delaware

The court instructs the jury that under the law of this state every person who shall abet, procure, command or counsel any other person or persons to commit any crime or misdemeanor, shall be deemed an accomplice, and equally criminal as the principal offender. Therefore, we say that if you believe from the evidence that one of the defendants inflicted the fatal wound, and that the other defendants were present, assisting, counseling or encouraging him by word or act to commit the crime, they would be equally as guilty as the one who actually inflicted the fatal wound.[34]

§ 2805(5). Illinois

The jury are instructed that, if the evidence convinces you beyond a reasonable doubt that ——— was killed in manner and form as charged in the indictment, and that this defendant was present and in any way or manner aided, abetted, or assisted in such killing, then the jury should find him guilty, although there was no eyewitness to such killing, and although no motive for the killing is proven.[35]

§ 2805(6). Iowa

The jury are instructed that if some person or persons other than defendant gave the poison, and if defendant and such other person or persons conspired and agreed together to kill said ———, and if, in carrying out such conspiracy, they acted in concert to accomplish

[32] People v. Liera, 149 P. 1004, 27 Cal. App. 346.

[33] People v. Verduzco, 110 P. 970, 13 Cal. App. 789.

[34] State v. Prettyman, 100 A. 476, 6 Boyce, 452.

[35] Kennedy v. People, 40 Ill. 488.

the end, and if the poison was administered by one of them, then the giving of the poison was the act of all, and each was equally guilty with the other.[36]

§ 2805(7). Kentucky

You are instructed that, if you believe from the evidence beyond a reasonable doubt that ———, in ——— county, state of ———, before the finding of the indictment herein, willfully, feloniously, and with malice aforethought, and not in the necessary, or to him apparently necessary, defense of himself or his mother, with a knife or dirk, a deadly weapon, cut, stabbed, and wounded one ———, from the effects of which cutting, stabbing, and wounding the said ——— then and there presently died, and if you further believe from the evidence beyond a reasonable doubt that at the time he did so the defendant was then and there present, willfully, feloniously, and with malice aforethought, and not in her necessary or to her apparently necessary, self-defense, counseling and advising the said ——— to do said cutting, stabbing, and wounding, or aiding or assisting the said ——— in doing said cutting, stabbing, and wounding, then, in that event, you should find the said defendant guilty, as charged in the indictment, and fix her punishment at confinement in the state penitentiary for life, or at death, in your discretion.[37]

The court instructs the jury: If you believe from the evidence to the exclusion of a reasonable doubt, that in ——— county, before the finding of the indictment herein, the defendants, ———, ———, and ———, acting together and in concert with each other, or that one or more of said defendants, willfully and maliciously shot and wounded ——— with a pistol with intention to kill said ———, or willfully and maliciously cut said ——— with a knife with intention to kill him, or willfully and maliciously struck said ——— with a shotgun with intention to kill him [if you believe from the evidence, to the exclusion of a reasonable doubt, said shotgun was a weapon reasonably calculated to produce death when used by a person of the physical strength of and in the manner in which it was used by one of the defendants on said occasion, if either of them did strike ——— with a shotgun], you should find the defendants or defendant who so shot or cut or struck said ———, if any of the defendants did, guilty of malicious wounding and fix the punishment of such defendant or defendants at confinement in the penitentiary for any time not less than ——— nor more than ——— years, and if you further believe from the evidence, to

[36] State v. Smith, 77 N. W. 499, 106 Iowa, 701. In this case no conspiracy was alleged, but under the statute all persons aiding and abetting the commission of an offense are principals.

[37] Steely v. Commonwealth, 112 S. W. 655, 129 Ky. 524.

the exclusion of a reasonable doubt, that at the time said ——— was so shot, cut, and struck, or at the time he was either so shot, cut, or struck, if he was so shot, cut, or struck by defendants, or any of them, the other defendant or defendants were present or near enough to aid and assist said shooting, cutting, or striking, and that the defendant or defendants thus present or thus near did willfully and maliciously aid, assist, abet, or counsel any one or more of their codefendants to so shoot, cut, or strike said ——— with intention to kill him, you should find said defendant or defendants who thus aided, assisted, abetted, or counseled said shooting, cutting, or striking, if any of them did, guilty of malicious wounding, and fix their punishment at confinement in the penitentiary for any time not less than ——— nor more than ——— years.[38]

§ 2805(8). Michigan

You are instructed that, if you find that at the time the murder was committed, and on that night, defendant actually participated; that he met, went forward, aided, either by being there upon guard, or by counseling and encouraging the commission of the crime, if he was there for the purpose, intending to aid and encourage the commission of the crime—he would be equally guilty with the person or persons who inflicted the mortal wounds.[39]

§ 2805(9). Missouri

You are further instructed that all persons are principals who are guilty of acting together in the commission of a crime. When any crime is actually committed by one person, and another person is present, and, knowing the unlawful intent, aids, abets, encourages, or assists the person actually engaged in the commission of the unlawful act, then such person so aiding, abetting, encouraging, or assisting is a principal and equally guilty with the person who actually committed the crime.[40]

The court instructs the jury that, if they believe from the evidence in this cause beyond a reasonable doubt, that at the county of ——— and state of ———, the defendant alone, or that the defendant and one ———, or either of them, and the other present, aiding, abetting, or consenting thereto, did on or about the ——— day of ———, feloniously, willfully, deliberately, premeditatedly, and of his (the defendant's) malice aforethought, kill and murder ——— in the manner and form charged in the indictment, you should find the defendant guilty of murder in the first degree, and so state in your verdict.[41]

[38] Greenwell v. Commonwealth, 100 S. W. 852, 125 Ky. 192.

[39] People v. Repke, 61 N. W. 861, 103 Mich. 459.

[40] State v. Murray, 193 S. W. 830.

[41] State v. Miller, 56 S. W. 907, 156 Mo. 76.

§ 2805(10). North Carolina

You are instructed that, if the jury shall find from the evidence in this case, beyond a reasonable doubt, that these defendants formed a common design and a common purpose to go to the house of ——— and assault him with guns and pistols, or to inflict any bodily harm upon him or the inmates of his house, and if you further find beyond a reasonable doubt that, in pursuance of this common design and purpose, entered into and agreed to by all of them, they were there, and that when ——— came to the door some one of them fired a shot into his body from a weapon and killed him, and that this was done in pursuance of the common design entered into by all of them, and death was caused to him in that way, after it had been premeditated and deliberated upon by them, and they did it with malice, then all would be guilty of murder in the first degree.[42]

§ 2805(11). Oklahoma

You are instructed that all persons concerned in the commission of a crime, whether they directly commit the act constituting the offense, or only aid and abet its commission, are principals in the offense and equally guilty.[43]

You are instructed that in this case, if you believe from the evidence beyond a reasonable doubt that the defendant A. shot and killed the deceased, in ——— county, and state of ———, at any time since the ——— day of ———, and that the shooting was with the premeditated design to effect the death of the said deceased, and without authority of law, and that the defendant M. was concerned in the shooting, and aided and abetted or encouraged A. to shoot the deceased, and with a premeditated design that his death should thereby be effected, then it would be your duty to convict both the defendants of murder. But if you believe from the evidence beyond a reasonable doubt that the defendant A. shot the deceased, with the premeditated design to effect his death and without authority of law, but do not believe from the evidence beyond a reasonable doubt that the defendant M. was concerned in the shooting and aided and abetted or encouraged A. to shoot the deceased, then it will be your duty to convict the defendant A., and acquit the defendant M. If you convict the defendants, or one of them for murder, you will assess the punishment on them or him at death, or imprisonment for life, at your discretion.[44]

You are instructed that, if you believe from the evidence beyond a reasonable doubt that, after the first meeting with the deceased,

[42] State v. Cain, 100 S. E. 884, 178 N. C. 724.

[43] McDaniel v. State, 127 P. 358, 8 Okl. Cr. 209.

[44] McDaniel v. State, 127 P. 358, 8 Okl. Cr. 209.

the defendant A. armed himself with a shotgun and returned to the place where the deceased was for the purpose of engaging deceased in a deadly conflict, and then and there voluntarily entered into the difficulty, but do not believe beyond a reasonable doubt that the defendant M. had such purpose, or aided or encouraged, abetted A. in such purpose, then it will be your duty to acquit the defendant M.[45]

The court charges the jury that before you can convict the defendant upon the theory of a conspiracy between the defendant and ——— and ———, his alleged associates, you must find from the evidence, beyond a reasonable doubt, and to a moral certainty, that they conspired together, before the shot was fired, to do some unlawful act, or to do some lawful act in an unlawful manner, and that the fatal wound was inflicted by one of them, and in furtherance of the purpose for which they had conspired.[46]

The court instructs the jury, as a matter of law, that, while it is necessary, in order to establish a conspiracy, to prove a combination of two or more persons, by concerted action, to accomplish the criminal or unlawful purpose alleged in the information, yet it is not necessary to prove that the parties ever came together and entered into any formal agreement or arrangement between themselves to effect such purpose; the combination, or common design, or object, may be regarded as proved, if the jury believe from the evidence, beyond a reasonable doubt, that the parties charged were actually pursuing, in concert, the unlawful object stated in the information, whether acting separately or together, by common or different means, providing all were leading to the same unlawful result.[47]

You are instructed that, if two or more persons are moved and influenced by a common intent and purpose to feloniously assault another with deadly weapons and take his life, and each knows of the common felonious intent and purpose of the other to make such a felonious assault upon such person, and take his life, then the law says, under such circumstances, the act of one is the act of all the assailants; the shot of one is the shot of all; they are all responsible, under such circumstances, for the acts of each other.[48]

§ 2805(12). Texas

You are instructed that, if the proof shows in this case that W. killed the deceased, then, before you would be authorized to convict this defendant of any grade of culpable homicide, you must find from the evidence beyond a reasonable doubt that the said W. un-

[45] McDaniel v. State, 127 P. 358, 8 Okl. Cr. 209.

[46] Thompson v. State, 117 P. 216, 6 Okl. Cr. 50.

[47] Thompson v. State, 117 P. 216, 6 Okl. Cr. 50.

[48] Thompson v. State, 117 P. 216, 6 Okl. Cr. 50.

lawfully killed the deceased, and that the defendant was present, and knew of the unlawful intent on the part of W., and so knowing aided him by acts, encouraged him by words or gestures, to kill the said deceased, and in that connection you are charged that the mere presence of the defendant in company with the said W. will not be sufficient to establish the defendant's guilt, but the proof must go further and establish beyond a reasonable doubt that said W. unlawfully killed the deceased, and that the defendant, knowing the unlawful intent of the said W. to kill the said deceased, aided and abetted him in the said killing, and if you have a reasonable doubt as to the existence of any one of the above propositions you will acquit the defendant.[49]

You are instructed that all persons are 'principals' who are guilty of acting together in the commission of an offense. When an offense has been actually committed, by one or more persons, the true criterion for determining who are principals is: Did the parties act together in the commission of the offense? Was the act done in pursuance of a common intent and in pursuance of a previously formed design in which the minds of all united and concurred? If so, then the law is that all are alike guilty, provided that the offense was actually committed during the existence and in the execution of the common design and intent of all, and all were actually and bodily present at the time of the commission of the offense and participated therein; or if all were not actually and bodily present at the time of the commission of the offense, but some of them, not being actually and bodily present, kept watch so as to prevent interruption of those engaged in committing the offense and had previously agreed to the commission of the offense and were acting together at the time of its perpetration, then such persons so aiding, encouraging, or watching are principal offenders, provided they knew of the unlawful intent of the others who actually committed the offense, if any. Also all persons who, knowing the unlawful intent of persons who do actually commit an offense, and who aid by acts, or who encourage by words or gestures, those actually engaged in the commission of an offense at the time of such commission, and who are performing one part of the transaction constituting the unlawful offense while the others who actually committed the offense are performing another part in aid of its accomplishment, the parties having previously agreed to the commission of the offense, are guilty as principal offenders and are punishable the same as those who actually commit the offense charged. Now, therefore, if you believe from the evidence in this case, beyond a reasonable doubt, that the defendant, ———, and ———, or they

[49] Condron v. State, 138 S. W. 594, 62 Tex. Cr. R. 485.

together with ———, had entered into an agreement with each other, to procure arms and to compel G. to return money to ———, and ———, claimed to have been taken away from ———, and ———, by G., and agreed to act together with each other in taking the money away from G., and previously formed a design in which the minds of all three or four united and concurred in a common intent to take the money away from G. in pursuance of a previously formed design, and that they and each of them intended at the time that, if any resistance was offered upon the part of said G. to take the life of the said G., and that, in pursuance of said common intent of all, the said defendant, acting in conjunction with ——— and ———, or with them and ———, went to the tent of said G., and that ——— and ——— shot and killed ———, but that defendant was not actually and bodily present at the time, but was doing some act carrying out his part, if any, of the common intent and design of all, if any, or if he was actually and bodily present and doing some act in pursuance of the common design of all, then he is guilty of whatever offense ——— and ——— are guilty of from all the facts and circumstances in evidence as you may determine. If you believe from the evidence in this case that ——— and ——— had an intention to commit robbery, and did attempt to do so, and in so doing killed ———, but that the defendant had no knowledge of their unlawful intent, if any, to rob said G., and was not acting together with them in the commission of said offense, if any, or if you have a reasonable doubt thereof, you will acquit the defendant; or if you believe that ——— and ——— went to the place of the homicide for the purpose of procuring their own money that had been taken from them by G., if any, with no intent to kill any one, or to rob any one, or if you believe that ——— and ——— did intend to take the life of G. or any one else, but that the defendant had no knowledge thereof, or that the defendant had no knowledge of their intent to rob, if any they had, or if you have a reasonable doubt in either of the above instances, you will acquit him. If you believe from the evidence that defendant was not acting together with ——— and ——— in the attempt to take money unlawfully from G., if any, or had not previously entered into an agreement with ——— and ——— to take money from G. unlawfully, if any, or if you have a reasonable doubt thereof, you will acquit the defendant.[50]

You are instructed that all persons are principals who are guilty of acting together in the commission of an offense. When an offense is actually committed by one or more persons, but others are present, and, knowing the unlawful intent, aid by acts or encourage

[50] Bass v. State, 127 S. W. 1020, 59 Tex. Cr. R. 186.

by words or gestures those actually engaged in the commission of the unlawful act, such persons so aiding and encouraging are principal offenders, and may be prosecuted as such. And all persons who endeavor at the time of the commission of the offense to secure the safety or concealment of the offenders are principals, and may be convicted and punished as such. And any person who advises or agrees to the commission of an offense, and who is present when the same is committed, is a principal thereto, whether he aids or not in the illegal act. If you believe from the evidence that the said P. G. did not shoot and kill ——— as charged in the indictment, but you further believe from the evidence beyond a reasonable doubt that on the date charged in the indictment, in the county of ——— and state of ———, the said ——— or ———, or any one else, shot and killed said ——— with a gun; and, if you further believe from the evidence beyond a reasonable doubt that the said P. G. was present at the time of said shooting (if any), and, knowing the unlawful intent, aided by acts or encouraged by words or gestures those actually engaged in said shooting, if any; or if you believe from the evidence beyond a reasonable doubt that the said P. G. advised or agreed to the shooting and killing of her husband, the said ——— (if he was shot and killed), and was present when the same was done, whether she aided or not in said shooting; or, if you further believe from a reasonable doubt that the defendant P. G. endeavored, at the time of the shooting of ——— (if he was shot as charged) to secure the safety or concealment of the ones doing the shooting—then, if you so find, she would be a principal, and subject to the same punishment under the law as those actually engaged in the shooting and killing of the said ———, if he was unlawfully shot and killed.[51]

You are instructed that all persons who shall engage in procuring aid, arms or means of any kind to assist in the commission of an offense while others are executing the unlawful act, and all persons who endeavor at the time of the commission of the offense, to secure the safety or concealment of the offenders, are principals, and may be convicted and punished as such.[52]

You are instructed that, if you find from the evidence that by such means and at such time and place ——— did unlawfully and with express malice kill said infant, and that when the said ——— so killed said infant the defendant was present and had agreed with the said ——— to so kill said infant, or that she was present when the said ——— so killed said infant (if he did so), and, knowing his unlawful intent, did aid him by acts or encourage him by words or

[51] Goode v. State, 123 S. W. 597, 57 Tex. Cr. R. 220.

[52] Goode v. State, 123 S. W. 597, 57 Tex. Cr. R. 220.

gestures in so killing said infant, you will find defendant guilty of murder in the first degree, and assess her punishment at death or confinement in the penitentiary for life, in your discretion.[53]

You are instructed that if you believe from the evidence, beyond a reasonable doubt, that ——— unlawfully shot and thereby killed said ——— with a pistol, and that he was not justified in so doing on the grounds of self-defense, as that law is given you in this charge hereafter, then you will find the defendant not guilty, unless you find from the evidence, beyond a reasonable doubt, that the defendant was present and knew the unlawful intent of ———, and acted together with him in the commission of said offense, and aided him by acts or encouraged him by words or gestures in the commission of said offense, and that ——— committed said offense in pursuance of a common intent, and in pursuance of a previously formed design, in which the minds of both united and concurred.[54]

You are instructed that, when an offense is actually committed by one person, but another is present, and, knowing the unlawful intent, aids by acts or encourages by words or gestures the person actually engaged in the commission of the unlawful act, or who, not being actually present, keeps watch so as to prevent the interruption of the person engaged in the commission of the offense, such person so aiding, encouraging, or keeping watch is a principal offender.[55]

You are instructed that any person who advises or agrees to the commission of an offense, and who is present when the same is committed, is a principal thereto, whether he aids or not in the illegal act, and any person who is a principal, under the rules hereinabove given you, may be prosecuted, and, if found guilty, may be convicted and punished as such.[56]

§ 2805(13). Virginia

The court instructs the jury that in considering whether or not T. and H. are principals in the second degree in this case, aiding, abetting, counseling, advising, or consenting to said killing of ———, they may consider all the acts and declarations of the said T. and H. at the time of the said killing, both before and after the killing of the said ———; and if they believe from the whole evidence that they were so aiding and abetting in said crime, then they are guilty in this case.[57]

[53] Cordes v. State, 112 S. W. 943, 54 Tex. Cr. R. 204.

[54] Proctor v. State, 112 S. W. 770, 54 Tex. Cr. R. 254.

[55] Grimsinger v. State, 69 S. W. 583, 44 Tex. Cr. R. 1.

[56] Grimsinger v. State, 69 S. W. 583, 44 Tex. Cr. R. 1.

[57] Horton v. Commonwealth, 38 S. E. 184, 99 Va. 848.

§ 2806. What constitutes aiding and abetting

§ 2806(1). Oklahoma

You are instructed that to aid and abet may consist of words spoken, or acts done for the purpose of assisting in the commission of a crime or of encouraging its commission.[58]

§ 2806(2). Virginia

The court further instructs the jury that to constitute an aider and abettor it is essential that the aider and abettor should share the criminal intent of the principal or party who committed the offense. The court further instructs the jury that wherever a reasonable doubt exists as to the person's intention in interfering in the struggle or fight between two other persons, he cannot be found guilty as an aider and abettor; and if the jury shall believe from the evidence in this case that a fight arose or occurred between J. and W., in which the said J. was the aggressor, and that the said J. struck the said W. two blows upon the head, which resulted in his death, then the court tells the jury that unless they shall further believe, beyond all reasonable doubt, that T. and H. interfered or took part in said difficulty, and shared in the criminal intent of the said J., they cannot find the said T. and H. guilty as aiders and abettors in the crime.[59]

§ 2807. Liability of one not actually present at scene of homicide or attempted homicide

You are instructed that if, therefore, you believe from the evidence beyond a reasonable doubt that H., in ——— county, state of ———, on or about the ——— day of ———, with his malice aforethought, made an assault, with a deadly weapon, in and upon the person of T., with the specific intent then and there on the part of him, the said H., to kill and murder the said T.; and if you further believe from the evidence beyond a reasonable doubt that the defendant, before the commission of said assault, if you find it was committed, to wit, on or about the ——— day of ———, did unlawfully and willfully and of his malice aforethought advise, or encourage the said H. to kill and murder the said T.; or if you believe from the evidence beyond a reasonable doubt that the defendant promised any reward or favor to the said H. to kill and murder the said T.; and if you further believe that the said defendant was not present at the time said assault was committed by the said H., if you find that it was so committed—then you will find the defendant guilty as charged in the indictment, and assess his punishment at confinement in the penitentiary for any period of time not less than ——— nor more than ——— years, as the

[58] McDaniel v. State, 127 P. 358, 8 Okl. Cr. 209.

[59] Horton v. Commonwealth, 38 S. E. 184, 99 Va. 848.

jury may determine. But if you believe that before the commission of said assault, if any, the defendant did not advise, encourage, or promise any reward or favor to the said H. to kill and murder the said T., or if you have a reasonable doubt as to either of these issues, you will acquit the defendant.[60]

You are instructed that, if you believe from the evidence beyond a reasonable doubt that defendant, with express malice aforethought, knowing the unlawful intent of said ——— to kill and murder upon his express malice aforethought, did keep watch so as to prevent the interruption of the said ——— in the committing of said offense, though not actually present, then you will find the defendant guilty of murder in the first degree.[61]

§ 2808. Prosecution of joint defendants on theory that crime alleged was result of conspiracy

I instruct you that a conspiracy is a combination of two or more persons, by some concerted action, to accomplish some criminal or unlawful purpose, or to accomplish some purpose, not in itself unlawful or criminal, by criminal or unlawful means.[62]

I further instruct you that while it is necessary, in order to establish the existence of a conspiracy, to prove a combination of two or more persons by concert of action to accomplish a criminal or unlawful purpose, yet it is not necessary to prove that the conspirators came together and entered into a formal agreement to effect such purpose. Such common design and purpose may be regarded as proved, if the jury believe from the evidence, beyond a reasonable doubt, that the parties to such conspiracy were actually pursuing in concert the common design and purpose, whether acting separately or together, by common or different means, providing they were all leading to the same unlawful purpose.[63]

I instruct you that where two or more persons are associated together for the purpose of doing an unlawful act, the act or declaration of one of such persons, while engaged in or pursuant to the common object or design, is the act or declaration of all, for which all are liable, and each person so associated is deemed or presumed to have consented to or commanded what was done by any of the others.[64]

I therefore instruct you that if you are satisfied from the evidence in this case beyond a reasonable doubt that the defendants had entered into a conspiracy to shoot and kill the prosecuting wit-

[60] Vails v. State, 128 S. W. 1117, 59 Tex. Cr. R. 340.

[61] Grimsinger v. State, 69 S. W. 583, 44 Tex. Cr. R. 1.

[62] State v. Chong Ben, 173 P. 258, 89 Or. 313.

[63] State v. Chong Ben, 173 P. 258, 89 Or. 313.

[64] State v. Chong Ben, 173 P. 258, 89 Or. 313.

ness, and in pursuance of such conspiracy, common design, and purpose, the defendant shot at the said prosecuting witness with a pistol with intent to kill him, the said prosecuting witness at the time and place named in the indictment, then it will be your duty to find all of the defendants guilty as charged in the indictment.[65]

I instruct you that if you find from the evidence in this case beyond a reasonable doubt that one of the defendants shot at the prosecuting witness with a pistol with intent to kill him, the said prosecuting witness, and the other defendants were present, aiding and abetting him in the shooting, then you should find all of the defendants guilty as charged in the indictment.[66]

I therefore instruct you that if you find from the evidence in this case beyond a reasonable doubt that these defendants, or any two of them, while acting and conspiring together, in this county and state, at the time named in the indictment, did assault one ———, with intent to then and there kill him, the said ———, by then and there shooting at the said ——— with a pistol, loaded with powder and ball, and while within shooting distance of and with intent to kill him, the said ———, then it will be your duty to find such defendants that you find acted and conspired together guilty as charged.[67]

I further instruct you that if you find from the evidence in this case beyond a reasonable doubt that on the ——— day of ———, in this county and state, either of the defendants named in the indictment, while acting alone and not in conjunction with the other defendants, did assault ———, named in the indictment, with intent to kill him, the said ———, by then and there shooting at the said ———, with a pistol loaded with powder and ball, and in shooting distance of and with intent to kill the said ———, then you should find such defendant guilty as charged, and the other two defendants not guilty.[68]

I instruct you that you may find one or more of the defendants guilty and the others not guilty. If the testimony satisfies you beyond a reasonable doubt, that either of the defendants is guilty of the crime charged, then you should find such defendant guilty. On the other hand, if you entertain a reasonable doubt from the evidence as to the guilt of either of the defendants of the crime charged, then you should find such defendant not guilty.[69]

[65] State v. Chong Ben, 173 P. 258, 89 Or. 313.

[66] State v. Chong Ben, 173 P. 258, 89 Or. 313.

[67] State v. Chong Ben, 173 P. 258, 89 Or. 313.

[68] State v. Chong Ben, 173 P. 258, 89 Or. 313.

[69] State v. Chong Ben, 173 P. 258, 89 Or. 313.

§ 2809. Concealment of crime

The jury are instructed that, though the jury shall believe from the evidence that the murder was committed at the time and place mentioned in the indictment, still, if you are not satisfied from the evidence beyond a reasonable doubt that defendant was previously aware of the purpose to commit such murder, or participated therein, or aided or abetted or assisted in the perpetration thereof, then you should not find defendant guilty, though you further believe from the evidence that he subsequently failed to disclose or actually concealed such murder.[70]

§ 2810. Homicide, subsequent to robbery, by accomplice of defendant in robbery

The court charges the jury that if the jury believe from the evidence that there was a plot between defendant and E. to rob R., and that the killing was after that plot had been consummated, and from a cause having no connection with the common object of the plot and was by E. alone, the jury cannot convict the defendant.[71]

§ 2811. Conviction of principal and accessory of different degrees of crime

The jury are instructed that, if you do not believe from the evidence, beyond a reasonable doubt, that the state of facts as set out in instruction No. ——— existed, yet do believe from the evidence beyond a reasonable doubt that the defendant, in this county, and before the finding of the indictment herein, willfully and feloniously shot and killed ———, not in his necessary or apparently necessary self-defense, and not in the necessary or apparently necessary defense of ———, ———, ———, or ———, or you believe from the evidence, beyond a reasonable doubt, that ———, ———, ——— or ———, or any one or more of them, in this county, and before the finding of the indictment herein, willfully and feloniously shot and killed ———, not in their necessary or apparently necessary self-defense, or in the necessary or apparently necessary defense of one of them or of defendant, and that the defendant was present at the time and near enough so to do, and did, willfully and feloniously, aid, encourage, advise, or command the person or persons, who did shoot the said ———, so to do, not in his necessary or apparently necessary self-defense, and not in the necessary or apparently necessary defense of the other defendants, or some one or more of them, then you ought to find him guilty; guilty of willful murder if you shall believe from the evidence beyond a reasonable doubt that such shooting and killing of ———, or such aiding and

[70] Kennedy v. People, 40 Ill. 488.

[71] McLeroy v. State, 25 So. 247, 120 Ala. 274.

assisting, was done with malice aforethought; or guilty of voluntary manslaughter, if you shall believe from the evidence beyond a reasonable doubt that such shooting and killing of ———, or such aiding and assisting, was done in sudden heat and passion or in sudden affray and without previous malice.[72]

The jury are instructed that, if the jury believe from the evidence beyond a reasonable doubt that ——— was unlawfully, willfully, feloniously, and with malice aforethought, or in sudden affray, or sudden heat and passion, shot and killed by ———, ———, or ———, when it was not necessary, and did not reasonably appear to the one doing the killing to be necessary, to protect himself, defendant, or the other persons associated with him at the time, from danger, real or apparent, of death or great bodily harm at the hands of ———, or those acting in concert with him, and shall further believe from the evidence beyond a reasonable doubt that the defendant was present at the time, and did unlawfully, willfully, and feloniously aid, abet, advise, counsel, or encourage the said ———, ———, or ———, or the one of them who did said killing, they should find the defendant ——— guilty—that is, guilty of murder—if they believe from the evidence beyond a reasonable doubt that said aiding, abetting, advising, consulting, or encouraging, if he did same, was done with malice aforethought, but guilty of voluntary manslaughter if they believe from the evidence such aiding, abetting, advising, consulting, or encouraging, if any was done, was without previous malice, and shall further believe from the evidence beyond a reasonable doubt that it was done in a sudden affray, or in sudden heat and passion, upon provocation which was reasonably calculated to excite his passion beyond the power of control.[73]

§ 2812. Principals in second degree

§ 2812(1). Georgia

The jury are instructed that, if you should find in this case, under the evidence and the law I have given you in charge, that the defendant is guilty of murder under the evidence, that he was the actor or absolute perpetrator of the crime, why then that would end your deliberations, and you should return a verdict accordingly; but you may inquire whether under the evidence, if he is not the actor or absolute perpetrator of the crime, as to whether or not under the evidence he is guilty as a principal in the second degree.[74]

[72] Gambrell v. Commonwealth, 113 S. W. 476, 130 Ky. 513.

[73] Watkins v. Commonwealth, 97 S. W. 740, 123 Ky. 817.

[74] Bexley v. State, 80 S. E. 314, 141 Ga. 1.

§ 2812(2). Virginia

The court instructs the jury that principals in the first degree in every murder or other crime are those who are the actors, or actual perpetrators of the crime,—those who are the immediate perpetrators of the act; that principals in the second degree are those who did not, with their own hands, commit the act, but were present, aiding, and abetting it. It is not necessary, in order to make a person principal in the second degree, that he be actually present when the crime was committed, or that he actually participated in the commission of the crime. The test as to whether or not he is a principal in the second degree is, was he encouraging, inciting, or in some manner offering aid or consent to the crime? All persons present lending countenance or otherwise aiding while another does the act, are principals in the second degree, and liable to the same punishment as if they were principals in the first degree, and actually committed the crime.[75]

§ 2812(3). West Virginia

You are instructed that a principal in the second degree is one who is present aiding and abetting the principal actor in the commission of the crime, and actual physical presence is not necessary. A constructive presence is sufficient, as in the instance of a person keeping watch or guard at a convenient distance while the murder is being committed by the principal actor.[76]

§ 2813. Right to convict one not present at time and place of kill- and not indicted as an accessory before the fact

The jury is instructed that an accessory before the fact is one who is absent at the time of the actual perpetration of the crime, but procures, counsels, commands, incites, or abets another to commit the crime. The crime of an accessory before the fact is a particular one. The absence of the accessory before the fact at the time and place of the principal offense is an essential element of the crime, and absence at the time the crime was committed is necessary to make him an accessory before the fact; and in this case, defendant not being indicted as an accessory before the fact, if you do not believe from the evidence in the case beyond a reasonable doubt that he killed ———, as alleged in the indictment, or that he was present when the said ——— was killed, aiding and abetting in the killing of said ——— as alleged in the indictment, he cannot be convicted. But in order to constitute presence at the time and place of killing said ———, it is not necessary that it would be shown by the evidence in the case that defendant was immediately standing by when the said ——— was killed, within sight or

[75] Horton v. Commonwealth, 38 S. E. 184, 99 Va. 848.

[76] State v. Cremeans, 57 S. E. 405, 62 W. Va. 134.

hearing. It is enough if the jury believe from the evidence in the case that said defendant kept watch or guard at a convenient distance while ——— was being killed by the principal actor.[77]

The jury are hereby instructed that, if they believe from the evidence in this case that T. took the life of ———, as charged in the indictment, and that defendant did not procure or advise the said T. to take the life of the said ———, and was not present at the time of the killing of said ———, and did not aid or abet therein, and if the jury further believe that said defendant, after killing of the said ———, learned from and was informed by the said T. that he, the said T., took the life of the said ———, and the said defendant having so learned the fact of such killing suppressed and concealed such fact or aided or abetted the said T. in the suppression or concealment of the fact of the killing of the said ———, then the jury should find the said defendant not guilty as charged in the said indictment.[78]

E. Murder

1. *In General*

§ 2814. Elements of crime

§ 2814(1). Alabama

The court charges the jury that if the defendant, in ——— county, and before the finding of this indictment, purposely killed the deceased, by shooting him with a gun, with a wickedness or depravity of heart towards said deceased, and the killing was determined on beforehand, and after reflection (for however short a time before the fatal shooting was done is immaterial), the defendant is guilty of murder.[79]

The jury are instructed that if the deceased died from the effects of a wound inflicted by a gun in the hands of the defendant, and such wound was intentionally inflicted in pursuance of a previously formed design to take his life, he would be guilty of murder.[80]

§ 2814(2). Colorado

You are instructed that our statute defines these two offenses, murder and manslaughter, in the following terms: Murder is the unlawful killing of a human being in the peace of the people, with malice aforethought, either express or implied. The unlawful killing may be perpetrated by poisoning, sticking, starving, drowning, stabbing, shooting, or by any other of the various forms or means by which human nature may be overcome and death thereby occa-

[77] State v. Cremeans, 57 S. E. 405, 62 W. Va. 134.

[78] State v. Cremeans, 57 S. E. 405, 62 W. Va. 134.

[79] Dunn v. State, 89 So. 147, 143 Ala. 67.

[80] Harkness v. State, 30 So. 73, 129 Ala. 71.

sioned. Manslaughter is the unlawful killing of a human being, without malice, express or implied, and without any mixture of deliberation whatever. It must be voluntary, upon a sudden heat of passion caused by a provocation apparently sufficient to make the passion irresistible, or involuntary, in the commission of an unlawful act, or a lawful act without due caution or circumspection.[81]

§ 2814(3). Illinois

The court instructs the jury that if you believe from the evidence in this case, beyond a reasonable doubt, that the defendant, with malice aforethought, either express or implied, inflicted upon the deceased the mortal wound in manner and form as charged in the indictment, and that the said deceased did then and there die from said mortal wound in manner and form as charged in the indictment, then the jury may find the defendant guilty of murder, provided you further believe, beyond a reasonable doubt, that said mortal wound was not inflicted upon the deceased by the defendant in self-defense.[82]

The jury are instructed that if they believe, from the evidence, beyond a reasonable doubt, that the defendant killed the deceased, as charged in the indictment, under circumstances showing no considerable provocation but showing an abandoned and malignant heart upon the part of the defendant, the law pronounces such act of defendant to be murder.[83]

You are further instructed that if you believe from the evidence in this case, beyond a reasonable doubt, that the defendant with malice aforethought, either expressed or implied, inflicted upon the deceased the mortal wound or wounds in manner and form as charged in the indictment, not in self-defense, as the same is defined in these instructions, and not upon a sudden heat of passion, caused by a provocation apparently sufficient to make the passion irresistible, and that the said deceased did thereafter die from said mortal wound or wounds in manner and form as charged in the indictment, then the jury should find the defendant guilty of murder.[84]

§ 2814(4). Indiana

The jury are instructed that one who, unprovoked, attacks another for the purpose of wounding or killing him, who does nothing but attempt to ward off the attack, and flees, and is pursued and slain, is guilty of murder in the first degree if the jury find that it was done with premeditation, and murder in the second degree if done with malice, but without premeditation.[85]

[81] May v. People, 6 P. 816, 8 Colo. 210.

[82] People v. Terrell, 104 N. E. 264, 262 Ill. 138.

[83] People v. Curtright, 101 N. E. 551, 258 Ill. 430.

[84] Carle v. People, 66 N. E. 32, 200 Ill. 494, 93 Am. St. Rep. 208.

[85] Welty v. State, 100 N. E. 73, 180 Ind. 411.

§ 2814(5). Kentucky

You are instructed that, if you believe from the evidence beyond a reasonable doubt that the defendant, in this county, and before the finding of the indictment herein, willfully, feloniously, and of his malice aforethought, and not in his necessary or reasonably apparent necessary self-defense, so shot at and wounded ——— as that he then and there died thereby, then he is guilty of willful murder as charged in the indictment, and you ought to so find and fix his punishment at death or at confinement in the state penitentiary for life, in your discretion.[86]

If you believe from the evidence beyond a reasonable doubt that the defendant, ———, of ———, and before the finding of the indictment herein on the occasion mentioned in the evidence, willfully and feloniously shot at and wounded ——— in the body, with a pistol loaded with powder and leaden balls, or other hard and explosive substances, so that he then and there immediately died, not in his necessary, or reasonably apparent necessary, defense, then you ought to find him guilty; guilty of willful murder as charged in the indictment herein, if you believe from the evidence beyond a reasonable doubt that such shooting and killing was done willfully and feloniously and with malice aforethought; guilty of voluntary manslaughter included in the indictment herein, if you believe from the evidence beyond a reasonable doubt that such shooting at and killing was done in sudden heat and passion, or in sudden affray and without previous malice.[87]

You are instructed that, if you believe from the evidence beyond a reasonable doubt that in ——— county, and before the finding of the indictment, namely, ———, the defendant willfully, feloniously, and with malice aforethought killed ——— by shooting him with a pistol from which shooting said ——— presently died, then you will find the defendant guilty of willful murder, and fix his punishment at confinement in the penitentiary for and during his natural life, or at death.[88]

You are instructed that, if you believe from the evidence beyond a reasonable doubt that the defendant, in this county, before the finding of the indictment in this case, did unlawfully, wilfully, feloniously, and of his malice aforethought kill and murder ———, by shooting and wounding him with a gun or pistol loaded with powder and leaden balls, or with other hard and explosive substances, from which shooting and wounding the said ——— did then and there die, you will find the defendant guilty of willful murder as charged in the indictment, and fix his punishment at death or con-

[86] Carnes v. Commonwealth, 142 S. W. 723, 146 Ky. 425.

[87] Burns v. Commonwealth, 124 S. W. 409, 136 Ky. 468.

[88] Gordon v. Commonwealth, 124 S. W. 806, 136 Ky. 508.

finement in the state penitentiary for life, in the discretion of the jury.[89]

The jury are instructed that, if they believe from the evidence beyond a reasonable doubt that the defendant ——— in ——— county, state of ———, and before the finding of the indictment, did kill ——— by shooting him with a pistol, loaded with leaden ball, or other hard substances, when it was not necessary, and it did not reasonably appear to defendant to be necessary to protect himself, ———, ———, or ——— from danger, real or apparent, of death or great bodily harm at the hands of ———, or those, if any, acting in concert with and aiding him, they should find defendant guilty—that is, guilty of murder—if they believe from the evidence beyond a reasonable doubt that said killing was done unlawfully, willfully, feloniously, and with malice aforethought; but guilty of voluntary manslaughter if the jury believe from the evidence such killing was without previous malice, and should further believe from the evidence beyond a reasonable doubt that it was unlawfully, willfully, and feloniously done in a sudden affray, or in sudden heat and passion, upon provocation which was reasonably calculated to excite defendant's passion beyond the power of control. If the jury find the defendant guilty of murder, they will fix his punishment at death or confinement in the penitentiary for life. But if they find him guilty of voluntary manslaughter, they should fix his punishment at confinement in the penitentiary not less than ——— nor more than ——— years, in their discretion.[90]

The court instructs the jury that if they believe from all the evidence, beyond a reasonable doubt, that the accused, before the finding of the indictment in this case, did, in ——— county, state of ———, unlawfully, willfully, and maliciously, feloniously, and with malice aforethought, kill ——— by shooting and wounding the said ——— upon his body and person with a gun, a deadly weapon, loaded with a leaden ball or balls, or other hard substance, and of the effect of which shooting and wounding the said ——— did die within one year thereafter, they shall find the accused guilty, and fix his punishment at death, or confinement in the state penitentiary for life, in the discretion of the jury.[91]

§ 2814(6). Missouri

The court instructs the jury that if they believe and find from the evidence in this cause beyond a reasonable doubt that at the county of ———, and state of ———, the defendant, did on the ——— day of ———, or at any time prior to the finding of the in-

[89] Keeton v. Commonwealth, 108 S. W. 315, 32 Ky. Law Rep. 1164.

[90] Watkins v. Commonwealth, 97 S. W. 740, 123 Ky. 817, 29 Ky. Law Rep. 1273.

[91] Alderson v. Commonwealth, 74 S. W. 679, 25 Ky. Law Rep. 32.

dictment in this cause, feloniously, willfully, deliberately, premeditatedly, and of his malice aforethought kill and murder one ——— in the manner and form charged in either count of this indictment, you shoud find the defendant guilty of murder in the first degree, and so state in your verdict.[92]

The court instructs the jury that before they can find the defendant guilty of the crime charged against him in this case they must believe and find from the evidence before them, and that beyond a reasonable doubt, and to a moral certainty, (1) that said ——— was killed and murdered as charged in the indictment; (2) that the defendant was present at the time and place mentioned in said indictment, and did then and there willfully, intentionally, deliberately, and premeditatedly and of his malice aforethought, in the manner and by some of the means specified in said indictment, kill the said ———; and unless the jury so find they are bound to acquit the defendant.[93]

§ 2814(7). Oklahoma

The jury are instructed that, if they find and believe from the evidence in this case beyond a reasonable doubt that the defendant, in the county of ———, state of ———, on or about the ——— day of ———, or at any time before the filing of the information herein, did, in the manner and form and with the purpose and intent and design charged in the information, shoot and kill the deceased, and that said killing when perpetrated was done with a premeditated design to effect the death of the said deceased, and that the said defendant unlawfully and with such premeditated design to effect the death of the said deceased, did shoot and kill him, the said decedent, then it will be your duty to find the defendant guilty as charged in the information. On the other hand, if there remains in your minds a reasonable doubt as to the existence of any material fact necessary to constitute the crime of murder as herein instructed, then it will be your duty to acquit the defendant unless you should find that she is guilty of manslaughter in the first degree as hereinafter instructed.[94]

The court instructs the jury that, if you believe from the evidence beyond a reasonable doubt that the defendant, in ——— county, ———, on or about the ——— day of ———, and anterior to the filing of this information, to wit, the ——— day of ———, did then and there at said time and place alleged willfully, unlawfully, intentionally, and feloniously, without authority of law and with a premeditated design to effect the death of ———, shoot the said ———

[92] State v. Howell, 23 S. W. 263, 117 Mo. 307.

[93] State v. Howell, 23 S. W. 263, 117 Mo. 307.

[94] Palmer v. State (Cr. App.) 187 P. 502.

as alleged in the information with a certain shotgun, then and there had and held in his hand, and did thereby inflict a mortal wound upon the said ———, of which he did then and there die, then it will be your duty to find the defendant guilty of murder as charged in the information, unless you should find that at said time said defendant was justifiable, or have a reasonable doubt thereof, in which case you should acquit the defendant of the charge of murder.[95]

You are instructed that the defendants, ——— and ———, are charged in the information in this case with the crime of murder. The information alleges that the defendants, in ——— county, and state of ———, feloniously, without authority of law and with premeditated design to effect the death of one ———, shot the said ——— with a certain loaded shotgun, which ——— had and held in his hands, thereby inflicting upon the said ——— a mortal wound of which he died; that the shooting occurred on the ——— day of ———, and that ——— died on the same day, and it alleges that by reason of the facts stated the defendants are guilty of murder. In addition to the charge of murder, the information contains and charges a lesser degree of felonious homicide known as manslaughter. To this charge contained in the information the defendants have pleaded not guilty, and you are now impaneled and sworn to try the question of their guilt or innocence.[96]

§ 2814(8). Texas

You are instructed that if you believe from the evidence beyond a reasonable doubt that the defendant, ———, in the county of ——— and state of ———, on or about the time alleged in the indictment, with a gun or pistol, and not in defense of himself against an unlawful attack, real or apparent, reasonably producing a rational fear or expectation of death or serious bodily injury, and not under circumstances which would reduce the offense to the grade of manslaughter, with intent to kill did unlawfully and with malice aforethought shoot with a gun or pistol, and thereby kill the said ———, as charged in the indictment, you will find the defendant guilty of murder as charged, and assess his punishment at death, or by confinement in the penitentiary for life, or for any term of years not less than ———.[97]

I instruct you that our statute provides that any person of sound memory and discretion who shall unlawfully kill any reasonable creature in being, within this state, with malice aforethought, shall be deemed guilty of murder, and "murder" is distinguishable from

[95] Brantley v. State, 175 P. 51, 15 Okl. Cr. 6.

[96] McDaniel v. State, 127 P. 358, 8 Okl. Cr. 209.

[97] Zimmerman v. State, 215 S. W. 101, 85 Tex. Cr. R. 630.

every other species of homicide by the absence of the circumstances which reduce the offense to negligent homicide or manslaughter, or which excuse or justify the homicide.[98]

§ 2814(9). Virginia

You are instructed that murder is the unlawful killing of another, with malice, which may be express or implied, and is distinguished in ——— as murder in the first and murder in the second degree.[99]

§ 2815. Distinction between murder and other species of homicide

You are instructed that every person with a sound memory and discretion, who shall unlawfully kill any reasonable creature in being within this state, with malice aforethought, either express or implied, shall be deemed guilty of murder. Murder is distinguishable from every other species of homicide by the absence of circumstances which reduce the offense to negligent homicide or manslaughter, or which excuse or justify the homicide.[1]

I instruct you that our statute provides that any person of sound memory and discretion who shall unlawfully kill any reasonable creature in being within this state, with malice aforethought, shall be deemed guilty of murder, and murder is distinguishable from every other species of homicide by the absence of the circumstances which reduce the offense to negligent homicide or manslaughter, or which excuse or justify the homicide. The distinguishing characteristic of murder in the second degree is implied malice aforethought. Malice aforethought includes all those states of mind under which the killing of a person takes place without any cause which will in law justify, excuse, or extenuate the homicide. It is a condition of the mind which shows a heart regardless of social duty and fatally bent on mischief, the existence of which is inferred from acts committed or words spoken. Malice in its legal sense denotes a wrongful act done intentionally without just cause or excuse.[2]

§ 2816. Definition of certain terms, such as "willfully," "feloniously," "deliberately," etc.

§ 2816(1). Alabama

You are instructed that "deliberate" and "premeditated," as these words are used in the statute defining murder, means only this: that the slayer must intend, before the blow is delivered, though it be for only an instant of time before, that he will shoot at the time he does shoot, and that death will be the result of the shot; or, in other words, if the slayer had any time to think before the act, how-

[98] Witty v. State, 171 S. W. 229, 75 Tex. Cr. R. 440.

[99] Hodges v. Commonwealth, 15 S. E. 513, 89 Va. 265.

[1] Montgomery v. State, 151 S. W. 813, 68 Tex. Cr. R. 78.

[2] Crowell v. State, 148 S. W. 570, 66 Tex. Cr. R. 537.

ever short, such time may have been even a single moment, and did think, and he shot as the result of an intention to kill, produced by even this momentary operation of the mind, and death ensued, that would be a deliberate and premeditated killing within the meaning of the statute defining murder in the first degree.[3]

§ 2816(2). Kentucky

The court instructs the jury that the words "willful" and "willfully," as used in these instructions, mean intentional, not accidental or voluntary. The word "feloniously," as used in these instructions, means proceeding from an evil heart or purpose, done with a deliberate intention of committing a crime.[4]

You are instructed that the words "willful" and "willfully," as used in these instructions, mean intentional; not accidental or voluntary. The word "feloniously," as used in these instructions, means proceeding from an evil heart or purpose; done with the deliberate intention of committing a crime. A criminal conspiracy, within the meaning of the word "conspired" as used in these instructions, is a corrupt combination of two or more persons to do an unlawful act or to do a lawful act by unlawful means.[5]

§ 2816(3). Missouri

The court instructs the jury that "deliberately" means in a cool state of blood. It does not mean brooded over, considered, reflected upon for a week, a day, or an hour; but it means an intent to kill executed by a person not under the influence of violent passion suddenly aroused by some unlawful provocation, but in furtherance of a formed design to gratify a feeling of revenge, or to accomplish some other unlawful act. And the passion here referred to is that only which is produced by what the law recognizes as a just or lawful cause of provocation.[6]

The jury are instructed that, as used in these instructions, "willfully" means intentionally; that is, not accidentally. "Deliberately" means in a cool state of blood; that is not in a heat of passion suddenly aroused by some real or supposed grievance. "Premeditatedly" means thought of beforehand for any length of time, however short.[7]

You are instructed that, as used in this indictment and these instructions, the terms "willfully," "deliberately," "premeditatedly," and "malice aforethought" are defined as follows: "Willfully" means intentionally; not accidentally. In the absence of qualifying

[3] Dunn v. State, 39 So. 147, 143 Ala. 67.

[4] Taylor v. Commonwealth, 188 S. W. 1087, 172 Ky. 136.

[5] Gambrell v. Commonwealth, 113 S. W. 476, 130 Ky. 513.

[6] State v. Spaugh, 98 S. W. 55, 200 Mo. 571.

[7] State v. Hudspeth, 60 S. W. 136, 159 Mo. 178.

facts and circumstances, the law presumes that a person intends the ordinary and probable results of his acts and conduct. "Deliberately" means in a cool state of the blood. It does not mean brooded over or reflected upon for a week, or a day, or an hour, but it means an intent to kill, executed by the defendant in a cool state of the blood, in furtherance of a firm design to gratify a feeling of revenge, or to accomplish some other unlawful purpose, and not under the influence of a violent passion suddenly aroused by some provocation. "Premeditatedly" means thought of beforehand for any length of time, however short.[8]

The court instructs the jury that by the term "feloniously" is meant wickedly and against the administration of the law; that is, wickedly and unlawfully. By the term "willfully" is meant intentionally, and not by accident. By the term "deliberately" is meant done in a cool state of the blood. It does not mean brooded over or considered or reflected on for a week or a day or an hour, but it does mean an intention to kill, executed by a party not under the influence of a violent passion suddenly aroused; and the passion here referred to is that only which is produced by what the law recognizes as a just cause of provocation. By the term "premeditation" is meant thought of beforehand for any length of time, however short.[9]

§ 2816(4). Washington

The jury are instructed that "purposely," as used in these instructions, means an intentional doing, with the intent of the party who does the act to do that certain thing. "Deliberation" is the mental operation of weighing motive or consideration that makes for or against an inclination for the proposed act or line of action. "Premeditation" is the mental operation of thinking upon an act before doing it, or upon an inclination before carrying it out. Malice is deliberate and premeditated when it has been dwelt upon at all in the mind, and when the motive or consideration moving to the act of killing has been to any extent mentally weighed. Premeditation may be as quick as thought in the mind of man.[10]

§ 2817. Presence of malice as essential or distinguishing characteristic of murder

§ 2817(1). Alabama

The court instructs the jury that, if there is a reasonable doubt as to whether the killing was done with malice, the defendant cannot be convicted of murder at all.[11]

[8] State v. Grant, 53 S. W. 432, 152 Mo. 57.

[9] State v. Howell, 23 S. W. 263, 117 Mo. 307.

[10] State v. Straub, 47 P. 227, 16 Wash. 111.

[11] Glass v. State, 78 So. 819, 201 Ala. 441; Andrews v. State, 48 So. 858, 159 Ala. 14.

The jury are instructed that, when the killing is malicious, there can be no conviction of any offense less than murder.[12]

The court charges the jury that, if the killing in this case was without malice the defendant would not be guilty of a higher grade of offense than manslaughter in the first degree.[13]

§ 2817(2). Delaware

The court instructs the jury that malice is an essential ingredient of the crime of murder of both degrees. It is a condition of the mind or heart, and without it there can be no murder either of the first or second degree.[14]

§ 2817(3). Texas

You are instructed that malice is also a necessary ingredient of the offense of murder in the second degree. The distinguishing feature, however, so far as the element of malice is concerned, is that, in murder in the first degree, malice must be proved, to the satisfaction of the jury, beyond a reasonable doubt, as an existing fact, while in murder in the second degree malice will be inferred from the fact of an unlawful killing.[15]

§ 2818. What constitutes malice

§ 2818(1). Alabama

The jury are instructed that, if one who is subject to arrest takes the life of an officer attempting to arrest him, with the sole motive of avoiding arrest, such killing will be malicious, notwithstanding the total absence of ill will towards the person whom he killed.[16]

The jury are instructed that "malice," as used here, does not necessarily mean personal ill will or hatred; yet, if the sole purpose actuating defendant to stab ——— was to get revenge for some wrong previously done him, whether real or fancied, then the law would consider the act as done with malice.[17]

You are instructed that "malice," as the word is used in courts of law, signifies a wrongful act done intentionally, without legal justification or excuse. The word, as commonly used in the everyday affairs of life, has, I believe, the meaning of personal hatred or ill will. This is something more than its meaning here. In this case it signifies the formed design on the part of the defendant to take the life of the deceased unlawfully, not in self-defense, and without such provocation allowed by the law to be such as would repel

[12] Heningburg v. State, 45 So. 246, 153 Ala. 18.

[13] Untreiner v. State, 41 So. 285, 146 Ala. 26.

[14] State v. Prettyman, 100 A. 476, 6 Boyce, 452.

[15] Hicks v. State, 171 S. W. 755, 75 Tex. Cr. R. 461.

[16] McGuffin v. State, 59 So. 635, 178 Ala. 40.

[17] Ellis v. State, 25 So. 1, 120 Ala. 333.

the imputation of malice. In other words, malice is criminal intention.[18]

§ 2818(2). Georgia

Legal malice is not ill will or hatred. It is an unlawful intention to kill, without justification or mitigation, which must exist at the time of the killing. But it is not necessary for that intention to exist for any length of time before the killing. A man may form the intention to kill, do the killing instantly, and regret the deed as soon as done.[19]

You are instructed that legal malice is an intent unlawfully to take away the life of a fellow creature, in a case where the law would neither justify nor to any degree excuse the intention, if the killing should take place as intended.[20]

§ 2818(3). Illinois

The jury are instructed that malice includes not only anger, hatred and revenge, but every other unlawful and unjustifiable motive. Malice is not confined to ill will towards an individual, but is intended to denote an action flowing from any wicked and corrupt motive, a thing done with a wicked mind, where the fact has been attended with such circumstances as evince plain indications of a heart regardless of social duty, and fatally bent on mischief; hence malice is implied from any deliberate or cruel act against another, however sudden, which shows an abandoned and malignant heart.[21]

§ 2818(4). Indian Territory

You are instructed that malice includes, not only anger, hatred, and revenge, but every other unlawful and unjustifiable motive. It is not confined to ill will towards an individual, but is intended to denote an action arising from any wicked or corrupt motive—anything done with a wicked mind, when the fact is attended by such circumstances as evinced plain indications of a heart regardless of social duties and fatally bent on mischief. Hence malice may be implied from any deliberate and unlawful act against another, if the unlawful act be of such a character as to show an abandoned and malignant disposition.[22]

§ 2818(5). Iowa

The jury are instructed that malice, within the meaning of the law, includes not only hatred and ill will, but also any other unlawful or unjustifiable motive which inspires one person to injure an-

[18] Stoball v. State, 23 So. 162, 116 Ala. 454.

[19] Long v. State, 56 S. E. 444, 127 Ga. 350.

[20] Mann v. State, 53 S. E. 324, 124 Ga. 760, 4 L. R. A. (N. S.) 984.

[21] People v. Lucas, 91 N. E. 659, 244 Ill. 603; Parsons v. People, 75 N. E. 993, 218 Ill. 386; McCoy v. People, 51 N. E. 777, 175 Ill. 224.

[22] Bias v. United States, 53 S. W. 471, 3 Ind. T. 27.

other, and it may be inferred from the willful doing of an unlawful act, within just provocation or excuse, with intent to injure the person of another. It does not necessarily mean hatred or ill will, but may be simply a vicious and wanton disregard of another's rights. Malice may be express or implied.[23]

§ 2818(6). Missouri

You are instructed that "malice" does not mean mere spite, or ill will, or dislike, as it is ordinarily understood, but means that condition of the mind which prompts one person to take the life of another without just cause or provocation; and it signifies a state of disposition which shows a heart regardless of social duty, and fatally bent on mischief. "Malice aforethought" means that the act was done with malice and premeditation.[24]

§ 2818(7). Montana

You are instructed that malice may be express or implied. It is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature. It is implied when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart. The term "malice" is not restricted to spite or malevolence toward the deceased in particular, but is understood to mean that general malignity and recklessness of and towards the lives and personal safety of others which proceed from a heart void of a just sense of social duty, and fatally bent on mischief. And whenever the fatal act is committed deliberately the law presumes that it is done in malice.[25]

§ 2818(8). South Carolina

You are instructed that malice has been defined to be a term of art importing wickedness and excluding just cause or excuse. It is something that springs from wickedness, from depravity, from a depraved spirit, from a spirit at the time bent on mischief, and not then having a regard for the social obligations, or the obligations which rest upon mankind.[26]

You are instructed that malice may be defined to be an evil spirit, a depraved and wicked spirit, such as is found in a heart totally devoid of social duty, and fatally bent upon mischief. In the language of some of our old books, malice is either expressed or implied. Express malice is where one person kills another with a sedate, deliberate, meant, and formed design; such formed design being evidenced by external circumstances which discover the inward intention, such as lying in wait, antecedent menacing threats,

[23] State v. Christ, 177 N. W. 54.

[24] State v. Grant, 53 S. W. 432, 152 Mo. 57.

[25] State v. Halk, 141 P. 149, 49 Mont. 173.

[26] State v. Miller, 53 S. E. 426, 73 S. C. 277, 114 Am. St. Rep. 82.

former grudges, and concerted schemes to do somebody harm. Malice is implied from any deliberate, cruel act, committed by one person against another; for instance, as where a man kills another without any, or without considerable, provocation, the law implies malice in such a case.[27]

§ 2818(9). Texas

The jury are instructed that express malice, as herein used, is when a person with cool and sedate mind, in pursuance of a formed design to kill another, or to inflict upon him serious bodily injury, which would probably end in depriving him of his life does, without legal justification, mitigation, or excuse, kill such person.[28]

The jury are instructed that every person, with a sound memory and discretion, who shall unlawfully kill any reasonable creature in being within this state, with malice aforethought, either expressed or implied, shall be deemed guilty of murder. All murder committed with express malice is murder of the first degree. "Malice aforethought" is a term used in law to designate the wicked and mischievous intent with which a man willfully does a wrongful act, and it is to be inferred from acts committed or words spoken. Express malice exists where a murder is committed with sedate, deliberate mind on the part of the murderer, and in pursuance of a formed design to kill the person killed. The mind of the murderer need not be entirely free from excitement in order to bring it within the meaning of the term "sedate and deliberate"; for, if it be in such condition as to admit of reflection upon the character of the act, then it is sedate and deliberate, within the meaning of the law.[29]

§ 2818(10). Washington

In this connection you are instructed that malice, as the word is used in defining criminal offenses, denotes a criminal act done intentionally, without just cause or excuse. The intention is an inference of law resulting from the doing of the act, except in rare instances, where the intention is expressly declared by the wrongdoer, and except where the circumstances rebut the presumption of its existence. Malice is presumed where one person deliberately injures another. It is the deliberation with which the act is performed that gives it a malicious character. It is the opposite of an act performed under sudden or uncontrollable passion, which prevents the deliberation of cool reflection in forming a purpose. Hence, if in this case you should find that the act charged is not,

[27] State v. Bodie, 11 S. E. 624, 33 S. C. 117.

[28] Thomas v. State, 125 S. W. 35, 57 Tex. Cr. R. 452.

[29] Cain v. State, 59 S. W. 275, 42 Tex. Cr. R. 210.

when committed, accompanied by wrong intent and cool reflection, but was, on the contrary, the result of sudden and uncontrollable passion, produced by adequate cause or provocation, then the defendant would be guilty of no higher degree than manslaughter.[30]

§ 2818(11). West Virginia

The court instructs the jury that to convict one of murder it is not necessary that malice should exist in the heart of the accused against the deceased. If the accused was guilty of striking with a deadly weapon another, and of killing him, the intent and malice may both be inferred from such act; and such malice may not be directed against any particular person, but may be such as shows a "heart regardless of social duty and fatally bent on mischief."[31]

§ 2819. Malice aforethought or premeditated malice

§ 2819(1). United States

The jury are instructed that, to find a deliberate intent to kill, you do not have to believe that defendant had that intent in his mind a year or month or day or an hour. In this age of improved weapons, when a man can discharge a gun in the twinkling of an eye, if you see a man draw one of these weapons, and fire it, and the man toward whom he presents it falls dead, you have a deliberate intent to kill, as manifested by the way he did that act. Malice aforethought does not, as I have already told you, necessarily import any special malevolence towards the individual slain, but also includes the case of a generally depraved, wicked, and malicious spirit, a heart regardless of social duty, and a mind deliberately bent on mischief. It imports premeditation. Malice, says the law, is an intent of the mind and heart.[32]

The jury are instructed that the malice which distinguishes the crime of murder must be aforethought. It implies premeditation—a prior intent to do the act. It may have existed but for a moment—an inappreciably brief period of time—or longer. No limit has been, nor can be, fixed as to its duration. If it in fact existed for any period, however brief, the killing would be murder; but, if malice was wanting, the homicide could not be of a higher grade of offense than manslaughter.[33]

§ 2819(2). California

The jury are instructed that malice aforethought, either express or implied, is manifested by the doing of an unlawful and felonious act intentionally and without legal cause or excuse. It does

[30] State v. Vance, 70 P. 34, 29 Wash. 435.

[31] State v. Trail, 53 S. E. 17, 59 W. Va. 175.

[32] Allen v. U. S., 17 S. Ct. 154, 164 U. S. 492, 41 L. Ed. 528.

[33] United States v. Lewis (C. C. Tex.) 111 Fed. 630.

not imply a pre-existing hatred or enmity toward the individual injured.[34]

You are instructed that murder is the unlawful killing of a human being with malice aforethought. Such malice may be express or implied. It is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature. It is implied when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart.[35]

§ 2819(3). Colorado

You are instructed that the distinguishing feature between murder and manslaughter is the ingredient of malice. Malice aforethought is as essential an ingredient of murder as the act of killing. Malice, either express or implied, must be proved, and in the absence of malice such killing will be manslaughter. Our statute thus defines "express" and "implied" malice, either of which is sufficient to constitute the crime of murder, when it exists in connection with the unlawful killing. Express malice is that deliberate intention unlawfully to take away the life of a fellow creature, which is manifested by external circumstances capable of proof. Malice shall be implied when no considerable provocation appears, or where all the circumstances of the killing show an abandoned and malignant heart.[36]

You are instructed that, if you find from the evidence that the prisoner intentionally killed the deceased, and that it was not done in necessary self-defense, or under circumstances which justified or excused the act in law, you will then inquire whether it was done maliciously, in order to enable you to fix the grade of the offense. And if you further find that there existed in the mind of the prisoner a deliberate intention to kill the deceased, this constitutes malice aforethought, and the crime is murder; or if you find that there was no considerable provocation, or that all the circumstances of the killing show an abandoned and malignant heart, the offense is the same.[37]

§ 2819(4). Delaware

The court instructs the jury that murder of the first degree is committed when a person is killed by another with express malice aforethought. Express malice aforethought exists where one person kills another with a sedate, deliberate and formed design. This formed design may be manifested in many ways, for example, by antecedent menaces or threats that disclose a purpose to

[34] People v. Balkwell, 76 P. 1017, 143 Cal. 259.

[35] People v. Mendenhall, 67 P. 825, 135 Cal. 344.

[36] May v. People, 6 P. 816, 8 Colo. 210.

[37] May v. People, 6 P. 816, 8 Colo. 210.

commit the act charged. Where one from hatred, jealousy, or revenge, or because of a grudge, coolly and deliberately forms the design to kill another and commits the act it is done with express malice aforethought and is murder of the first degree.[38]

The court instructs the jury that, if the killing is done with a sedate, deliberate, and formed design, the length of time that such design or intention exists in the mind of the slayer is immaterial, for the killing under such circumstances would be murder of the first degree.[39]

§ 2819(5). Illinois

The court instructs the jury, as a matter of law, that the words "malice aforethought" do not necessarily imply the lapse of a considerable time between the malicious intent to take life and the actual execution of that intent. Whether the design to effect death was formed on the instant or had been previously entertained for any considerable time is immaterial, for the killing with malice aforethought, if proved by the evidence beyond a reasonable doubt, is murder under the laws of this state.[40]

§ 2819(6). Indiana

The jury are instructed that, to constitute malice aforethought, it is only necessary that there be a formed design to kill; and such design may be conceived at the moment the fatal stroke is given, as well as a long time before. Malice aforethought means the intention to kill; and when such means are used as are likely to produce death, the legal presumption is that death was intended.[41]

§ 2819(7). Iowa

The jury are instructed that whoever kills any human being with malice aforethought, either express or implied, is guilty of murder. Malice aforethought is a necessary ingredient in the crime of murder, either of the first or second degree, and must be established by the state before you would be justified in finding the defendant guilty of murder in either degree. By "malice" is meant not only anger, hatred, and revenge, but any other unlawful, and unjustifiable motives. It is not confined to ill will against the individual, but is intended to denote an action flowing from any wicked and corrupt intent. An act done with a wicked mind and attended with such circumstances as to plainly indicate a heart regardless of moral and social duties, and fully bent on mischief, indicates malice within the meaning of the law. The word "aforethought," used in connection with the word "malice" in our law,

[38] State v. Prettyman, 100 A. 476, 6 Boyce, 452.

[39] State v. Prettyman, 100 A. 476, 6 Boyce, 452.

[40] People v. Weir, 129 N. E. 116, 295 Ill. 268.

[41] Welty v. State, 100 N. E. 73, 180 Ind. 411.

simply means thought out or conceived beforehand, but it is not necessary that such malice should have existed for any considerable length of time to constitute malice aforethought within the meaning of the law. It is sufficient if it exists for any length of time before the commission of the act. "Malice aforethought" may be either express or implied. "Express malice" means a settled purpose and design to commit the offense in question, and must be shown by proof of that fact directly and without inference. It may be proved as generally understood by expressions of hatred, threats, and the like. "Implied malice" means that which may be inferred from the act and fact shown. Thus, when a wanton, wicked, cruel, or revengeful act is shown, the inference or implication may be drawn that the person who did such act was actuated by malice.[42]

§ 2819(8). Kentucky

You are instructed that the term "with malice," as used in these instructions, means "the absence of legal excuse or justification," and the term "aforethought" as used in these instructions means a predetermination to do the act complained of, and it is not material how suddenly or recently the predetermination was formed.[43]

You are instructed that the phrase "with malice aforethought," as used in the indictment and instructions herein, means a predetermination to do the act of killing without a legal excuse, and it is immaterial as to what time before the killing such a determination was formed.[44]

§ 2819(9). Missouri

You are instructed that the term "malice," as used in the indictment, does not mean, in a legal sense, mere spite, ill will, hatred, or dislike, as it is ordinarily understood, but it means that condition of the mind which prompts one person to take the life of another person without just cause or justification, and signifies the state of disposition which shows a heart regardless of social duty and fatally bent on mischief; and "malice aforethought" means that the act was done with malice and premeditation.[45]

§ 2819(10). New Mexico

The court instructs the jury that premeditated malice aforethought is where the intention to unlawfully take human life is deliberately formed in the mind, and that intention thought of before the fatal deed is done. There need be no appreciable space of time

[42] State v. Baker, 135 N. W. 1097, 138 N. W. 841, 157 Iowa, 126.

[43] Hall v. Commonwealth, 159 S. W. 1155, 155 Ky. 541.

[44] Carnes v. Commonwealth, 142 S. W. 723, 146 Ky. 425; Burns v. Commonwealth, 124 S. W. 409, 136 Ky. 468; Gambrell v. Commonwealth, 113 S. W. 476, 130 Ky. 513.

[45] State v. Howell, 23 S. W. 263, 117 Mo. 307.

between the formation of the intention and the killing itself. It is only necessary that the act of killing be preceded by a concurrence of the will, deliberation, and premeditation on the part of the slayer.[46]

§ 2819(11). North Carolina

You are instructed that premeditation is a prior determination to do the act in question, but it is not necessary that such determination shall exist for any considerable period of time before it is carried into effect. If the determination is formed deliberately and upon due reflection, it makes no difference how soon afterwards the fatal resolve is carried into execution. To constitute murder in the first degree, there must be express malice, not merely malice which is implied.[47]

§ 2819(12). Oklahoma

The court instructs the jury that, to warrant a conviction for murder, the jury must be satisfied by the evidence beyond a reasonable doubt that the defendant, before the act, deliberately formed the design with a cool and deliberate mind to kill the deceased, and that the defendant proceeded in accordance with that design to the infliction of the death wound. The act, to constitute murder, must not result from a mere sudden, rash, inconsiderate impulse, passion, or excitement, however unjustifiable and unwarranted it may be.[48]

§ 2819(13). Texas

You are instructed that the distinguishing characteristic of "murder in the second degree" is implied malice aforethought. "Malice aforethought" includes all other states of mind under which the killing of a person takes place without any cause which will in law justify, excuse, or extenuate the homicide. It is a condition of the mind which shows a heart regardless of social duty and fatally bent on mischief, the existence of which is inferred from acts committed or words spoken. "Malice" in its legal sense denotes a wrongful act done intentionally without just cause or excuse.[49]

You are instructed that "malice aforethought" is the voluntary and intentional doing of an unlawful act by one of sound memory and discretion with the purpose, means, and ability to accomplish the reasonable and probable consequences of the act.[50]

§ 2819(14). Washington

The jury are instructed that premeditated malice is shown where the intention to unlawfully take life is deliberately formed in the

[46] State v. Rodriguez, 167 P. 426, 23 N. M. 156, L. R. A. 1918A, 1016.

[47] State v. Cameron, 81 S. E. 748, 166 N. C. 379.

[48] Brantley v. State, 175 P. 51, 15 Okl. Cr. 6.

[49] See Brown v. State, 174 S. W. 360, 76 Tex. Cr. R. 316; Witty v. State, 171 S. W. 229, 75 Tex. Cr. R. 440.

[50] Witty v. State, 171 S. W. 229, 75 Tex. Cr. R. 440.

mind, and that determination meditated upon before the fatal stroke is given. There need be no particular length of time between the formation of the intention to kill and the killing. It is only necessary that the act of killing be preceded by a concurrence of will deliberation and premeditation on the part of the slayer.[51]

§ 2820. Implied malice

§ 2820(1). Massachusetts

The jury are instructed that, if the evidence satisfies the jury that the defendant committed the assault and battery on the deceased alleged in the indictment by striking her with his hands and feet, and that at the time of said assault he knew, or had reasonable cause to believe, that the deceased was sick and suffering from disease, and was thereby put in such a weak and feeble condition that his attack would endanger her life, or inflict on her great bodily harm, or hasten her death, then you would be justified in finding implied malice and convicting defendant of murder. But if he was not aware of her sickness, and had no reason to suppose that his act in so assaulting her would do her material injury, or any harm beyond that which would be occasioned by similar acts to a person in health, there would be no sufficient evidence of implied malice and although you may find the acts of defendant hastened the death of deceased, he could be convicted of manslaughter only.[52]

§ 2820(2). New Mexico

You are instructed that in case of homicide it is not always possible or necessary that express malice be established by the evidence. Malice may be implied from the circumstances, acts, and language of the parties at the time of the killing, and from the means used to accomplish the homicide. The question of whether or not there was malice is to be determined by the jury, as any other material element in the case, beyond a reasonable doubt, and in deciding that issue you may take into consideration all the facts and circumstances surrounding the case, the language and acts of the defendant, if any, the means by which the homicide was committed, and any other fact and circumstance which, in your opinion, throws light upon the question of malice.[53]

§ 2820(3). Texas

You are instructed that "implied malice" is that which the law infers from or imputes to certain acts however suddenly done. Thus, when the fact of an unlawful killing is established, and the facts do not establish express malice beyond a reasonable doubt, nor

[51] State v. Bridgham, 97 P. 1096, 51 Wash. 18.

[52] Commonwealth v. Fox, 7 Gray (Mass.) 585.

[53] State v. Rodriguez, 167 P. 426, 23 N. M. 156, L. R. A. 1918A, 1016.

tend to mitigate, excuse, or justify the act, then the law implies malice, and the murder is in the second degree. And the law does not further define murder in the second degree than if a killing is shown to be unlawful, and there is nothing in evidence on the one hand showing express malice, or which tends to establish any justification, excuse or mitigation on the other, then the law implies malice, and the homicide is murder in the second degree.[54]

§ 2821. Premeditated design

Distinction between intent to kill and premeditated design, see post, § 2844.
Premeditation and deliberation as necessary elements of murder in the first degree, see post, § 2841.

§ 2821(1). Alabama

The court charges the jury that if the defendant, in ——— county, and before the finding of this indictment, purposely killed the deceased by shooting him with a gun, with a wickedness or depravity of heart towards the deceased, and the killing was determined on beforehand and after reflection (for however short a time before the fatal shooting was done is immaterial), the defendant is guilty of murder.[55]

§ 2821(2). Georgia

You are instructed, with respect to intention to kill as an element of the offense of murder, that it is not necessary for that intention to exist for any length of time before the killing—a man may form the intention to kill, do the killing instantly, and regret the deed as soon as done.[56]

§ 2821(3). New York

The jury are instructed that murder is premeditated when the killing is done after the idea to kill is formed—after the intent to kill is formed—after the design is thought over and revolved in the mind and meditated upon. Deliberation is forethought or intention as distinguished from a sudden impulse. It is the making of a choice of action; to deliberate; to take time; to think just what you will do and then do it; to execute your choice; to execute your thought; to make a choice of action. A rash or sudden impulse is not a deliberate intent. Deliberation is the exercise of forethought in the formation of an intention. If the killing is not the instant effect of impulse, if there is any hesitation or doubt to overcome, a choice made as the result of thought, however short the mental thought, the struggle of the mind, it is sufficient to characterize the crime as being deliberate. If there is an opportunity for a choice, if there is the exercise of a choice between doing a thing and not

[54] Witty v. State, 171 S. W. 229, 75 Tex. Cr. R. 440.

[55] Harkness v. State, 30 So. 73, 129 Ala. 71.

[56] Hart v. State, 80 S. E. 909, 14 Ga. App. 364.

doing it—if that opportunity exists and the choice is made—if I have an opportunity of saying whether I will do this or I will not and I make up my mind to do it, that is deliberation sufficient within the law to apply the term as characterizing this offense.[57]

§ 2821(4). Oklahoma

The court instructs the jury that, in order to constitute murder under our statute, it is essential that the homicide be committed with a premeditated design on the part of the defendant to unlawfully take the life of the person slain; and in order that you may fully understand the legal meaning of the words "Premeditated design," as used in this connection, I charge you that should the unlawful killing be established to your satisfaction beyond a reasonable doubt, then to determine the grade of the homicide it becomes necessary for you to inquire into the condition of the mind of the party killing, and in reaching this conclusion the important questions to be considered are: Do the facts and circumstances in the case at the time of the killing, and before and immediately after that time, having connection with or relation to it, furnish satisfactory evidence, beyond a reasonable doubt, of a deliberate mind on the part of the person killing to do the killing at the time he does the act that results in the killing? And do these facts and circumstances show beyond a reasonable doubt a formed design on the part of the person killing to take the life of the person slain? If they do, then the killing will be by premeditated design and will be murder. Premeditated design includes malice aforethought, and accordingly, to warrant a conviction for murder, the jury must be satisfied from the evidence beyond a reasonable doubt that the killing was a consummation of a previously formed design to take the life of the person killed, and that the design to kill was formed deliberately and with a deliberate mind; that is, at the time when the mind of the person killing was self-possessed and capable of contemplating the consequences of the act proposed to be done. There is, however, no definite space of time necessary to intervene between the formed design to kill and the actual killing. A single moment of time may be sufficient, all that is required being that the mind be cool and deliberate in forming its purpose, and that the design to kill is formed, and the design to effect death is inferred from the fact of the killing, unless the circumstances raise a reasonable doubt as to whether or not any such design existed. When the evidence satisfies your mind beyond a reasonable doubt that the killing was the result of a previously formed design, and that the design was formed when the mind was calm and deliberate and capable of contemplating the consequences of the act proposed to

[57] People v. Gilbert, 92 N. E. 85, 199 N. Y. 10, 20 Ann. Cas. 769.

be done by him, and such killing is further shown to have been unlawful and done with malice and premeditated design, then the homicide is murder, and, should you so find beyond a reasonable doubt, your verdict should be rendered accordingly.[58]

You are instructed that homicide is murder when perpetrated without authority of law and with a premeditated design to effect the death of the person killed, or of some other human being.[59]

You are instructed that a design to effect death is premeditated, within the meaning of the law, if the intention to take life is deliberately formed in the mind before the act is done which results in death no matter for how short a time. It may be formed instantly before committing the act by which it is carried into execution.[60]

The court instructs you that, to warrant a conviction for murder, the jury must be satisfied by the evidence beyond a reasonable doubt that the defendant, before the act, deliberately formed the design with a calm and deliberate mind to kill the deceased or some other person, and that he proceeded in accordance with that design to the infliction of the death wound. The act must not result from a mere sudden, rash, inconsiderate impulse, passion or excitement, however unjustifiable and unwarranted it may be. Now, if you believe from the evidence beyond a reasonable doubt that the defendant, as charged in the information, in ——— county, state of ———, with premeditated design, as hereinbefore explained to you, with a gun, same being a deadly weapon, or instrument well calculated and likely to produce death by the manner in which it was used, with a sedate and deliberate mind, and formed design to kill, did unlawfully shoot and thereby kill the said ———, hereinafter referred to as the deceased, you will find the defendant guilty of murder, and so state in your verdict, affixing the penalty therefor; that penalty being death or imprisonment in the state penitentiary at hard labor for life.[61]

The jury are instructed that a design to effect death, sufficient to constitute murder, is inferred from the fact of the killing, unless the circumstances raise a reasonable doubt whether such design existed, and such design may be formed instantly before committing the act by which it is carried into execution. Homicide, committed with a design to effect death, is none the less murder because the perpetrator was in a state of anger, passion, or excitement at the time.[62]

[58] Brantley v. State, 175 P. 51, 15 Okl. Cr. 6.

[59] McDaniel v. State, 127 P. 358, 8 Okl. Cr. 209.

[60] McDaniel v. State, 127 P. 358, 8 Okl. Cr. 209.

[61] Kent v. State, 126 P. 1040, 8 Okl. Cr. 188.

[62] Morris v. Territory, 99 P. 760, 1 Okl. Cr. 617.

§ 2821(5). Texas

The jury are instructed that the law does not and cannot define any precise time for the formation of any such design. It may take place in the shortest interval—even the moment before the act, as well as the month before. The difference in the degrees of murder does not result from the length of time taken to form the design or the speed with which it was executed.[63]

§ 2821(6). Washington

The jury are instructed that no particular length of time need elapse before there can be deliberation or premeditation in an act. A single moment may be enough. It is sufficient if you find from the evidence, and beyond a reasonable doubt, that any length of time elapsed, no matter how short, sufficient to allow a design to be formed in the mind, and that design to be deliberated upon and meditated over before carrying into effect.[64]

§ 2822. Deliberate design executed under influence of sudden passion or excitement

See, also, post, § 2878.

§ 2822(1). Oklahoma

The jury are instructed that a design to effect death, sufficient to constitute murder, is inferred from the fact of killing, unless the circumstances raise a reasonable doubt whether such design existed, and such design may be formed instantly before committing the act by which it is carried into execution. Homicide committed with the design to effect death is not the less murder because the perpetrator may have been in a state of anger or excitement at the time.[65]

You are instructed that homicide committed with a design to effect death is not the less murder because the perpetrator was in a state of anger.[66]

§ 2822(2). Texas

You are instructed that, if the design is formed with a sedate, deliberate mind, the fact of the design being executed while the slayer is under the influence of rage, passion, or other character of excitement will not prevent the killing being attributable to the preconceived express malice of the slayer.[67]

§ 2823. Killing from motives of revenge

§ 2823(1). Colorado

You are instructed that, when the killing is done with a deadly weapon, or a weapon calculated to produce and actually producing

[63] Howard v. State (Cr. App.) 58 S. W. 77.

[64] State v. Hawkins, 63 P. 258, 23 Wash. 289.

[65] Vance v. Territory, 105 P. 307, 3 Okl. Cr. 208.

[66] Atchison v. State, 105 P. 387, 3 Okl. Cr. 295.

[67] Howard v. State (Cr. App.) 58 S. W. 77.

death, malice may be legitimately inferred, in the absence of proof that the act was done in necessary self-defense, or upon sufficient provocation or cause; and the presumption in such case will be that the act was voluntary and committed with malice aforethought. If you believe, from the evidence, that the deceased was required by the ordinances of the town of ——— to close his saloon on the night of the homicide, at the hour of 12 o'clock, and that he was attempting, in good faith, to do so in compliance with said ordinances, or in obedience to the order of a police officer of said town, then the deceased had a legal right to remove all persons from his saloon for that purpose. And if the prisoner, after being requested to leave the saloon, refused, the deceased was authorized to use sufficient force to remove him; and if he used no more force than was reasonably necessary for that purpose, and thereupon the prisoner, in revenge for being put out of the saloon, stabbed and killed the deceased, the act was murder. If, however, the deceased used a greater degree of force than was necessary for the removal of the prisoner, because of the prisoner's refusal to pay for his drinks obtained at the bar (if such circumstances occurred), or for other cause, and in consequence of the employment of such excessive force, and not by the resistance of the prisoner in leaving the saloon, nor by accident, the parties were carried several feet into the street, this constitutes in law a provocation. And the question for the jury to determine will be whether the provocation was sufficient to mitigate the offense of killing.[68]

§ 2823(2). Oklahoma

You are instructed that if you find and believe from the evidence in this case beyond a reasonable doubt that the defendant shot and killed the deceased, and you further find and believe beyond a reasonable doubt that his sole purpose of shooting and killing him was from motives of revenge, for any real or imaginary wrong previously inflicted upon him by the deceased, if any, and such motive was the sole moving cause of the killing, then the killing under such circumstances and for such reasons is murder, and if you so believe from the evidence beyond a reasonable doubt, you should return a verdict of guilty of murder as charged in the information.[69]

§ 2824. Killing one interfering to prevent defendant from committing another crime

The jury are instructed that a person who is capable of understanding the nature and character of his act and of distinguishing between right and wrong, who is prevented by the interference of

[68] May v. People, 6 P. 816, 8 Colo. 210.

[69] Duncan v. State, 144 P. 629, 11 Okl. Cr. 217; Turner v. State, 111 P. 988, 4 Okl. Cr. 164.

another from carrying out a threatened purpose to inflict death or great bodily harm upon a third person, and who because of such interference becomes angered, leaves the scene of the interference, secures or obtains a weapon, returns to the scene of the interference and kills the person who had interfered and prevented the commission of another crime, is responsible in the eyes of law, and is not justified or excused in killing the person who interfered with and prevented the commission of the other crime.[70]

§ 2825. Killing because of refusal of deceased to sign note

You are instructed that, if you find and believe from the evidence beyond a reasonable doubt that on the day of the homicide proved by the evidence defendant went to ——— with the intention or design of either compelling ——— to sign a note with or for defendant or of killing said ——— if he refused to sign such note, and that he requested said ——— to sign such note, and that ——— refused to do so, and that defendant thereupon did kill said ——— because of such refusal, then you should find defendant guilty of murder in the first degree.[71]

§ 2826. Killing paramour for suspected unfaithfulness

You are instructed that there is another thing that it is not inopportune, as a matter of law, to call the attention of jurors to, and of everybody else, as well as the jury. It is unlawful for a man to kill a woman with whom he is living, and who is not his wife, because she sees proper to leave him. It is unlawful for him to kill her because he suspects or believes that she has been guilty of similar conduct with other men—similar to what she has been guilty of with him. He has no superior right in law to her. She is not his wife, and other men—if there are other men with whom she has engaged in illicit intercourse—have just as much right to kill him as he has to kill them. Neither one of them has any right to kill her on account of it. It is a violation of law to sustain such relations, and the law puts no protection around parties who engage in any such life. Barbaric rage and fury towards a woman will not justify men. There is but one law in this country. We judge everybody by one level, horizontal rule. We cannot have one law for the half-savage brute and another law for a philosopher. We have only one law to administer, and, if a man kills under circumstances that would make it murder for one man, it is murder for another man, if he is of sound mind, and capable of knowing and distinguishing between wrong and right.[72]

[70] Starke v. State, 37 So. 850, 49 Fla. 41.

[71] State v. Robertson, 77 S. W. 528, 178 Mo. 496.

[72] Calvin v. State, 44 S. E. 848, 118 Ga. 73.

§ 2827. Killing one with intent to kill another

See, also, post, § 2835(4).

The jury are instructed that, when an injury intended against one person mortally affects another, as when a blow aimed at one person lights upon another and kills him, the inquiry will be whether, if the blow had killed the person against whom it was aimed, the offense would have been murder or manslaughter. If A., having malice against B., strikes at and misses him, but kills C., this is murder in A.; but if the blow had been without malice, and under such circumstances that if B. had died, it would be manslaughter, then the killing of C. is only manslaughter. If a man, out of malice to A., shoot at him, but miss him and kill B., it is no less a murder than if he had killed the person intended. If you believe from the evidence that the defendant was acting in self-defense, and shot the deceased while firing at another, you must acquit A.[73]

§ 2828. Killing in pursuance of unlawful conspiracy

§ 2828(1). Indian Territory

You are instructed that, although you may believe that said ——— had threatened to arrest defendant and parties with him, and had exhibited his pistol for that purpose, and although you may further believe that said ———, as an officer, had no right to arrest said parties outside of the corporate limits of ———, still, if you believe, beyond a reasonable doubt, from the evidence, that said killing was done in compliance with and in furtherance of an unlawful conspiracy, such killing would be murder.[74]

§ 2828(2). Kentucky

You are instructed that if you shall believe from the evidence, beyond a reasonable doubt, that the defendants G., or any two or more of them, including the defendant A., conspired and agreed to and with each other to kill and murder ———, and that in pursuance and furtherance of such conspiracy, and in execution thereof, and while the same existed, any one or more of the defendants above named within such conspiracy as included the defendant A. did willfully shoot and kill the said ———, in this county, and before the finding of the indictment herein, then you ought to find the defendant A. guilty of willful murder as charged in the indictment herein, and fix his punishment at death or at confinement in the state penitentiary for life, in your discretion, according to the proof.[75]

[73] State v. Baptiste, 30 So. 147, 105 La. 661.

[74] Bruner v. U. S., 76 S. W. 244, 4 Ind. T. 580.

[75] Gambrell v. Commonwealth, 113 S. W. 476, 130 Ky. 513.

§ 2829. Killing officer to escape arrest

The jury are instructed that, if an officer has reasonable cause to suspect that a felony has been actually committed, he is justified in arresting the parties suspected, although it afterwards appear that no felony has been committed, and whether his judgment was a proper judgment or not must be left to the jury. He could also arrest an offender, without warrant, for treason, felony, breach of the peace, and some misdemeanors, when committed in his view, or if there existed facts which gave rise to the reasonable judgment to suspect the person arrested to be the guilty party. If these were the circumstances there, the defendant could not complain of his arrest, and could not resist it.[76]

Was the accused subject to arrest for any of these supposed crimes? If so, no person could know it any better than he. If the facts were such as to give rise to a reasonable suspicion, no one knew it better than he; and, if he was thus subject to arrest, if in resisting arrest or in his endeavor to escape arrest he killed the officer without the necessity of self-defense, it would be murder of one degree or the other, depending upon whether he deliberately intended to take the life of the officer, or only to do grave bodily harm. I have said that, in order to render the arrest lawful by the officer, it was not necessary that he be guilty of either of the offenses charged against him. The arrest would be lawful, even though he might be innocent. The prisoner could not adjudge for himself whether the facts and circumstances were such as would justify his arrest. The main question for you to determine here is whether he had created facts and circumstances which would give rise to the right to make the arrest; that is, give rise, in the judgment of the officer, to a reasonable cause to suspect him of being guilty.[77]

§ 2830. Killing, with malice, officer seeking to arrest without warrant

The jury are instructed that in this case there is testimony from several witnesses that the defendant, the prisoner at the bar, upon several occasions, spoke of the deputy sheriff and used expressions in regard to him and in regard to what would happen if the deputy sheriff would attempt to arrest him again, from which the commonwealth asks the jury to believe that this defendant, the prisoner at the bar, had towards the deputy sheriff express malice; that he had in his mind feelings of ill will or hostility toward the deputy sheriff. It is a question of fact, gentlemen, for you to decide upon the evidence in the case whether such is the truth. The instruc-

[76] Brown v. State, 42 A. 811, 62 N. J. Law, 666.

[77] Brown v. State, 42 A. 811, 62 N. J. Law, 666.

tions that I have just given in regard to the criminal responsibility of the defendant, if the deputy sheriff was killed by him in the course of effecting an unlawful arrest, was on the assumption that no express malice was proved. I shall now instruct you upon the assumption that you do in fact find that there was express malice in the mind of this defendant, the prisoner at the bar, toward the deputy sheriff, ———. Express malice means an actual state of mind existing in the heart of the defendant towards the deputy sheriff of ill will, or hatred, or dislike, or kindred feelings. Where express malice is shown to exist on the part of the person sought to be arrested, against the person who attempted to arrest him, and where he kills the person, where he intentionally kills the person who sought to arrest him, through express malice, a different rule of criminal responsibility applies from that which exists where the killing in resistance of an unlawful arrest was without any proof or evidence of express malice. In this case, assuming now that the deputy sheriff was acting without authority of law in attempting to arrest defendant, if defendant knew ——— was the man at the foot of the stairs, and also knew that ——— intended to do no bodily harm to him or to any member of his family, or any injury to his habitation, but only to arrest and take him into custody, and if he had no apprehension or reasonable ground for apprehension of any such bodily harm or danger of harm from ——— or those with ———, and if without warning or notice to ——— to desist, the prisoner, in cool blood, with express malice in his heart, to gratify feelings of ill will, or hatred, or any feeling which the jury find was express malice, intentionally shot and killed ———, you will be warranted in finding the defendant guilty of murder, even though ——— was acting without right and unlawfully in attempting to make the arrest without a warrant. If you find further, by the degree of proof which I have referred to and shall later refer to again, if he intentionally shot, if the intentional shooting was deliberately premeditated in the sense I have explained deliberate premeditation, you will be justified in finding the defendant guilty of murder in the first degree, even though ——— was acting without right and unlawfully in attempting to make the arrest without a warrant.[78]

The jury are instructed that "if, without warning or notice to ——— to desist, the prisoner, in cool blood, with express malice in his heart, to gratify feeling of ill will, or hatred, or any feeling which the jury find was express malice, intentionally shot and killed ———, you will be warranted in finding the defendant guilty of

[78] Commonwealth v. Phelps, 95 N. E. 868, 209 Mass. 396, Ann. Cas. 1912B, 566.

murder, even though ——— was acting without right and unlawfully in attempting to make the arrest without a warrant.[79]

§ 2831. Murder by lying in wait

§ 2831(1). Alabama

The court instructs the jury that if, after considering all the evidence, you have a fixed conviction that the defendant went to the spring with his gun for the purpose of killing the deceased, and waited until the deceased came, and then shot and killed him, he would be guilty of murder in the first degree.[80]

§ 2831(2). North Carolina

You are instructed that, when our statute speaks of murder perpetrated by lying in wait, it refers to a killing where the person who does the killing has stationed himself for private attack, or one who is lying in ambush for private attack. While being in ambush and concealed, watching and waiting for a victim, would comprehend what is meant by lying in wait, still it is not necessary for the assailant to be actually concealed. If he placed himself in a position so as to make a private attack upon his victim, so as to assail him, under circumstances when the person assailed did not know of his presence or of his purpose, and in the darkness of the night, or when the ordinary darkness was obscured by clouds and mist, and under such circumstances he makes a secret assault upon the person assailed and shoots and kills him, and flees without a disclosure of his identity, a killing under these circumstances would constitute a waylaying within the meaning of the statute.[81]

You are instructed that, if you find from this evidence—the burden being on the state to so satisfy you beyond a reasonable doubt—that the prisoners lay in wait on the night of ———, and shot the deceased and from that wound he died; if you find that they willfully and intentionally shot him and that they lay in wait for that purpose, the court charges you that it would be your duty to find defendant guilty of murder in the first degree.[82]

§ 2831(3). Oklahoma

In this case the court instructs the jury that if you believe from the evidence, beyond a reasonable doubt, that the defendant, on the night of ———, in the county of ———, state of ———, left the residence of one ———, with a loaded rifle, and went to the place or near the place where deceased then resided, and lay in waiting around said premises for the purpose of taking the life of the de-

[79] Commonwealth v. Phelps, 95 N. E. 868, 209 Mass. 396, Ann. Cas. 1912B, 566.

[80] Tribble v. State, 40 So. 938, 145 Ala. 23.

[81] State v. Wiseman, 101 S. E. 629, 178 N. C. 784.

[82] State v. Walker, 86 S. E. 1055, 170 N. C. 716.

ceased, and that the said defendant shot the deceased while returning to his home, and while riding in the highway in a buggy, and that at the time he shot the deceased he had no reasonable and well-founded belief that his life was in danger, or that he would suffer some great bodily injury at the hands of the deceased, then, in that event, the defendant is guilty of murder as charged in the indictment, and the jury should so find.[83]

§ 2832. Same—Revenging illicit intercourse with defendant's wife

The jury are instructed that, if the jury believe from the evidence beyond all reasonable doubt that the deceased, several months prior to the killing, did have sexual intercourse with the defendant's wife, with or without force, and that the defendant, in ——— county, state of ———, and before the finding of this indictment, killed the deceased by decoying him to his (defendant's) house, and by lying in wait for him, on account of such illicit intercourse between deceased and defendant's wife, then defendant is guilty of murder in the first degree, and it is the sworn duty of the jury to so find their verdict.[84]

§ 2833. Murder by poison

The jury are instructed that, if you find that the defendant unlawfully, with bad intention, caused poison to be taken by ———, which caused the death of the said ———, you should find the defendant guilty of murder in the first degree; but, if you fail to so find, your verdict should be not guilty.[85]

§ 2834. Permitting one to perish through exposure to weather

You are instructed that the law in this kind of a case is that, if the defendant, at the times charged in the indictment, was the husband of the deceased, the law imposed upon him the obligation of affording her shelter and protection from the cold, and of caring for and saving her life under all circumstances and conditions, as far as it lay in his power to do, and if, at the times charged in the indictment, when she received the injuries therein named, said ——— was in such feeble condition, or was from any cause so feeble, or was in such condition as not to be able to protect herself, and to reach her house or shelter, and the defendant was her husband, and knew of her said condition, and also knew from all the facts and circumstances, taking into consideration her condition, the coldness of the night, the extent and character of her wrappings, and where she lay, and the length of time he left her lying there so exposed, that leaving her in such condition would endanger her

[83] Wells v. Territory, 78 P. 124, 14 Okl. 436.

[84] Williams v. State, 30 So. 484, 130 Ala. 107.

[85] State v. Thomas, 109 N. W. 900, 135 Iowa, 717.

life, and if he willfully and purposely so left her, and her death was caused by such exposure—if all these facts exist, it would be murder; and if you find from the evidence, beyond a reasonable doubt, that, about the time charged in said indictment, ——— was in such condition as not to be able to protect herself, and that the said defendant knew such fact, and had the means and ability to protect and keep her from the cold, and that he left her so exposed as stated in the indictment, and lying out of any house or shelter all night, and was her husband, and had reason to believe that the leaving her to lie out in such condition all night would endanger her life, and that he, said defendant, so left her, said ———, in such condition, with malice aforethought, either express or implied, and that she died from the effects of such exposure, and that the same occurred in ——— county, state of ———, you will find the defendant guilty of murder.[86]

§ 2835. Homicide in committing another offense

Death caused in committing abortion as ground for prosecution for murder or manslaughter, see ante, § 561.

§ 2835(1). Arkansas

You are instructed that if you believe from the evidence in this case, beyond a reasonable doubt, that the defendant, after premeditation and deliberation, or in the perpetration of robbery, or in the attempt to perpetrate the crime of robbery upon ———, struck the blow or blows which caused, or contributed to cause, the death of ———, or that some other person, after premeditation and deliberation, or in perpetration of or attempt to perpetrate the crime of robbery, struck the blow or blows which caused, or contributed to cause, the death of ———, and that the defendant was present at the time the fatal blow was given, and was aiding and abetting, or ready and consenting to aid and abet, said other person in the commission of said offense, then you are instructed that the defendant is guilty of murder in the first degree, and you should so find.[87]

§ 2835(2). California

You are instructed that testimony has been adduced before you tending to show that the defendant and others were engaged in a robbery of one ——— and the deceased, ———, at the ——— Ranch in ——— county; that while so engaged, and in furtherance of the common purpose of defendant and his associates to accomplish this robbery, the deceased was slain by the defendant, or by some of the parties with whom he was then engaged in the alleged robbery. I charge you that it is no defense to a party associated with others in and engaged in a robbery that he did not propose or intend to

[86] Territory v. Manton, 19 P. 387, 8 Mont. 95.

[87] Strong v. State, 169 S. W. 1189, 114 Ark. 574.

take life in its perpetration, or that he forbade his associates to kill, or that he disapproved or regretted that any person was thus slain by his associates. If the homicide in question was committed by one of his associates engaged in the robbery, in furtherance of their common purpose to rob, he is as accountable as though his own hand had intentionally and actually given the fatal blow, and is guilty of murder in the first degree.[88]

You are instructed that, if a number of persons conspire together to commit a felony and take the life of another person in the prosecution of the common design, it is murder in all, although only one may have inflicted the fatal blow, the others being present aiding and abetting. In such homicides the law superadds the intent to kill to the original felonious intent, and estops the criminal from denying the further intent, thus imputed. The thing done having proceeded from a corrupt mind is to be viewed the same, whether the corruption is of one particular form or another.[89]

§ 2835(3). Indiana

The jury are instructed that, to kill a man purposely and with premeditated malice, or to kill a man in the commission or in the attempt to commit a crime—a robbery or an arson—is murder in the first degree, and it makes no difference whether he is killed before the fire reaches him or is burned to death.[90]

§ 2835(4). Kentucky

The jury are instructed that, if you believe from the evidence beyond a reasonable doubt that the defendant in ——— county and before the finding of the indictment, did unlawfully, willfully, and feloniously, not in his necessary or apparently necessary self-defense, shoot at G. with a pistol loaded with powder and leaden balls, but that the ball or balls so shot at said G. did miss him, and instead then and there strike and kill W., you should find defendant guilty—that is, guilty of murder if you believe from the evidence beyond a reasonable doubt that the shooting was done with malice aforethought, or of voluntary manslaughter if you believe from the evidence beyond a reasonable doubt that it was done in a sudden affray, or in sudden heat and passion, and without previous malice.[91]

§ 2835(5). Missouri

You are further instructed that, if you find from all the evidence in this case that at the city of ——— and state of ———, on or about the ——— day of ———, the defendant and one M. formed

[88] People v. Lawrence, 76 P. 893, 143 Cal. 148, 68 L. R. A. 193.

[89] People v. Olsen, 22 P. 125, 80 Cal. 122.

[90] Stocking v. State, 7 Ind. 326.

[91] Wheatley v. Commonwealth, 81 S. W. 687, 26 Ky. Law Rep. 436. See, also, ante, § 2827.

a joint intent and purpose to rob the deceased, within the meaning of the term "robbery" as before defined to you in these instructions, and that, in pursuance of such common purpose and intent, said M., at the city of ——— and state of ———, and on or about the said ——— day of ———, or at any time before the filing of the indictment herein, did make an attempt to rob the deceased, and that, while such attempt to rob deceased was being made, said M., in furtherance of said attempt to rob deceased, shot and killed deceased, and that defendant was then and there present, for the purpose of aiding, abetting, encouraging, or assisting in such robbery, then such killing of said ——— under such circumstances and facts was murder in the first degree, and, if you so find the facts to be from all the evidence in this case, then the defendant is equally guilty with said M., although you may further find that defendant fired no shot at the time, and you will find the defendant guilty of murder in the first degree, and so state in your verdict.[92]

You are therefore further instructed that, if you find from the evidence that on or about the ——— day of ———, one M. made an attempt to rob deceased (bearing in mind the definition of "robbery" before given in these instructions), and that the defendant, knowing of the attempt being made by said M. to rob said ———, joined in said attempt, that is, did some act calculated to assist said M. in the commission of such robbery, while such attempt was being made, with the intent then and there to assist said M. in committing such robbery, and in doing so shot and killed, or assisted in shooting and killing, deceased, then the killing of the deceased under such circumstances was murder in the first degree, and if you so find the facts to be, you will find the defendant guilty of murder in the first degree, and so state in your verdict.[93]

The jury are further instructed that if you find and believe from the evidence in this cause beyond a reasonable doubt that the defendant, at the county of ——— and state of ———, on or about the ——— day of ———, willfully, deliberately, premeditately, and with malice aforethought shot and wounded one ——— in the perpetration of, or attempting to perpetrate, a robbery upon him, the said ———, and if you further find from the evidence that within a year and a day thereafter, and during the month of ———, the said ——— died from the effects of such wounds inflicted by the defendant as aforesaid, at the county of ——— and state of ———, as charged in the indictment, you will find the defendant guilty of murder in the first degree, and, unless you so find beyond a reasonable doubt, you will acquit the defendant. The term "robbery," as mentioned in these instructions, means the felonious taking of the

[92] State v. Murray, 193 S. W. 830. [93] State v. Murray, 193 S. W. 830.

money, or property of another from his person or in his presence, and against his will, either by violence to his person, or by putting him in fear of some immediate injury to his person, with the intent to permanently deprive the owner of such money or property, and without any honest claim to it. An attempt to perpetrate a robbery means the willful doing of an act or acts towards the commission of a robbery for that purpose and with that intent, but a failure in the perpetration thereof.[94]

§ 2835(6). Nebraska

You are instructed that if you believe from the evidence, beyond a reasonable doubt, that at the time of the alleged killing the defendant had entered the saloon of the said ——— for the purpose of feloniously and violently taking the money or personal property of said ——— from his person by force, intimidation, or by putting said deceased, ———, in fear, and that in the prosecution of that purpose the defendant shot the deceased, and thereby caused his death, then such killing under such circumstances would be murder in the first degree. In other words, if from the evidence the jury believe beyond a reasonable doubt that the defendant killed said ———, and also at the time of the killing that the defendant was engaged in an attempt to perpetrate a robbery upon the person of the said deceased, then the defendant would be guilty of murder in the first degree.[95]

§ 2835(7). Oklahoma

You are instructed that, when two or more persons agree and confederate together to commit a crime under such circumstances as may, when tested by human experience, specifically result in the taking of human life, either in the execution or resistance of their unlawful plans, then each party to such common understanding or conspiracy will be held responsible for the consequences which might be reasonably expected to flow and which do flow from carrying into effect their unlawful combination, and for the taking of human life, if any, to accomplish the object of the conspiracy, even though such consequences were not specifically intended as a part of the original plan. The law is that, if two or more persons conspire to commit a felony and death happens in the prosecution of the common object, all are alike guilty of the homicide. The act of one of them done in the furtherance of the original design, in contemplation of law, is the act of all. And if such conspiracy and agreement is to do or perform an unlawful act constituting a felony, and in the prosecution of such unlawful act constituting a felony an individual is killed or death ensues, such killing is murder, as

[94] State v. McGinnis, 59 S. W. 83, 158 Mo. 105.

[95] Rhea v. State, 88 N. W. 789, 63 Neb. 461.

to all who are parties to such agreement and conspiracy, or who participate in such unlawful act constituting a felony. And if in this case you find from the evidence beyond a reasonable doubt that the defendants entered into a conspiracy or common design among themselves, or with P. and H., to rob the deceased, or if they in conjunction with each other, or the said P. and H., did rob the deceased, such a conspiracy or act upon the part of said defendants would be an unlawful act constituting a felony under and by virtue of the laws of this state, and if, in carrying out such conspiracy or common design, if any, either of the said defendants or any one acting in conjunction with them in committing said act of robbery, if the same was committed, and in carrying out said conspiracy and unlawful act, if any, killed the said deceased, such killing was murder, and all concerned therein would be guilty of murder, even though they were not present and did not actually assent to the killing of the said deceased.[96]

Now, bearing in mind the foregoing definitions and instructions, if you find and believe from the evidence beyond a reasonable doubt that P., named in the information, in the county of ———, state of ———, killed ———, and you further find from the evidence beyond a reasonable doubt that said killing was done by the said P. while in the commission of a felony, and you further find and believe from the evidence beyond a reasonable doubt that the defendants, prior to such killing, entered into a conspiracy or design with the said P. to commit said robbery or unlawful act, or that the defendants, in conjunction with themselves and the said P., did rob the said ———, and that during the commission of said unlawful act the said P., or any other person connected with the defendants, in the commission of such conspiracy or common design, if any, killed the said ———, then and in that event you will find the defendants guilty of murder, and so say by your verdict.[97]

§ 2835(8). Texas

You are instructed that if any person, in the perpetration or in the attempt to perpetrate a robbery upon another, shall take the life of such other, he shall be deemed guilty of murder, and murder committed in the perpetration of robbery or in the attempt to perpetrate robbery is per se murder of the first degree.[98]

§ 2835(9). Utah

The court charges the jury that if you believe beyond a reasonable doubt from the evidence that the defendant, ———, while perpetrating, or attempting to perpetrate, a robbery, shot and killed

[96] Turner v. State, 126 P. 452, 8 Okl. Cr. 11.

[97] Turner v. State, 126 P. 452, 8 Okl. Cr. 11.

[98] Schwartz v. State, 83 S. W. 195, 47 Tex. Cr. R. 213, 11 Ann. Cas. 620.

the deceased, then the court instructs you, for the purpose of determining the guilt or innocence of this defendant, that it is immaterial whether the shot so fired by the defendant was shot intentionally or by an unintentional discharge of the pistol in the hands of said defendant.[99]

§ 2836. Killing in the commission of, or attempt to commit, rape

You are instructed that the crime charged in the second count is thus defined: "If any person in the perpetration or attempt to perpetrate any rape, kill another, every person so offending shall be deemed guilty of murder in the first degree." Under the law, to warrant a conviction of defendant of the crime charged in the second count of the information the state is not required to prove that the act of killing was done purposely, and of deliberate and premeditated malice. The facts necessary to be established by the state by evidence beyond a reasonable doubt, to warrant a conviction of the crime charged in the second count, are that the defendant, in perpetrating or attempting to perpetrate a rape upon the said ———, did choke, suffocate, or strangle her, the said ———, and of which choking, suffocating, or strangling by defendant, she, the said ———, then and there died.[1]

§ 2837. Killing occurring in general melée

§ 2837(1). Louisiana

The court instructs the jury that, if you find from the evidence that, at the time and place of the killing of deceased, defendant and A. were engaged in a fight, and while they were so engaged the deceased and ——— became involved in a fight on the same spot, and deceased was killed by his antagonist, defendant and A. are not responsible for the killing, provided you find that they in no way aided or abetted the killing.[2]

§ 2837(2). Texas

You are instructed that if the jury find from the evidence that, after defendant first shot deceased, if you so find, he (defendant) was in a room, and his gun was caught, and failed to fire again, and the house he was in had been fired into by other parties, there in company with deceased, and defendant, under the facts, picked up the pistol of deceased, and, hearing a noise, and believing he was in danger, fired another shot into deceased after he was down, in a room that was dark to such an extent that defendant could not know fully his danger from attack by the companions of deceased,

[99] State v. Thorne, 117 P. 58, 39 Utah, 208.

[1] Morgan v. State, 71 N. W. 788, 51 Neb. 672.

[2] State v. Sehon, 68 So. 221 or 222, 137 La. 83.

then such shooting would not be murder, and you should acquit defendant of murder under such facts.[3]

§ 2838. Shooting to alarm

See, also, post, § 2920.

You are instructed that if you believe from the evidence that the defendant shot and killed deceased, but did the shooting with no intent to hit the deceased, and only shot for the purpose of scaring the deceased, and to prevent his coming onto and doing serious bodily injury to defendant with the ax, then you are instructed that the defendant would not be guilty, and so say by your verdict.[4]

§ 2839. Use of deadly weapon

Presumption of intent or malice from use of deadly weapon, see post, § 3029.
Use of deadly weapon as element of offense of aggravated assault, see ante, § 848.

§ 2839(1). United States

The jury are instructed that a deadly weapon is a weapon with which death may be easily and readily produced; anything, no matter what it is, whether it is made for the purpose of destroying animal life, or whether it was not made by man at all, or whether it was made by him for some other purpose, if it is a weapon, or if it is a thing with which death can be easily and readily produced, is recognized by the law as a deadly weapon.[5]

§ 2839(2). Illinois

The jury are instructed that, if you believe from the evidence that the stick in question was a large one, and that the necessary consequence of a violent blow with it on the head by a man of ordinary strength would be to destroy human life, then the law regards such a stick, when used in striking a fellow creature, as a deadly weapon.[6]

§ 2839(3). Missouri

The jury are instructed that whether or not the piece of gas pipe was a deadly weapon, within the meaning of the law, is a question of fact for the jury to decide, in determining which they will take into consideration the character and nature of the instrument, the manner in which it was used, if they believe it was used, and the probable effect of such use.[7]

§ 2839(4). Nebraska

The jury are instructed that a deadly weapon is one likely to produce death or great bodily injury, as a knife, an ax, or a club.[8]

[3] Jones v. State, 71 S. W. 962, 44 Tex. Cr. R. 405.
[4] Reddick v. State (Cr. App.) 47 S. W. 993.
[5] Acers v. United States, 17 S. Ct. 91, 164 U. S. 388, 41 L. Ed. 481.
[6] Davis v. People, 19 Ill. 74.
[7] State v. Drumm, 56 S. W. 1086, 156 Mo. 216.
[8] Clarey v. State, 85 N. W. 897, 61 Neb. 688.

§ 2839(5). Texas

You are instructed that a "deadly weapon" is one which in the manner used is likely to produce death or serious bodily harm; and, within the meaning of the law, a "pistol" is a "gun."[9]

2. *Degrees of Murder*

§ 2840. Murder in first degree

§ 2840(1). Alabama

The jury are instructed that if the defendant, in this county, and before the finding of the indictment, purposely killed ——— by shooting him with a pistol, with a wickedness or depravity of heart towards said deceased, and the killing was determined on beforehand, and after reflection for however short a time before the fatal shot was fired, defendant is guilty of murder in the first degree.[10]

The jury are instructed that if defendant, in this county, and before the finding of this indictment, killed ——— by shooting him with a pistol, with malice aforethought, he is guilty of murder; and if said killing was willful, deliberate, malicious, and premeditated, and the deliberation and premeditation existed for only a moment before the fatal shot was fired, the defendant is guilty of murder in the first degree.[11]

The court charges the jury that if they find from the evidence in this case beyond all reasonable doubt that the defendant in ——— county, state of ———, before the finding of the indictment, purposely killed ——— by striking him with a piece of wood, with a wickedness or depravity of heart towards deceased, and the killing was determined on beforehand, and after reflection (for however short a time before the fatal blow was struck is immaterial), then the defendant is guilty of murder in the first degree.[12]

The court charges the jury that if they find from the evidence in this case, beyond all reasonable doubt, that the defendant, in ——— county, state of ———, and before the finding of this indictment, purposely killed ———, by shooting him with a pistol, with a wickedness or depravity of heart towards the deceased, and the killing was determined on beforehand, and after reflection (for however short a time before the fatal shooting was done is immaterial), then the defendant is guilty of murder in the first degree.[13]

The court charges the jury that if they find from the evidence in this case, beyond all reasonable doubt, that the defendant, in ———

[9] Witty v. State, 171 S. W. 229, 75 Tex. Cr. R. 440.

[10] Watson v. State, 46 So. 232, 155 Ala. 9.

[11] Watson v. State, 46 So. 232, 155 Ala. 9.

[12] Sherrill v. State, 35 So. 129, 138 Ala. 3.

[13] Bondurant v. State, 27 So. 775, 125 Ala. 31.

county, state of ———, and before the finding of this indictment, purposely killed the deceased, ———, after reflection, with a wickedness or depravity of heart towards deceased, and the killing was determined on beforehand, even a moment before the fatal shooting was done, then the defendant is guilty of murder in the first degree.[14]

§ 2840(2). Arkansas

The court instructs the jury that, if you believe from the evidence that defendant took a position on the gallery, accessible to the gun, and shot and killed the deceased pursuant to a previously formed design to kill him, then you will find him guilty of murder in the first degree.[15]

§ 2840(3). Delaware

While it is not necessary for the court to instruct you respecting murder of the first degree, we will briefly define it in order that you may the more clearly understand what is meant by murder of the second degree. Murder of the first degree is where the killing was done with express malice aforethought; and express malice aforethought is where one person kills another with a sedate, deliberate mind and formed design. Malice is an essential element of murder of both degrees, for without malice there cannot be murder of either degree. Malice we may say is a condition of the heart, and is not restricted to spite or malevolence toward the particular person slain, but also includes that general malignity and general disregard of human life which proceed from a heart void of a just sense of social duty and fatally bent on mischief. Malice is implied by law from every unlawful and cruel act committed by one person against another, however sudden it may be, for the law considers that he who does an unlawful and cruel act voluntarily, does it maliciously. If death ensues from an unlawful and cruel act of violence on the part of the slayer, in the absence of adequate or sufficient provocation, the law implies that the act was done maliciously.[16]

§ 2840(4). Missouri

You are instructed that if you believe and find from the evidence that the defendant, at the county of ——— and state of ———, on or about the ——— day of ———, at a time prior to the ——— day of ——— (being the date of the filing of the indictment herein), feloniously, willfully, deliberately, premeditatedly, and of his malice aforethought forcibly and violently made an assault with his hands and arms upon the said ——— and then and there feloniously, willfully, deliberately, premeditatedly, and of his malice

[14] Bondurant v. State, 27 So. 775, 125 Ala. 31.

[15] Caughron v. State, 139 S. W. 315, 99 Ark. 462.

[16] State v. Naylor, 90 A. 880, 5 Boyce, 99.

aforethought with his said hands and arms pushed, threw, and cast the said ——— into a pond there situated in which there was a great quantity of water, and by means of such casting, throwing, and pushing the said ——— into said pond of water the said defendant feloniously, willfully, deliberately, premeditatedly, and of his malice aforethought then and there caused the said ——— to be choked, suffocated and strangled and drowned, and that by reason of said choking, suffocating, strangling, and drowning the said ——— then and there prior to the said ——— day of ———, died, then you will find the defendant guilty of murder in the first degree, and so state in your verdict.[17]

You are further instructed that he who willfully, that is, intentionally, uses upon another at some vital point a deadly weapon, must, in the absence of qualifying facts, be presumed to know that the effect is likely to produce death, and knowing this, must be presumed to intend death, which is the probable consequence of such an act, and if such deadly weapon is used without just cause or provocation he must be presumed to do it wickedly and from a bad heart, and if the jury believes from the evidence that the defendant shot and killed ———, as charged, and that at the time or before the shot was fired, the defendant had formed in his mind the willful, premeditated, and deliberate design or purpose to take the life of the deceased, and that the shot was fired in furtherance of that design or purpose and without any justifiable cause or legal excuse therefor as explained in these instructions, then the jury should find the defendant guilty of murder in the first degree.[18]

The court instructs the jury that, if you find and believe from the evidence that at the county of ——— and state of ———, at any time before the ——— day of ———, the defendant willfully, deliberately, premeditatedly, and of his malice aforethought, did, with a certain knife, cut, stab, and wound one ———, inflicting upon her a mortal wound, from which said mortal wound the said ———, at the county of ——— and state of ———, died, and if you believe from the evidence that the said knife was a dangerous and deadly weapon, then you will find the defendant guilty of murder in the first degree, and so state in your verdict. In that event you have nothing to do with the punishment. That is fixed by law.[19]

The court instructs the jury that if you believe from the evidence that at the county of ——— and state of ———, at any time before ———, the defendant did willfully, deliberately, premeditatedly, and of his malice aforethought, shoot ——— with a loaded shotgun,

[17] State v. Barrington, 95 S. W. 235, 198 Mo. 23.

[18] State v. McCarver, 92 S. W. 684, 194 Mo. 717.

[19] State v. Garth, 65 S. W. 275, 164 Mo. 553.

inflicting upon him a mortal wound, from which said mortal wound the said ——— within one year thereafter, at the county of ——— and state of ———, died, then you will find the defendant guilty of murder in the first degree, and by your verdict simply say so. In that case you have nothing to do with the punishment.[20]

You are instructed that, if you believe and find from the evidence in this cause that the defendant, at the city of ——— and state of ———, on or about the ——— day of ———, did feloniously, willfully, deliberately, premeditatedly, and of his malice aforethought, make an assault upon ——— with a certain loaded pistol, and then and there, with said pistol, feloniously, willfully, deliberately, premeditatedly and of his malice aforethought did kill the said ———, by shooting her upon her head and body, and thereby inflicting upon her a mortal wound, of which said wound she, within a year and a day thereafter, died at the said city of ———, during the month of ———, and was thus killed by the shooting aforesaid, as charged in the indictment, then you will find the defendant guilty of murder in the first degree, and will so state in your verdict. He who willfully (that is, intentionally) uses upon another, at some vital part, a deadly weapon, such as a loaded pistol, must, in the absence of qualifying facts, be presumed to know that the effect is likely to be death, and, knowing this, must be presumed to intend death, which is the probable consequence of such an act; and, if such deadly weapon is used without just cause or provocation, he must be presumed to do it wickedly, and from a bad heart. If, therefore, you find and believe from the evidence in this cause that the defendant took the life of ———, by shooting her in a vital part with a pistol, with manifest design to use such weapon upon her, and with sufficient time to deliberate and fully form the conscious purpose to kill her, and without sufficient or just cause or provocation, then such killing is murder in the first degree. And while it devolves upon the state to prove the willfulness, deliberation, premeditation, and malice aforethought, all of which are necessary to constitute murder in the first degree, yet these need not be proved by direct evidence, but may be deduced from all the facts and circumstances attending the killing; and if you can satisfactorily and reasonably infer their existence, from all the evidence, you will be warranted in finding the defendant guilty of murder in the first degree.[21]

The court instructs the jury that if they believe and find from the evidence in this cause beyond a reasonable doubt that at the county of ———, and state of ———, the defendant, did on the ——— day

[20] State v. Hudspeth, 60 S. W. 136, 159 Mo. 178.

[21] State v. Duestrow, 38 S. W. 554, 137 Mo. 44.

of ———, or at any time prior to the finding of the indictment in this cause, feloniously, willfully, deliberately, premeditatedly, and of his malice aforethought, kill and murder one ——— in the manner and form charged in either count of this indictment, you should find the defendant guilty of murder in the first degree, and so state in your verdict.[22]

§ 2840(5). Montana

You are instructed that, in order to constitute murder of the first degree, the killing must have been done and perpetrated with malice aforethought and must have been done willfully, deliberately, and premeditatedly, and before the jury are authorized to convict the defendant of the crime of murder in the first degree, they should be satisfied from the evidence in the case beyond a reasonable doubt that the defendant killed ——— willfully, deliberately, premeditatedly, and with malice aforethought, and you are instructed that if you find from all the evidence in the case beyond a reasonable doubt that the defendant shot and killed ——— on or about the ——— in this year, in the county of ———, in the state of ———, with malice aforethought, willfully, deliberately, and premeditatedly, and that he was not justified or excused for so doing, then you should find the defendant guilty of murder in the first degree.[24]

§ 2840(6). Pennsylvania

You are instructed that murder of the first degree is a willful, deliberate, and premeditated killing. It is the most heinous crime known to the law. It means that the prisoner had time to make up his mind to kill the deceased, and that he killed him in pursuance of that determination. As you know from everyday experience, it takes a very short time to form an intention. An intention may be formed almost instantaneously, and it matters not how long the prisoner may have had his intention. If he formed it almost immediately before, and did intend to kill the deceased, and shot him with the purpose, it is murder of the first degree.[25]

§ 2840(7). Virginia

The court instructs the jury that whoever kills a human being with malice aforethought is guilty of murder; that all murder which is perpetrated by poison, lying in wait, or any other kind of willful, deliberate, and premeditated killing, is murder in the first degree.[26]

[22] State v. Howell, 23 S. W. 263, 117 Mo. 307.

[24] State v. Jones, 139 P. 441, 48 Mont. 505.

[25] Commonwealth v. Morrison, 109 A. 878, 266 Pa. 223.

[26] Stapleton v. Commonwealth, 96 S. E. 801, 123 Va. 825; Longley v. Commonwealth, 37 S. E. 339, 99 Va. 807.

The jury are instructed that, if you believe from the evidence that the deceased became angered at what the prisoner said to him, and came down out of the cab of his engine to where the prisoner was, and if you should believe from the evidence that the intention of the deceased in thus acting was to make an attack on the prisoner, or of creating on the mind of the prisoner the impression that the deceased intended to make an attack upon him, and that the manner or actions of the deceased were such as to create on the mind of the prisoner the impression that an attack was going to be made upon him; or that the prisoner did, in fact, believe an attack was going to be made upon him by the deceased, and that he thought he was in danger of serious bodily harm at the hands of the deceased, and that the prisoner shot the deceased in order to save himself from serious bodily harm; that then the prisoner was not guilty of murder in the first degree.[27]

§ 2840(8). West Virginia

The court instructs the jury that if you believe from the evidence in this case beyond all reasonable doubt that the prisoner, on the ——— day of ———, in the county of ——— and state of ———, feloniously, willfully, maliciously, deliberately and unlawfully did kill ——— with a deadly weapon, then it is your duty, under the law, to find him guilty of murder of the first degree as charged in the indictment in this case.[28]

The court instructs the jury that any willful, deliberate and premeditated killing of a human being is murder of the first degree; and the jury is further instructed that if you believe from the evidence in this case beyond all reasonable doubt that the prisoner, on the ——— day of ———, in the county of ———, state of ———, with a deadly weapon did feloniously, willfully, maliciously, deliberately and unlawfully kill ———, then it is the duty of the jury under the law to find the prisoner guilty of murder of the first degree.[29]

§ 2841. Premeditation and deliberation as necessary elements of murder in first degree

§ 2841(1). Arkansas

The court instructs you that in order to constitute a homicide, murder in the first degree, according to these instructions, the killing must have been willful, deliberate, malicious, and premeditated; and there must have been an intent in the mind of the defendant to take the life of the deceased at the time the act was com-

[27] Bowles v. Commonwealth, 48 S. E. 527, 103 Va. 816.

[28] State v. Worley, 96 S. E. 56, 82 W. Va. 350.

[29] State v. Worley, 96 S. E. 56, 82 W. Va. 350.

mitted, and this intent must have been formed after deliberation and premeditation, and premeditation as used in these instructions means, thought of beforehand; deliberation means a weighing in the mind of the consequences of a course of conduct, as distinguished from acting upon a sudden impulse without the exercise of the reasoning powers. It is immaterial how long the premeditation existed, so that it did exist and precede the homicide.[30]

§ 2841(2). Colorado

You are instructed that, to warrant a jury in finding a verdict which would impose the death penalty they must find, and so indicate in their verdict, that the killing was with deliberation or premeditation; that is, that the prisoner conceived the intent to kill; that he meditated upon it; and that he formed and afterwards executed a deliberate determination to take life. If a deliberate intent to kill be thus formed and acted upon, it is immaterial how soon, after such evil design is formed, it is executed.[31]

§ 2841(3). Idaho

From these definitions the jury will see that any unlawful killing of a human being, with malice aforethought, is murder; but if nothing further characterizes the offense it is murder of the second degree. To constitute the higher offense there must be superadded, to the general definition above given, willfulness, deliberation, and premeditation. By willfulness is meant that it was of purpose, with the intent that, by the given act, the life of the party should be taken. It must be deliberate and premeditated. By this it is not meant that the killing must have been conceived or intended for any particular length of time. It is sufficient if it was done with reflection and conceived beforehand. And in this view, as I have said before, the deliberate purpose to kill and the killing may follow each other as rapidly as successive impulses or thoughts of the mind. It is enough that the party deliberate before the act—premeditate—the purpose to slay before he gave the fatal blow. But while the purpose, the intent, and its execution may follow thus rapidly upon each other, it is proper for the jury to take into consideration the shortness of such interval in considering whether such sudden and speedy execution may not be attributed to sudden passion and anger, rather than to deliberation and premeditation, which must characterize the higher offense. From what I have said you will see that the distinction between the two grades of offense is that, in murder of the first degree (unless it is committed in the perpetration or attempt to perpetrate arson, rape, robbery, burglary, or mayhem), the killing must be deliberate and premedi-

[30] Diggs v. State, 190 S. W. 448, 126 Ark. 455.

[31] May v. People, 6 P. 816, 8 Colo. 210.

tated, whilst in murder of the second degree the killing is not deliberate or premeditated. In the one case there is deliberate, premeditated, preconceived design, though it may have been formed in the mind immediately before the mortal blow was given, to take life. In the other case there is no deliberation, premeditation, or preconceived design to kill. In both, however, the killing must have been unlawful and accompanied with malice.[32]

§ 2841(4). Indiana

The jury are instructed that, to constitute either degree of murder, there must be a malicious intent to kill. If the killing was done maliciously and purposely, it does not necessarily follow that it was done with premeditation. Premeditation implies that the slayer had time and opportunity for deliberate thought; that after his mind conceived the thought of taking the life of deceased he meditated upon it and formed a deliberate determination to do the act; but there need be no appreciable space between the formation of the intent to kill and the killing. The formation of the intent to kill and the killing may be instantaneous as successive thoughts. After such a determination is so formed and then carried into execution, no matter how soon thereafter, it is murder in first degree; otherwise, it is not, and it is for the state to show that there was such premeditation beyond a reasonable doubt.[33]

§ 2841(5). New Jersey

The jury are instructed that, in order to constitute murder in the first degree and to justify a conviction of that crime, it must appear by evidence beyond a reasonable doubt, not only that there was an unlawful killing, but that the defendant intended to take the life of the deceased, and that the intent was carried into execution willfully, deliberately, and with premeditation. The term "willfully," as here used, means the same as intentionally; the inquiry being, did the defendant intend to take the life of the deceased? The next inquiry is, was the killing done deliberately, and with premeditation? By "deliberately" and "premeditation," however, the law does not mean that any particular length of time need intervene between the formation of the purpose to kill and its execution. It is not necessary that the deliberation and premeditation should continue for a day or an hour or a minute. It is enough that the design to kill be fully and clearly conceived in the mind, and purposely and deliberately executed.[34]

[32] State v. Shuff, 72 P. 664, 9 Idaho, 115.

[33] McDermott v. State, 89 Ind. 187.

[34] State v. Zdanowicz, 55 A. 743, 69 N. J. Law, 619.

§ 2841(6). Texas

You are instructed that, in order to warrant a verdict of murder in the first degree, malice must be shown by the evidence to have existed; that is, the jury must be satisfied from the evidence, beyond a reasonable doubt, that the killing was a consummation of a previously formed design to take the life of the person killed, and that the design to kill was formed deliberately, with a sedate mind, that is, at the time when the mind of the person killing was self-possessed and capable of contemplating the consequences of the act proposed to be done. There is, however, no definite space of time necessary to intervene between the formed design to kill and the actual killing. A single moment of time may be sufficient. All that is required is that the mind be cool and deliberate in forming its purpose, and when the design to kill is formed.[35]

§ 2841(7). Virginia

You are instructed that, to constitute murder in the first degree, the prisoner must have been incited to the killing by malice, and the killing must have been willful, deliberate, and premeditated killing on the part of the prisoner; but a mortal wound given with a deadly weapon in the previous possession of the slayer, without any, or upon slight, provocation, is prima facie willful, deliberate, and premeditated killing, and throws upon the accused the necessity of proving extenuating circumstances.[36]

§ 2841(8). West Virginia

The court instructs the jury that, before you can find the defendant guilty of murder in the first degree, you must believe from the evidence that the killing of ——— was willful, deliberate, and premeditated, and with malice aforethought, and was the result of cool, deliberate judgment, and previous malignity of heart, without justification, excuse, palliation, or alleviation.[37]

§ 2841(9). Wisconsin

The jury are instructed that, to constitute a murder in the first degree, the killing must have been done willfully, deliberately, and with premeditation; that is, intentionally, sanely, and with prior deliberation, and without legal excuse or justification. "Willfully," as used in the information and these instructions, means "intentionally"; that is, not accidentally. "Deliberately," means an intent to kill, executed by the slayer in a cool state of the blood, in furtherance of a formed design, to gratify a feeling of revenge or accomplish some other unlawful purpose, and not under the influence of a violent passion, aroused by real or supposed grievances,

[35] Brown v. State, 169 S. W. 437, 74 Tex. Cr. R. 356.

[36] Hodges v. Commonwealth, 15 S. E. 513, 89 Va. 265.

[37] State v. Manns, 37 S. E. 613, 48 W. Va. 480.

amounting to a temporary dethronement of reason. "Premeditated design to kill" means a previously formed intention to kill. But while the law requires, in order to constitute murder in the first degree, that the killing should be willful, deliberate, and premeditated, still it does not require that the willful intent, premeditation, or deliberation shall exist for any particular length of time before the crime is committed. It is not necessary that the killing should have been considered, brooded over, or reflected upon for a week, a day or an hour. It is sufficient if there was a design and a determination to kill, distinctly formed in the slayer's mind at any moment before or at the time the shot was fired which caused the death of the person killed. There may be no appreciable space of time between the intent to kill and the act of killing, and if sufficient deliberation was had to form a design or purpose to take life, and to put that design or purpose into execution by destroying life, then there was, in law, sufficient deliberation to constitute murder in the first degree, no matter whether the design to take life had been for a long time contemplated by the slayer, or whether the design to kill was formed by him at the instant of the fatal shot. It is enough that the intent to kill preceded the fatal act, although the act followed instantly.[38]

§ 2842. What constitutes deliberate and premeditated killing

§ 2842(1). Alabama

The jury are instructed that premeditation and deliberation here does not mean that the man slayer must ponder over the killing for a long time. It does not mean that he must sit down and reflect over it or think over it for an appreciable length of time; but it may exist and may be entertained while the man slayer is pressing the trigger of the pistol that fired the fatal shot. If it does exist before and while he is pressing the trigger that fired the fatal shot, even if it be only for a moment or instant of time, it is the premeditation and deliberation as used as an element of murder in the first degree.[39]

You are instructed that, if a slayer has any time to think before an act, however short such time may be, even a single moment, and does think, and then strikes the blow as a result of an intention to kill produced by this momentary operation of the mind, and death ensues, this would be a deliberate and premeditated killing within the meaning of our statutes defining murder in the first degree.[40]

You are instructed that "deliberate" and "premeditated" as those

[38] Pergul v. State, 80 N. W. 593, 104 Wis. 230, 76 Am. St. Rep. 865.

[39] Caldwell v. State, 84 So. 272, 203 Ala. 412.

[40] Green v. State, 39 So. 362, 143 Ala. 2.

words are used in the statute, mean only this: that the slayer must intend before the blow is delivered, though it be for only an instant of time before, that he will strike at the time he does strike, and that death will be the result of the blow, or in other words, if the slayer had any time to think, before the act, however short such time may have been, even a single moment, and did think, and he struck the blow as a result of an intention to kill, produced by this even momentary operation of the mind, and death ensued, that would be a deliberate and premeditated killing within the meaning of the statute defining murder in the first degree.[41]

§ 2842(2). Iowa

The jury are instructed that it is not essential that the willful intent, premeditation, and deliberation shall exist in the mind of the slayer for any considerable length of time before the actual perpetration of the crime. It is sufficient if there was a fixed design or determination to maliciously kill, distinctly framed in the mind of such slayer, at any time before the fatal injury inflicted. And in this case, if the jury believe from the evidence, beyond a reasonable doubt, that the defendant assaulted and shot the deceased at the time and place and in the manner charged in the indictment, and that either at some time before, or in the moment or instant of time immediately before, the fatal shot was fired, the defendant had formed in his mind a willful, deliberate, and premeditated design or purpose of his malice aforethought to take the life of the said deceased, and that the said fatal shot was fired by the said defendant in furtherance of that design or purpose, without any justifiable cause or lawful excuse therefor, then it may be said that the defendant acted with deliberation and premeditation, and you should find him guilty of murder in the first degree. But if you fail to find from the evidence, beyond a reasonable doubt, that the said fatal act of the defendant was accompanied with some degree of deliberation and premeditation, or that it was the result of a fixed determination on the part of the defendant to kill the deceased, you must then acquit the defendant of the crime of murder in the first degree.[42]

§ 2842(3). Montana

The jury are instructed that "conceive," as used in these instructions, means to think of; "preconceive" means to think of beforehand—that is, before the execution of the act thought of. Therefore, "preconceived," as used in these instructions, means "premeditation"; and "premeditation" is thought beforehand for any length of time, however short. "Deliberation" does not mean

[41] Ragsdale v. State, 32 So. 674, 134 Ala. 24.

[42] State v. McPherson, 87 N. W. 421, 114 Iowa, 492.

brooded over, considered, reflected upon for a week, or day, or an hour, but it means the intent to kill, executed by the party not under the influence of a violent passion suddenly aroused, amounting to a temporary dethronement of the reason, but in the furtherance of a formed design to gratify a feeling of revenge, or to accomplish some other unlawful purpose; that is, it means in a cool state of blood, and deliberate killings are usually characterized as "cold-blooded murders," such as proceed from deep malignity of heart, and are prompted by motives of revenge or gain.[43]

§ 2842(4). Nebraska

The jury are instructed that, to constitute murder in the first degree, there must have been an unlawful killing done, purposely and with deliberate and premeditated malice. If a person has actually formed the purpose maliciously to kill, and has deliberated and premeditated upon it before he performs the act, and then performs it, he is guilty of murder in the first degree, however short the time may have been between the purpose and its execution. It is not time that constitutes the distinctive difference between murder in the first degree and murder in the second degree. An unlawful killing, with malice, deliberation, and premeditation, constitutes the crime of murder in the first degree. It matters not how short the time, if the party has turned it over in his mind, and weighed and deliberated upon it.[44]

The jury are instructed that while the law requires, in order to constitute murder of the first degree, that the killing shall be willful, deliberate, and premeditated, still it does not require that the willful intent, premeditation, or deliberation, shall exist for any length of time before the crime is committed. It is sufficient if there was a design and determination to kill distinctly formed in the mind at any moment before the blow is struck, and in this case, if the jury believe from the evidence, beyond a reasonable doubt, that the defendant feloniously struck and killed the deceased as charged in the information, and that before the blow was struck, although but an instant before such blow, the defendant had formed in his mind a willful, deliberate, and premeditated design or purpose to take the life of the deceased, and that the blow was struck in furtherance of that design or purpose, and without any justifiable cause or legal excuse therefor, as explained in these instructions, the jury should find the defendant guilty of murder in the first degree.[45]

[43] State v. Spotted Hawk, 55 P. 1026, 22 Mont. 33.

[44] Savary v. State, 87 N. W. 34, 62 Neb. 166.

[45] Savary v. State, 87 N. W. 34, 62 Neb. 166.

§ 2842(5). New Jersey

You are instructed that murder in the first degree consists in the taking of a human life with intent to kill, and that intent must be executed with deliberation and premeditation. It is not necessary that that deliberation and premeditation should continue for an hour, or even for a minute. It is enough that the design to kill be fully formed and purposely executed. You will see, therefore, that the two important elements necessary to constitute the crime of murder in the first degree are an intent to kill and the execution of that intent with deliberation and premeditation. I do not know that I can define those words better than they define themselves. Deliberation and premeditation imply a weighing of the matter and a forethought with regard to the matter; but, as I have stated, that weighing of the matter, and that forethought, need not be for an hour, or even for a minute.[46]

§ 2842(6). North Dakota

You are instructed that, in order to constitute murder in the first degree as charged in the information the killing must have been willful, with malice aforethought, and with premeditation and deliberation. There must have been a specific, deliberate, premeditated intention to take life, unaccompanied by any circumstance of mitigation. The generally accepted meaning of the word "premeditation" is a prior determination to do the act in question and then doing it, but it is not essential that this intention should exist for any considerable period of time before it was carried out. If the determination is formed deliberately and upon due reflection, it makes no difference how soon the fatal resolve was carried into execution. An act is done willfully when done intentionally and on purpose.[47]

§ 2842(7). Pennsylvania

You are instructed that it is not necessary that you find that defendant went to the house with the intent to kill; if he formed the intent to kill with a mind capable of forming that intent an instant before he pulled that trigger, he is guilty of murder of the first degree.[48]

§ 2843. Killing in heat of passion as murder in first degree

The jury are instructed that, if the killing was malicious, even if it was done in the heat of passion, it is murder. Even if a killing is done in the sudden heat of passion excited by sufficient provocation, such as a blow, if there is malice in it, and if there

[46] State v. Lang, 66 A. 942, 75 N. J. Law, 1.

[47] State v. Mueller, 168 N. W. 66, 40 N. D. 35.

[48] Commonwealth v. Reed, 83 A. 601, 234 Pa. 573.

is also the premeditation and deliberation, as I have defined it to you, then it would be murder in the first degree.[49]

§ 2844. Distinction between intent to kill and premeditated design

You are instructed that there may, in contemplation of law, be an intention to kill a human being, which may not amount to a premeditated design to kill. Shooting a man intentionally and killing him is not necessarily the same as doing so with a premeditated design to kill him. There may be an intention to kill without its having been premeditated. In order to convict the defendant of murder in the first degree, you must be satisfied from the evidence, beyond a reasonable doubt, that the defendant not only had an intention to kill the deceased, but that he actually had a premeditated design to kill him.[50]

§ 2845. Murder in second degree

§ 2845(1). Alabama

The court instructs the jury that, although the jury may believe from all the evidence in this case that the death of ——— was caused by some act of the defendant, yet the jury cannot find him guilty of murder in the second degree, unless they should further believe from the evidence, beyond all reasonable doubt, that such act was inflicted with the intention to kill ———, or unless the defendant intended to do an act of violence from which ordinarily, in the usual course of events, death or great bodily harm might have been the consequence.[51]

§ 2845(2). California

You are instructed that it will be proper for you, in determining the question as to whether or not the defendant in this case is guilty of murder of the second degree, to consider the following propositions: Is ———, the person referred to by that name in the information in this case, dead? If she be dead, did she die as the result of an act committed by some other person? If so, did she die within a year and a day from the time of the commission of such act? If she did so die, was such act committed by the defendant in this case? If said defendant did commit such act, did she commit it willfully? If she did willfully commit such act, and it was unlawful, was it felonious?[52]

§ 2845(3). Delaware

You are instructed that murder of the second degree is where the crime is committed with implied malice; that is, where the

[49] Caldwell v. State, 84 So. 272, 203 Ala. 412.

[50] Cook v. State, 35 So. 665, 46 Fla. 20.

[51] Fowler v. State, 49 So. 788, 161 Ala. 1.

[52] People v. Balkwell, 76 P. 1017, 143 Cal. 259.

malice is not express, as in murder of the first degree, but is an inference or conclusion of law from facts actually proved. It is where there is no deliberate mind or formed design to take life, but where the killing was done without justification or excuse and without provocation or without sufficient excuse and provocation to reduce the offense to manslaughter. For example, where the killing was committed without design and premeditation, but under the influence of a wicked and depraved heart, or with a cruel and wicked indifference to human life, the law implies malice and makes the offense murder in the second degree.[53]

The court instructs the jury that the state does contend that the prisoner is guilty of murder of the second degree, and it becomes our duty to instruct you with more particularity in respect to such crime. Murder of the second degree is where the killing is done with implied malice. Implied malice is an inference or conclusion of the law from the facts found by the jury. Murder of the second degree is where there was no deliberate mind or formed design to take life or to perpetrate a crime punishable with death, but where the killing nevertheless was done without justification or excuse, and without provocation, or without sufficient provocation to reduce the offense to manslaughter. And where the circumstances surrounding the case show that the killing was committed under the influence of a wicked and depraved heart, or with cruel and wicked indifference to human life, the law implies malice and makes the offense murder of the second degree.[54]

§ 2845(4). Michigan

You are instructed that if you find, at the time of the homicide, that the defendant intentionally discharged a pistol at the person of ———, while ——— was running in the highway, with malice in his heart at the time, and that such malice was the moving cause of the act, and as a result of the shot ——— received a wound from the effects of which he died, the defendant is guilty of murder in the second degree.[55]

§ 2845(5). Missouri

You are instructed that, if you believe from the evidence that the defendant intentionally shot and killed ———, then you are instructed that there is no evidence of such provocation as would reduce such intentional killing of the said ——— from murder in the first degree to murder in the second degree.[56]

You are instructed that, if you believe and find from the evidence in this cause that the defendant, at the county of ——— and state

[53] State v. Naylor, 90 A. 880, 5 Boyce, 99.

[54] State v. Miele, 74 A. 8, 1 Boyce, 33.

[55] People v. Stubenvoll, 28 N. W. 883, 62 Mich. 329.

[56] State v. Tucker, 133 S. W. 27, 232 Mo. 1.

of ———, on or about the ——— day of ———, willfully, premeditatedly, and of his malice aforethought, but without deliberation, shot with a pistol, and by such shooting killed ———, then you will find him guilty of murder in the second degree.[57]

The court instructs the jury that if you believe from the evidence that in the county of ——— and state of ———, at any time before the filing of the indictment herein, the defendant did willfully, premeditatedly, and of his malice aforethought strike one ———, but without deliberation, with a large club, the same being a dangerous weapon, inflicting upon him a mortal wound, from which said mortal wound the said ——— within a year thereafter, at the county of ——— and state of ———, died, then you will find the defendant guilty of murder in the second degree, and assess his punishment in imprisonment at not less than ——— years in the penitentiary.[58]

The court instructs the jury that if they fail to find a verdict according to the law as declared in instruction No. ———, but shall find and believe from the evidence that at the county of ——— and state of ———, at any time before the ——— day of ———, the defendant willfully, premeditatedly, and of his malice aforethought did, with a dangerous and deadly weapon, to wit, a heavy wooden club (if you find such club to be a deadly weapon), strike, beat, bruise, wound, and fracture the skull of one ———, inflicting on her a mortal wound and fracture, from which said mortal wound and fracture the said ———, at the county of ———, then and there instantly died, then you will find the defendant guilty of murder in the second degree, and assess his punishment at imprisonment in the state penitentiary for any time not less than ——— years.[59]

You are instructed that, if you find from the evidence beyond a reasonable doubt that at the county of ———, in the state of ———, at any time before the finding of the indictment herein, the defendant did unlawfully, premeditatedly, and of his malice aforethought, but without deliberation, as defined in these instructions, kill ———, by shooting him with a revolving pistol, then and there loaded with gunpowder and leaden balls, you will find the defendant guilty of murder in the second degree, and assess his punishment at imprisonment in the penitentiary for a term of not less than ——— years.[60]

The court instructs the jury that if you believe from the evidence that at the county of ——— and state of ———, at any time before the ———, the defendant did willfully, premeditately, and

[57] State v. Minor, 92 S. W. 466, 193 Mo. 597.

[58] State v. Kinder, 83 S. W. 964, 184 Mo. 276.

[59] State v. Brown, 79 S. W. 1111, 181 Mo. 192.

[60] State v. Marsh, 71 S. W. 1003, 171 Mo. 523.

of his malice aforethought, but without deliberation, shoot ——— with a loaded shotgun, inflicting upon him a mortal wound, from which said mortal wound the said ———, within one year thereafter, at the county of ——— and state of ———, died, then you will find the defendant guilty of murder in the second degree, and assess his punishment at imprisonment in the penitentiary for a term not less than ——— years.[61]

§ 2845(6). Montana

The jury are instructed that, if you find from the evidence beyond a reasonable doubt that the defendant murdered ———, and you do not find him guilty of murder in the first degree, you should find him guilty of murder in the second degree. Murder in the second degree is the unlawful killing of a human being with malice aforethought, either express or implied, where the killing is not done deliberately, or with some degree of coolness, or in any one of the ways specified in the definition of murder in the first degree.[62]

§ 2845(7). North Carolina

You are instructed that murder in the second degree is the unlawful killing of a human being by a person who has formed in his mind a purpose, design, or intention unlawfully to kill with malice, but without premeditation and deliberation.[63]

You are instructed that, if you find from the evidence beyond a reasonable doubt, the burden being upon the state, that the prisoner intentionally shot the deceased with a pistol and inflicted a wound which caused his death, malice in that event is implied, and the prisoner is deemed to be guilty of murder in the second degree, and, in that event, this will be your verdict, unless the prisoner is guilty of murder in the first degree.[64]

§ 2845(8). North Dakota

You are instructed that murder in the second degree differs from murder in the first degree only in the fact that as to the second degree there is no premeditation or deliberation. Thus, where a person forms a design to kill in the midst of a conflict and immediately executes such design, the killing is not premeditated, and is therefore no higher offense than murder in the second degree.[65]

§ 2845(9). Pennsylvania

The jury are instructed that the commonwealth contends that that testimony is sufficient to warrant you in finding that there was this formed design upon the part of the defendant, and that it was

[61] State v. Hudspeth, 60 S. W. 136, 159 Mo. 178.

[62] State v. McGowan, 93 P. 552, 36 Mont. 422.

[63] State v. Cameron, 81 S. E. 748, 166 N. C. 379.

[64] State v. Cameron, 81 S. E. 748, 166 N. C. 379.

[65] State v. Mueller, 168 N. W. 66, 40 N. D. 35.

a willful and deliberate murder, and that he pointed the revolver with the intent to take life. Of course, if a man points a deadly weapon at a vital part of a man's body, you can infer that there was an intent to take life. If you find present all the ingredients to which I have referred, that there was this willful, deliberate, premeditated, felonious, and malicious murder, with the specific intent to take life, that this man had an opportunity to think about it and deliberate over it and formed his plan, and carried it into effect; understanding the effect of it, and did it with a wicked heart, then that would be murder in the first degree. On the other hand, if you think that all the elements that I have just referred to were present, but that he did not intend to take life and only intended to do grave bodily injury, then you can find a verdict of guilty of murder in the second degree.[66]

§ 2845(10). Texas

You are instructed that malice is also a necessary ingredient of the offense of murder in the second degree. The distinguishing feature, however, so far as the element of malice is concerned, is that in murder in the first degree malice must be proved, to the satisfaction of the jury, beyond a reasonable doubt, as an existing fact, while in murder in the second degree malice will be implied from the facts of an unlawful killing. Now, if you believe from the evidence in this case, beyond a reasonable doubt, that the defendant in the county of ——— and state of ———, on or about the ——— day of ———, as alleged, with his implied malice, did shoot ——— with a gun and thereby kill the said ———, as charged in the indictment, you will find him guilty of murder in the second degree, and assess his punishment at confinement in the state penitentiary for any period that the jury may determine and state in their verdict, provided it be not less than ——— years.[67]

You are instructed that, if you believe from the evidence beyond a reasonable doubt that the defendant, with a deadly weapon, the same being a gun, and an instrument reasonably calculated and likely to produce death by the mode and manner of its use, in sudden passion, and while sane, as hereinafter charged, with the intent to kill, did unlawfully and with implied malice aforethought shoot and thereby kill the said ———, as charged in the indictment, you will find him guilty of murder in the second degree, and assess his punishment at confinement in the penitentiary for any period that the jury may determine and state in their verdict, provided it be for not less than ——— years.[68]

[66] Commonwealth v. Reeves, 110 A. 158, 267 Pa. 361.

[67] Witty v. State, 171 S. W. 229, 75 Tex. Cr. R. 440; Brookins v. State, 158 S. W. 521, 71 Tex. Cr. R. 101.

[68] Witty v. State, 171 S. W. 229, 75 Tex. Cr. R. 440.

The jury are instructed that, if you believe from the evidence in this case beyond a reasonable doubt that in ——— county, state of ———, on or about ———, defendant did unlawfully kill ——— by shooting him with a gun, but you do not believe from the evidence, beyond a reasonable doubt, that the killing was done with express malice (as hereinbefore defined), and unless you believe that the evidence under the law as given you in this charge tends to reduce the offense to manslaughter, or to justify, mitigate, or excuse the defendant's act, then from such unlawful and intentional killing, the law would imply malice, and the killing would be upon implied malice, and would be murder in the second degree, and if you so find beyond a reasonable doubt you will convict the defendant of murder of the second degree and assess his punishment at confinement in the penitentiary for any number of years you may agree upon, provided it be for not less than ———.[69]

You are instructed that, in this case, if you are satisfied from the evidence, beyond a reasonable doubt, that the defendant, acting together with W. as a principal, as the term "principal" is herein defined to you, with a gun, did, in the county of ———, state of ———, on or about the time charged in the indictment, unlawfully shoot and thereby kill the said ———, and if you are further satisfied from the evidence, beyond a reasonable doubt, that the defendant in so doing acted upon malice, but should not find from the evidence, beyond a reasonable doubt, that he acted upon express malice, then it will be your duty to find the defendant guilty of murder in the second degree, and to assess the proper punishment therefor.[70]

You are instructed that, if you find beyond a reasonable doubt that the defendant shot and killed ——— with a gun with malice aforethought, and you do not find beyond a reasonable doubt that such killing, if any, was with express malice, then you will convict the defendant of murder in the second degree, and so say in your verdict.[71]

§ 2846. Same—Killing in passion without adequate cause

§ 2846(1). Missouri

You are instructed that the heat of passion which destroys deliberation, and which reduces a killing from murder in the first degree to murder in the second degree, must be a heat of passion, the result of some conduct or action on the part of the deceased, such as will be reasonably calculated to arouse passion on the part of the defendant, and, in this connection, you are instructed that it is not

[69] Overcash v. State, 148 S. W. 701, 67 Tex. Cr. R. 181.

[70] Burns v. State, 145 S. W. 356, 65 Tex. Cr. R. 175.

[71] McMeans v. State, 114 S. W. 837, 55 Tex. Cr. R. 69.

sufficient to reduce the killing to murder in the second degree that defendant was in a heat of passion, but he must have been in a heat of passion produced by lawful provocation on the part of deceased, and in this connection you are further instructed that the fact that deceased impounded or took up the cattle of defendant, and refused to deliver the same to defendant on demand therefor, is not sufficient legal provocation to reduce the killing from murder in the first degree to murder in the second degree.[72]

The court instructs the jury that if you find from the evidence that at the county of ——— and state of ———, at any time before ———, the defendant shot ——— with a loaded shotgun, inflicting upon him a mortal wound, from which said mortal wound the said ——— within one year thereafter, at the county of ——— and state of ———, died, and that the defendant fired said shot while he was in a violent passion, suddenly aroused by insulting or abusive language spoken by deceased to him, then such killing was not done with deliberation, but although the defendant may have fired the shot while in a violent passion, suddenly aroused by insulting or abusive words spoken to him by the deceased, yet, if such killing was done willfully, premeditatedly, and of his malice aforethought, as explained in these instructions, the defendant is guilty of murder in the second degree.[73]

The jury are instructed that the word "willful," as used in the indictment, means intentionally, that is, not accidentally; "deliberately" means in a cool state of the blood, that is, not in the heat of passion; "premeditation" means thought of beforehand for any length of time, however short; "malice," in these instructions, does not mean hatred or ill will, as it commonly does, but it means the intentional doing of a wrongful act; "heat of passion," as used in these instructions means a condition of quick anger or sudden injury engendered by a real or supposed grievance suffered at the time; and in order to reduce the crime from murder in the first degree to murder in the second degree the killing must be done upon the instant the provocation is given, before the blood has time to cool and reason to resume its sway, before the mind has time to consider the character and gravity of the acts about to be done, and not from hatred or for pre-existing revenge.[74]

§ 2846(2). New York

The jury are instructed that, if the defendant in this case shot the revolver in a sudden passion excited by what the deceased had then said to him, that she did not want anything to do with him,

[72] State v. Tucker, 133 S. W. 27, 232 Mo. 1.

[73] State v. Hudspeth, 60 S. W. 136, 159 Mo. 178.

[74] State v. Jones, 78 Mo. 278.

would not have anything more to do with him and that she turned him down and repulsed his advances, and by her treatment of the defendant at that time, for an instant, for a moment, while he was standing in the hallway, disturbed his reasoning power, his reasoning faculties, and deprived him of the capacity to reflect, or while he was under the influence of some sudden and uncontrolled emotion caused or brought about by the final repulse of this girl or the final refusal of the girl to have anything more to do with him, and if that was of such a nature as to deprive him of his power to form an intent and deprive him of his mental power to premeditate and deliberate, and he did not have an intent to kill, and did not premeditate and deliberate upon it, then he cannot be convicted of murder in the first degree.[75]

§ 2846(3). Texas

The jury are instructed that the instrument or means by which a homicide is committed are to be taken into consideration in judging the intent of the party offending. If the instrument be one not likely to produce death in the manner used, it is not to be presumed that death was designed, unless from the manner in which it was used such intention evidently appeared. If you believe from the evidence beyond a reasonable doubt that the defendant struck ——— with a gun, and that said gun, in the manner in which it was used, was an instrument reasonably calculated to produce death or serious bodily injury, and that said striking was with an instrument reasonably calculated to produce death or serious bodily injury, and that said striking was in a sudden transport of passion, aroused without an adequate cause, and that by said stroke with said gun the said defendant killed the said ———, then you will find the defendant guilty of murder in the second degree, and assess his punishment at confinement in the penitentiary for any term of years not less than ——— years.[76]

You are instructed that if you believe from the evidence, beyond a reasonable doubt, that the defendant, with a deadly weapon or instrument reasonably calculated and likely to produce death by the mode and manner of its use, in sudden passion aroused without adequate cause and not in defense of himself against an unlawful attack, real or apparent, reasonably producing a rational fear or expectation of death or serious bodily injury, and not under circumstances which would reduce the offense to the grade of manslaughter with intent to kill, did unlawfully and with implied malice shoot and thereby kill said ——— as charged in the indictment, you will find him guilty of murder in the second degree and as-

[75] People v. Gilbert, 92 N. E. 85, 199 N. Y. 10, 20 Ann. Cas. 769.

[76] Crutchfield v. State, 152 S. W. 1053, 68 Tex. Cr. R. 468.

sess his punishment at confinement in the penitentiary for any period that the jury may determine and state in their verdict, provided it be for not less than ——— years.[77]

You are instructed that if you believe from the evidence, beyond a reasonable doubt, that the defendant, with a deadly weapon, or instrument reasonably calculated and likely to produce death by the mode and manner of its use, in a sudden transport of passion, without adequate cause, and not in defense of himself against an unlawful attack, reasonably producing a rational fear or expectation of death or serious bodily injury, with the intent to kill, did with a pistol, within the county of ——— and state of ———, on or about the ——— day of ———, shoot and thereby kill ———, as charged in the indictment, you will find him guilty of murder in the second degree, and so say in your verdict, and assess his punishment at confinement in the state penitentiary for any period that the jury may determine and state in their verdict, provided that it be for not less than ——— years.[78]

The jury are instructed that if you believe from the evidence, beyond a reasonable doubt, that defendant did shoot and kill said ———, not by mistake, but intentionally, but that at the time of doing so he was laboring under such a passion as deprived him of the power, at the time he formed that intent to kill her, to do so with a considerate and deliberate mind, then he would be guilty of murder in the second degree.[79]

§ 2846(4). Virginia

The court instructs the jury that if they believe from the evidence that the prisoner and the deceased became involved in a sudden quarrel, without any previous ill feeling or bad blood between them, and that the prisoner used insulting language to the deceased, and that the deceased came down out of the cab of his engine and started towards the prisoner, either with the purpose of resenting the said insults or of asking the prisoner what he meant by the language he had used towards him, and that the prisoner then shot deceased in the heat of passion, brought about either by the quarrel in which they had been engaged or by the deceased advancing upon him, or that the shooting was not done with the willful, deliberate, and premeditated intention to take the life of the deceased or to do him serious bodily harm, then they cannot find him guilty of murder in the first degree.[80]

[77] Best v. State, 125 S. W. 909, 58 Tex. Cr. R. 327.

[78] Clark v. State, 120 S. W. 179, 56 Tex. Cr. R. 293.

[79] White v. State, 72 S. W. 173, 44 Tex. Cr. R. 346, 63 L. R. A. 660.

[80] Bowles v. Commonwealth, 48 S. E. 527, 103 Va. 816.

§ 2847. Same—Killing person other than one intended

You are instructed that if you find and believe that the defendant, at the time and place mentioned in the second instruction, feloniously, willfully, premeditatedly, and of his malice aforethought, but without deliberation, shot at ——— with the intention of killing him, but missed him, and thus accidentally shot and killed ———, then you will find the defendant guilty of murder in the second degree, although you may believe that the defendant at the time did not intend to shoot or kill the said ———.[81]

§ 2848. Same—New-born babe dying because of assault on mother while pregnant with the child

You are instructed that, if a woman be quick with child, and, by a potion or otherwise, killeth it in her womb, or if a man beat her, whereby the child dieth in her body, and she is delivered of a dead child, this is a great misprision, but no murder; but if the child be born alive, and dieth of the potion or battery, this is murder. This is the doctrine of the common law, and would, under our statute, be murder in the second degree. No malice need be shown in a case of this character, beyond that inferred from the act stated; yet it is essential that the defendant should know that the woman was quick with child, and intentionally inflict the battery.[82]

The jury are instructed that if, from the evidence, you should believe, beyond a reasonable doubt, that the defendant, in ——— county, state of ———, within the time covered by the indictment, intentionally beat his wife, while she was quick with child, knowing that she was quick with child, and that she afterwards gave birth to the child, and that it was born alive, and afterwards died in consequence of the injuries received while in its mother's womb by the beating intentionally inflicted upon its mother by the defendant, he, the defendant, would be guilty of murder in the second degree, and it would be your duty in that event to return a verdict accordingly.[83]

§ 2849. Same—Implied malice

§ 2849(1). Delaware

The court instructs the jury that murder of the second degree is where the crime is committed with implied malice; that is, when the malice is not express as in murder of the first degree, but is a conclusion of law from the facts proved. It is where there is no deliberate mind or formed design to take life, but where the killing

[81] State v. Tucker, 133 S. W. 27, 232 Mo. 1.

[82] Clarke v. State, 23 So. 671, 117 Ala. 1, 67 Am. St. Rep. 157.

[83] Clarke v. State, 23 So. 671, 117 Ala. 1, 67 Am. St. Rep. 157.

was done without justification or excuse and without provocation or sufficient provocation to reduce the offense to manslaughter. When the killing is done without design and premeditation, but under the influence of a wicked and depraved heart, or with a cruel and reckless indifference to human life, the law implies malice and makes the offense murder of the second degree.[84]

§ 2849(2). Texas

You are instructed that "implied malice" is that which the law infers from or imputes to certain acts, however suddenly done. Thus when the fact of an unlawful killing is established, and the facts do not establish express malice beyond a reasonable doubt, nor tend to mitigate, excuse, or justify the act, then the law implies malice, and the murder is in the second degree; and the law does not further define murder in the second degree than if the killing is shown to be unlawful, and there is nothing in evidence on the one hand showing express malice, and on the other hand there is nothing in evidence that will reduce the killing below the grade of murder, then the law implies malice, and the homicide is murder in the second degree.[85]

You are instructed that the next lower grade of culpable homicide than murder in the first degree is murder of the second degree. Malice is also a necessary ingredient of the offense of murder in the second degree. The distinguishing feature, however, so far as the element of malice is concerned, is that in murder in the first degree malice must be proved to the satisfaction of the jury beyond a reasonable doubt as an existing fact, while in murder in the second degree malice will be implied from the fact of an unlawful killing.[86]

F. MANSLAUGHTER

1. *In General*

§ 2850. What constitutes

§ 2850(1). Arkansas

You are instructed that "manslaughter" is the unlawful killing of a human being without malice, express or implied, and without deliberation. Manslaughter may be voluntary or involuntary.[87]

The jury are instructed that, if the jury believe from the evidence that the defendant killed the deceased in the commission of an unlawful act, without malice and without means calculated to produce death, or in the prosecution of a lawful act done without

[84] State v. Prettyman, 100 A. 476, 6 Boyce, 452.

[85] Hicks v. State, 171 S. W. 755, 75 Tex. Cr. R. 461.

[86] Barton v. State, 111 S. W. 1042, 53 Tex. Cr. R. 443.

[87] Gilmore v. State, 122 S. W. 493, 92 Ark. 205.

due caution or circumspection, it would only be manslaughter, and you should so find.[88]

§ 2850(2). Colorado

The court instructs the jury that the crime of murder requires the mind to have acted from deliberation and intelligence, and when it is clouded by a passion, apparently irresistible, in a reasonable person, the killing is only manslaughter.[89]

§ 2850(3). Delaware

You are instructed that manslaughter is termed homicide and is so called because it is the killing of a human being; but it is not malicious homicide, and is, therefore, unlike murder, which contains malice. It is the unlawful killing of another, without malice, express or implied, and is either voluntary or involuntary.[90]

§ 2850(4). Florida

The court instructs the jury that the killing of a human being by the act, procurement, or culpable negligence of another, in cases where such killing shall not be justifiable or excusable homicide, as hereinafter defined, nor murder in any of its degrees, is manslaughter. Thus a killing done in sudden heat of passion, without any premeditated design to effect death, but not done under such circumstances as would make it justifiable homicide as hereinafter defined, would be manslaughter. And where two men engage in mutual combat, both being at fault, and neither being the aggressor more than the other, and in such combat one slays the other, such killing is manslaughter.[91]

§ 2850(5). Illinois

The court instructs the jury that manslaughter is the unlawful killing of a human being, without malice, express or implied, and without any mixture of deliberation whatever. It must be voluntary, upon a sudden heat of passion, caused by a provocation apparently sufficient to make the passion irresistible or involuntary, in the commission of an unlawful act, or a lawful act, without due caution or circumspection.[92]

§ 2850(6). Indiana

The jury are instructed that manslaughter is the unlawful killing of a human being without malice, express or implied, either voluntarily upon a sudden heat, or involuntarily, but in the commission of some unlawful act; and if you find from the evidence, beyond a reasonable doubt, that defendant did the killing unlawfully and

[88] Ackers v. State, 83 S. W. 909, 73 Ark. 262.

[89] May v. People, 6 P. 816, 8 Colo. 210.

[90] State v. Long (O. & T.) 108 A. 36, 7 Boyce, 397.

[91] Disney v. State, 73 So. 598, 72 Fla. 492.

[92] Greschia v. People, 53 Ill. 295.

voluntarily, but in a sudden heat and transport of passion, or involuntarily in the commission of an unlawful act and without malice, express or implied, then the offense would be manslaughter, and you should so find him guilty.[93]

§ 2850(7). Iowa

You are instructed that if you find from the evidence, beyond a reasonable doubt, that the defendant did take the life of the said ——— by means of the weapon described in the indictment, and that the killing, if any, was done in the heat of blood or passion, upon a sudden quarrel, and upon reasonable provocation, and without malice, express or implied, and you further so find that it was not justifiable or excusable, he is guilty of manslaughter, unless you find, under instructions hereafter given, that defendant was not accountable for his acts on account of insanity.[94]

§ 2850(8). Michigan

You are instructed that manslaughter is the unlawful killing of another without malice, express or implied. The offense is one that is committed without malice or premeditation, the result of temporary excitement by which the control of the reason is disturbed, rather than from any wickedness of the heart or cruelty or recklessness of disposition. The general rule is that reason should, at the time of the act, be disturbed or obscured by passion, to any extent which might render ordinary men of fair, average disposition, liable to act rashly or without due deliberation or reflection, and from passion and lack of reason rather than from judgment.[95]

§ 2850(9). Mississippi

The court charges the jury that the killing of a human being, without malice, in the heat of passion, without authority of law, and not in necessary self-defense, is manslaughter, and if you believe from the evidence beyond a reasonable doubt that the defendant so killed ———, you will find him guilty of manslaughter.[96]

§ 2850(10). North Carolina

You are instructed that manslaughter is the unlawful killing of a human being without malice, express or implied, and without deliberation or premeditation.[97]

§ 2850(11). South Carolina

The jury are instructed that manslaughter is taking the life of a fellow being in sudden heat and passion, superinduced upon a sufficient legal provocation.[98]

[93] Powers v. State, 87 Ind. 144.

[94] State v. Hockett, 30 N. W. 742, 70 Iowa, 442.

[95] People v. Droste, 125 N. W. 87, 160 Mich. 66.

[96] Martin v. State, 73 So. 64, 112 Miss. 365.

[97] State v. Cameron, 81 S. E. 748, 166 N. C. 379.

[98] State v. Foster, 45 S. E. 1, 66 S. C. 469.

§ 2850(12). Texas

You are instructed that, if you believe from the evidence beyond a reasonable doubt that the defendant, with a deadly weapon, in a sudden passion arising from an adequate cause, as the cause has been hereinbefore explained, and not in defense of himself against an unlawful attack producing a reasonable expectation or fear of death or serious bodily injury, with intent to kill, did, in the county of ——— and state of ———, on or about ———, as alleged, shoot with a gun, and thereby kill, said ———, as charged in the indictment, you will find the defendant guilty of manslaughter, and assess his punishment at imprisonment in the state penitentiary for a term of not less than ——— years nor more than ——— years.[99]

You are instructed that, if you believe from the evidence beyond a reasonable doubt that the defendant by his own willful and wrongful acts, if any, went to where the deceased was killed, for the unlawful and willful purpose of provoking a difficulty with him, with the unlawful and willful purpose and intention to commit an assault and battery upon the deceased, and you further believe from the evidence beyond a reasonable doubt that the defendant did some act or used language or did both, with the unlawful and willful intention of producing an occasion to bring on a difficulty and to commit an assault and battery upon deceased, and that such acts or language or both of the defendant, if any such there were, were reasonably calculated under the circumstances at the time to provoke a difficulty with the deceased, and that such acts or language or both, if any such there was, of defendant caused the deceased to attack the defendant with a knife, and that the defendant cut or stabbed the deceased with a knife, and thereby killed him in order to save his own life, then if you so find, you are instructed that the defendant's plea of self-defense will not avail him, and the homicide would be manslaughter, and, if you so find from the evidence beyond a reasonable doubt, you will find the defendant guilty of manslaughter, and assess the penalty as prescribed in this charge.[1]

The jury are instructed that, in this case, if you should find from the evidence, beyond a reasonable doubt, that the defendant, on or about the time charged in the indictment, did shoot and thereby kill the said ——— at the time he did so, and that the actions and words of the deceased, together with all the facts and circumstances in evidence, had produced in the mind of the defendant sudden passion, such as anger, rage, sudden resentment or terror, rendering it incapable of cool reflection, and that under the immediate influence thereof, in the county of ——— and state of ———, the

[99] Bibb v. State, 215 S. W. 312, 86 Tex. Cr. R. 112.

[1] Atkison v. State, 182 S. W. 1099, 79 Tex. Cr. R. 68.

defendant shot and thereby killed the deceased, and if you are satisfied from the evidence, beyond a reasonable doubt, that such killing was neither justified nor excused by law, as hereinafter explained to you, then you should find him guilty of manslaughter and assess his punishment at confinement in the penitentiary for a term of years not less than ——— nor more than ———, as you may determine and state in your verdict.[2]

You are instructed that, if you believe from the evidence beyond a reasonable doubt that the defendant, with a deadly weapon, in a sudden transport of passion aroused by adequate cause, as the same is herein explained, and not in defense of himself against an unlawful attack reasonably producing a rational fear of death or serious bodily injury, did shoot with a pistol and thereby kill ———, the deceased, as charged in the indictment, you will find the defendant guilty of manslaughter, and assess his punishment for any term not less than ——— nor more than ——— years.[3]

§ 2850(13). Washington

I now direct your attention to the crime of manslaughter, which is included within the crimes charged in the information; and I instruct you as a matter of law that if you are satisfied beyond a reasonable doubt from the evidence that the defendant did shoot and kill the deceased, in the manner alleged in the information, in this county and state, and further find that such killing was not purposely done, and was not done upon deliberation and with a premeditated design to effect the death of the deceased, but was done by the defendant without any design to effect his death, and that it was done either voluntarily upon sudden heat, or involuntarily but in the commission of some unlawful act, and are satisfied beyond a reasonable doubt that it was not in self-defense, then your verdict should be that the defendant is guilty of manslaughter. In order to reduce voluntary homicide to the grade or degree of manslaughter, it is necessary, not only that adequate cause exist to produce a degree of anger, rage, and sudden resentment or terror sufficient to render the mind incapable of cool reflection, but also that such a state of mind did actually exist at the time of the commission of the offense.[4]

2. *Voluntary Manslaughter*

§ 2851. Elements of voluntary manslaughter

§ 2851(1). Delaware

You are instructed that voluntary manslaughter is where one kills another in the heat of blood, and usually occurs in fighting or

[2] Burns v. State, 145 S. W. 356, 65 Tex. Cr. R. 175.
[3] Waters v. State, 114 S. W. 628, 54 Tex. Cr. R. 322.
[4] State v. Totten, 121 P. 70, 67 Wash. 192.

under great provocation. This may be termed the common kind of manslaughter and is probably somewhat familiar to you.[5]

§ 2851(2). Kentucky

The court instructs the jury that, if you believe from the evidence beyond a reasonable doubt that the defendant, in this county on the ——— day of ———, and before the finding of this indictment, willfully and feloniously, and not in self-defense as defined in instruction No. ———, shot and killed ———, with a pistol loaded with powder and ball or other hard substance, then you will find the defendant guilty—guilty of willful murder, if the shooting was done by defendant with malice aforethought; guilty of voluntary manslaughter, if the shooting was done by defendant in sudden heat and passion or in sudden affray without previous malice.[6]

The court instructs the jury that, if you shall not believe from the evidence beyond a reasonable doubt that the defendant has been proven guilty of murder as defined in instruction No. ——— above, but shall believe from the evidence beyond a reasonable doubt that he did, in ——— county, and before the finding of the indictment, without previous malice and not in his necessary or reasonably apparent necessary self-defense, but in a sudden affray or in sudden heat and passion, upon a provocation reasonably calculated to excite his passions beyond the power of his control, shoot and kill ———, you should in that event find him guilty of voluntary manslaughter and fix his punishment at confinement in the state penitentiary for an indeterminate period of not less than ——— years nor more than ——— years, and state in your verdict the minimum and maximum period that he shall be so confined.[7]

You are instructed that, if you shall not believe from the evidence beyond a reasonable doubt that the defendant has been proven guilty as defined in instruction No. ———, above, but shall believe from the evidence beyond a reasonable doubt that the defendant, in this county, and before the finding of the indictment herein, willfully, feloniously, and in sudden heat and passion, or in sudden affray, and without previous malice, and not in his necessary or reasonably apparent necessary self-defense, so shot at and wounded ——— as that he then and there died thereby, then the defendant is guilty of voluntary manslaughter included in the indictment herein, and you ought to so find.[8]

You are instructed that, if the defendant, "in sudden heat and passion or in sudden affray, and without previous malice, and not in his necessary, or reasonably apparent necessary self-defense, so

[5] State v. Long (O. & T.) 108 A. 36, 7 Boyce, 397.

[6] Breckenridge v. Commonwealth, 197 S. W. 395, 176 Ky. 686.

[7] Taylor v. Commonwealth, 188 S. W. 1087, 172 Ky. 136.

[8] Carnes v. Commonwealth, 142 S. W. 723, 146 Ky. 425.

shot and wounded ———, as that he then and there died thereby, then the defendant is guilty of voluntary manslaughter, included in the indictment herein, and you ought to so find.[9]

You are instructed that if you believe from the evidence, beyond a reasonable doubt, that in this county, and before the finding of the indictment, the defendant, in sudden affray, or in sudden heat and passion, upon a provocation reasonably calculated to excite the passions of the defendant beyond the power of his control, willfully killed ——— by shooting him with a pistol, from which shooting said ——— presently died, then you will find the defendant guilty of voluntary manslaughter, and fix his punishment at confinement in the penitentiary for a term of not less than ——— years nor more than ——— years.[10]

You are instructed that, if you believe from the evidence beyond a reasonable doubt that the defendant in this county, before the finding of the indictment in this case, did unlawfully, willfully, feloniously, in sudden affray, or in sudden heat or passion, and without previous malice, not in his necessary or apparently necessary self-defense, shoot with a gun or pistol loaded with powder and leaden ball, or other hard and explosive substances, and kill ———, you should find the defendant guilty of voluntary manslaughter, and fix his punishment at confinement in the state penitentiary for a term of not less than ——— nor more than ——— years, in your discretion.[11]

§ 2851(3). Montana

The jury are instructed that manslaughter is the unlawful killing of a human being, without malice or any mixture of deliberation. Voluntary manslaughter is the killing of a human being by another person upon a sudden heat and passion, caused by a provocation apparently sufficient to make the passions irresistible in a reasonable person.[12]

§ 2851(4). Texas

You are instructed that if you find from the evidence, beyond a reasonable doubt, that defendant, in ——— county, state of ———, about ———, did voluntarily shoot with a gun and kill ———, then if you shall find from the evidence that the deceased, ———, came to the home of defendant with or without a pistol after dark, and stopped in the front yard, or if he snapped a pistol, if any he had, at defendant, and that such acts, if any, aroused in the mind of defendant such a degree of anger, rage, sudden resentment, or terror as rendered it incapable of cool reflection, and

[9] Thurman v. Commonwealth, 134 S. W. 174, 142 Ky. 347.

[10] Gordon v. Commonwealth, 124 S. W. 806, 136 Ky. 508.

[11] Keeton v. Commonwealth, 108 S. W. 315, 32 Ky. Law Rep. 1164.

[12] Territory v. Manton, 19 P. 387, 8 Mont. 95.

in such condition he shot and killed ———, or if, on the occasion in question, there existed any condition or circumstance which was capable of creating, and which did create, in the mind of defendant such a degree of anger, rage, sudden resentment, or terror which rendered it incapable of cool reflection, and if in such condition he shot and killed ———, then such killing, if not justifiable under succeeding instructions, will be manslaughter, and you will so find.[13]

§ 2851(5). West Virginia

The court instructs the jury that voluntary manslaughter is where the act causing death is committed in the heat of sudden passion caused by provocation; and they are further instructed that if they believe from the evidence that the defendant, in the heat of sudden passion, caused by provocation, killed ——— at the time and place alleged in the indictment, they should find the defendant guilty of voluntary manslaughter, unless they further believe from the evidence that the defendant believed, and had reason to believe, that the blow which resulted in ———'s death was necessary to protect his own life, or protect himself from great bodily harm, and that the necessity of inflicting said blow was not brought about by the defendant's own conduct.[14]

§ 2852. Absence of malice

§ 2852(1). Arkansas

You are instructed that if the jury believe from the evidence that the defendant killed the deceased in the commission of an unlawful act, without malice and without means calculated to produce death, or in the prosecution of a lawful act done without due caution or circumspection, it would only be manslaughter, and you should so find.[15]

§ 2852(2). Delaware

You are instructed that manslaughter is the unlawful killing of another without malice. In order to reduce the crime to manslaughter the provocation must be very great; so great as to produce such a transport of passion as to render the person for the time being deaf to the voice of reason. While murder proceeds from a wicked and depraved heart and is characterized by malice, manslaughter results not from malice but from unpremeditated and unreflecting passion.[16]

§ 2852(3). Oklahoma

The court instructs the jury that every person who unlawfully and willfully, but without malice, strikes, stabs, wounds, or shoots

[13] Dean v. State, 83 S. W. 816, 47 Tex. Cr. R. 243.

[14] State v. Dickey, 37 S. E. 695, 48 W. Va. 325.

[15] Ackers v. State, 83 S. W. 909, 73 Ark. 262.

[16] State v. Naylor, 90 A. 880, 5 Boyce, 99.

at, or otherwise injures, another, of which striking, stabbing, wounding, shooting, or other injury such other person dies, is guilty of the crime of manslaughter.[17]

§ 2853. Intention to kill

See, also, post, § 2856(2).

The court instructs the jury that the term "willfully" means intentionally, designedly, or without lawful excuse. To make a person guilty of manslaughter, he must have willfully done the act which results in death, but it is not necessary that he should have intended to kill. If he willfully did the act which caused the death, a defendant would be guilty of manslaughter whether he intended to kill or not.[18]

The court instructs the jury that, if you find from the evidence, beyond a reasonable doubt, that the defendant, in what is now ——— county and state of ———, at any time within ——— years next before the finding of the indictment in this case, unlawfully and willfully struck, wounded, or otherwise injured ———, from the effects of which striking, wounding, or injuring ——— died, it will be your duty to convict the defendant of manslaughter.[19]

§ 2854. Killing different person from one intended

You are charged that, when an act committed is the unlawful homicide of a different person from the one intended, and is without malice aforethought, and is done while the mind is under the immediate influence of sudden passion, arising from an adequate cause, as adequate cause has been hereinbefore defined to you, and renders the mind at the time incapable of cool reflection, the act, if a crime, would be of no higher grade than manslaughter.[20]

§ 2855. Advising, in heat of passion, to kill another

You are instructed that if you believe from the evidence in this case beyond a reasonable doubt that ———, in ———, and before the finding of the indictment herein, did unlawfully, willfully, feloniously in sudden affray, or in sudden heat of passion, without previous malice, and not in the necessary, or to him apparently necessary, defense of himself or his mother, cut, stab, and wound ——— with a dirk or knife, a deadly weapon, from which cutting, stabbing, and wounding the said ——— then and there presently died, and if you shall further believe from the evidence beyond a reasonable doubt that at the time the said ——— so cut, stabbed, and wounded the said ——— the said defendant was then and there present, unlawfully, willfully, feloniously in sudden af-

[17] Miller v. State, 130 P. 813, 9 Okl. Cr. 55.

[18] Miller v. State, 130 P. 813, 9 Okl. Cr. 55.

[19] Miller v. State, 130 P. 813, 9 Okl. Cr. 55.

[20] Anderson v. State, 217 S. W. 390, 86 Tex. Cr. R. 207. See post, § 2880.

fray, or in sudden heat of passion, and not in her necessary, or to her apparently necessary, self-defense, counseling and advising the said ——— to do the said cutting, stabbing, and wounding, or aiding or assisting the said ——— in doing said cutting, stabbing, and wounding, then you should find the said defendant guilty of voluntary manslaughter, and fix her punishment at confinement in the state penitentiary for any length of time not less than ——— years nor more than ——— years, in your discretion.[21]

§ 2856. Sudden passion inspired by sufficient provocation

§ 2856(1). Alabama

You are instructed that, when passions have been suddenly aroused upon a sufficient provocation, in order that such may reduce a killing from murder to manslaughter, it must appear that the killing was done under the influence of passion promptly acted upon. If the passions did not have sway, and were allowed to subside, and vengeance or malice is allowed to take the place of passion, and the killing was done from motives of vengeance or malice, such killing would be murder, and not manslaughter.[22]

§ 2856(2). California

The jury are instructed that when the mortal blow, though unlawful, is struck in the heat of passion, excited by a quarrel, sudden and of sufficient violence to amount to adequate provocation, the law, out of forbearance for the weakness of human nature, will disregard the actual intent, and will reduce the offense to manslaughter; in such case, although the intent to kill exists, it is not that deliberate and malicious intent which is an essential element in the crime of murder.[23]

§ 2856(3). Delaware

The court instructs the jury that manslaughter occurs where one person unlawfully kills another without malice. In order to reduce the crime to manslaughter, the provocation must be very great—so great as to produce such a transport of passion as to render the person for the time being deaf to the voice of reason. While murder proceeds from a wicked and depraved spirit and is characterized by malice, manslaughter results from no malignity, but from unpremeditated and unreflecting passion.[24]

§ 2856(4). South Carolina

You are instructed that manslaughter is taking the life of a fellow being in sudden heat and passion, superinduced upon a sufficient legal provocation.[25]

[21] Steely v. Commonwealth, 112 S. W. 655, 129 Ky. 524, 33 Ky. Law Rep. 1032.

[22] Harrison v. State, 40 So. 568, 144 Ala. 20.

[23] People v. Chutuk, 124 P. 566, 18 Cal. App. 768.

[24] State v. Creste, 86 Atl. 214, 4 Boyce, 118.

[25] State v. Foster, 45 S. E. 1, 66 S. C. 469.

§ 2856(5). Texas

You are instructed that the next lower grade of culpable homicide than murder in the second degree is manslaughter. Manslaughter is voluntary homicide, committed under the immediate influence of sudden passion arising from an adequate cause, but neither justified nor excused by law. By the expression "under the immediate influence of sudden passion" is meant: (1) The provocation must arise at the time of the commission of the offense, and that the passion is not the result of former provocation. (2) The act must be directly caused by the passion arising out of the provocation. It is not enough that the mind is merely agitated by the passion arising from some other person than the party killed. (3) The passion intended is either of the emotions of the mind known as anger, rage, sudden resentment, or terror, rendering it incapable of cool reflection.[26]

The jury are instructed that when an unlawful killing takes place under the immediate influence of sudden passion, and no cause exists which will, under the law, justify or excuse its commission, then, in order to determine whether such homicide is murder in the second degree or manslaughter, the true test is, was there adequate cause to produce such passion? If such adequate cause existed, the homicide, if not justifiable, would be manslaughter.[27]

§ 2857. Character or force of passion

You are instructed that the passion which in law rebuts the imputation of malice, so as to reduce the killing to manslaughter, need not be so overpowering as for the time to shut out knowledge and destroy volition, but that heated condition of the mind that would render a reasonable man deaf to the voice of reason, so that although the act done was likely to produce death, it was not the result of malignity of heart, but imputable to human infirmity. There is no necessity that the reason should be dethroned, or that the slayer should act in a whirlwind of passion, but there must be sudden passion, upon reasonable provocation, apparently sufficient to make the passion irresistible.[28]

§ 2858. Necessity of adequate cause for provocation

The jury are instructed that, if the intent exists and the killing is unlawful, it will be murder, even though done upon a sudden quarrel or heat of passion, unless there was adequate provocation.[29]

[26] Wheeler v. State, 125 S. W. 29, 58 Tex. Cr. R. 296.

[27] Norris v. State, 61 S. W. 493, 42 Tex. Cr. R. 559.

[28] May v. People, 6 P. 816, 8 Colo. 210.

[29] People v. Chutuk, 124 P. 566, 18 Cal. App. 768,

§ 2859. What constitutes adequate cause for provocation

§ 2859(1). United States

The jury are instructed that manslaughter is the killing of a man unlawfully and willfully, but without malice aforethought. Malice aforethought, as I have defined it to you, must be excluded from it; that is, the doing of a wrongful act without just cause or excuse, and in the absence of mitigating facts, in such a way as to show a heart void of social duty, and a mind fatally bent upon mischief, must be out of the case. If that is driven out of the case, then if it is a crime at all it must come under this statute; it must come under this definition of the crime of manslaughter. The common law, which I will read to you, defines it in the same way. It tells you in a little broader terms what kind of conditions it springs out of. Speaking of voluntary manslaughter, it says it is the willful and unlawful killing of another on sudden quarrel, or in the heat of passion. Let us see what is meant by this definition. The party who is killed, at the time of the killing, must offer some provocation to produce a certain condition of mind. Now, what is the character of that provocation that can be recognized by the law as being sufficient to reduce the grade of the crime from murder to manslaughter? He cannot produce it by mere words, because mere words alone do not excuse even a simple assault. Any words offered at the time do not reduce the grade of the killing from murder to manslaughter. He must be doing some act—that is, the deceased, in this case, the party killed—which at the time is of a character that would so inflame the mind of the party who does the killing as that the law contemplates he does not act deliberately, but his mind is in a state of passion, in a heat of passion, where he is incapable of deliberating.[30]

§ 2859(2). Colorado

You are instructed that the provocation which will reduce a voluntary killing from the crime of murder to that of manslaughter must be a serious and highly provoking injury, inflicted upon the person killing, sufficient to excite an irresistible passion in a reasonable person, or an attempt by the person killed to commit a serious personal injury on the person killing. In other words, the passion must proceed from an adequate cause. If the jury find from the evidence that the prisoner refused to leave the deceased's saloon upon request, and that it became necessary to remove him in order to clear the room and close the saloon, and that he was removed for this purpose, and that no more force was used than was reasonably necessary for this purpose, then, in that case, the defense that the killing was in heat of blood, upon provocation, is

[30] Allen v. U. S., 17 S. Ct. 154, 164 U. S. 492, 41 L. Ed. 528.

not available to the prisoner, because not proceeding from an adequate cause.[31]

You are instructed that, if it should appear from the evidence that the deceased used greater force than was reasonably necessary to remove the prisoner, or that he maltreated or injured the prisoner outside of the saloon, or that the deceased violently assaulted the prisoner within the saloon, on account of a dispute that had arisen as to whether the prisoner had paid for certain drinks, such assault, excessive force, maltreatment, or injury forms matter of provocation, and you will then consider whether the evidence shows that such a serious and highly-provoking injury was thus inflicted upon the prisoner as the law requires to reduce the killing to manslaughter, or whether the deceased thus attempted to commit a serious personal injury upon the prisoner which would in law have the same effect; and you will further consider whether such injury, if any such was inflicted, produced in the mind of the prisoner that sudden, violent impulse of passion, which is supposed to be irresistible, and whether the killing was the result thereof.[32]

§ 2859(3). Illinois

The jury are instructed that in cases of voluntary manslaughter there must be a serious and highly provoking injury inflicted upon the person killing, sufficient to excite an irresistible passion in a reasonable person, or an attempt by the person killed to commit a serious personal injury on the person killing.[33]

§ 2859(4). Missouri

The jury are further instructed that no words of abuse or vile names, however calculated to excite indignation or anger, are sufficient to reduce the crime of killing to a lower degree than murder, and the use by the deceased of such words or the calling of such names by him (if you find from the evidence that he did use such words or call such names) would not constitute reasonable and lawful cause or provocation on the part of the defendant to use a deadly weapon upon the deceased. The provocation which would reduce the crime of killing to a lower degree than murder must consist of personal violence to the defendant, or the danger of such personal violence must have been apparent and imminent, or must have appeared to the defendant to be apparent and imminent at the time he shot and killed the deceased before the defendant can claim in this case that he had just cause or provocation to use upon the deceased a deadly weapon, such as was used by the defendant

[31] May v. People, 6 P. 816, 8 Colo. 210.

[32] May v. People, 6 P. 816, 8 Colo. 210.

[33] Duncan v. People, 24 N. E. 765, 134 Ill. 110.

in this case. On the other hand, if you find and believe from the evidence that the deceased struck the defendant with his fist with force and violence, or assaulted the defendant in any other manner before the defendant shot the deceased, then such violence or such assault would constitute in law just cause or provocation which would reduce the crime below the degree of murder, and, if you find that the defendant was assaulted by the deceased or received personal violence at the hands of the deceased before the defendant discharged his pistol at the deceased, and, thereupon, while in the heat of passion, caused by such assault or by such personal violence, he, the defendant, shot and killed the deceased, then, and in that event, you should convict the defendant of manslaughter in the fourth degree, unless under other instructions given you acquit the defendant on the grounds of self-defense.[34]

§ 2859(5). South Carolina

You are instructed that no provocation will excuse one of the crime of murder where the weapon used indicates an intention to take life, unless such provocation is accompanied with unlawful violence, or an apparent intention to do great bodily harm.[35]

You are instructed that manslaughter is defined to be the killing of a person under sudden heat and passion, and upon provocation. That leads me to define to you what provocation is. Now, no words, however opprobrious or offensive, will in the eyes of the law be sufficient provocation for a blow of any kind, much less the taking of life; but words, or menacing, threatening language, accompanied by some act which indicates immediate intent to carry that threat into execution, will be considered sufficient provocation; but, as I said to you, not a slight provocation. It must be a great provocation to justify the taking of human life.[36]

§ 2859(6). Texas

You are instructed that by the expression "adequate cause" is meant such as would commonly produce a degree of anger, rage, resentment, or terror in a person of ordinary temper sufficient to render the mind incapable of cool reflection. The following is deemed adequate cause: An assault and battery by deceased on the person of the defendant, causing pain. Any condition or circumstance which is capable of creating and does create sudden passion, such as anger, rage, sudden resentment or terror, rendering the mind incapable of cool reflection, whether accompanied by bodily pain or not, is deemed adequate cause. And where there are several causes to arouse passion, although no one of them alone might constitute adequate cause, it is for you to determine wheth-

[34] State v. Gieseke, 108 S. W. 525, 209 Mo. 331.
[35] State v. Way, 17 S. E. 39, 38 S. C. 333.
[36] State v. Bodie, 11 S. E. 624, 33 S. C. 117.

er or not all such causes combined might be sufficient to do so. Insulting words used by deceased towards defendant are not such adequate cause.[37]

You are instructed that by the expression "adequate cause" is meant such as would commonly produce a degree of anger, rage, resentment, or terror in a person of ordinary temper sufficient to render the mind incapable of cool reflection. The following are deemed adequate causes: An assault and battery of any character of violence to the person of another, which produces pain or bloodshed. In order to reduce a voluntary homicide to the grade of manslaughter, it is necessary not only that adequate cause existed to produce the state of mind referred to—that is, of anger, rage, sudden resentment, or terror, sufficient to render it incapable of cool reflection—but also that such state of mind did actually exist at the time of the commission of the offense. Although the law provides that the provocation causing the sudden passion must arise at the time of the killing, it is your duty, in determining the adequacy of the provocation (if any), to consider in connection therewith all the facts and circumstances in evidence in the case, and if you find that by reason thereof the defendant's mind at the time of the killing was incapable of cool reflection, and that said facts and circumstances were sufficient to produce such state of mind in a person of ordinary temper, then the proof as to the sufficiency of the provocation satisfies the requirements of the law, and so in this case you will consider all the facts and circumstances in evidence in determining the condition of the defendant's mind at the time of the alleged killing, and the adequacy of the cause (if any) producing such condition. If you believe from the evidence beyond a reasonable doubt that the defendant, with a deadly weapon, to wit, a knife, in a sudden passion aroused by adequate cause, as the same is herein explained, did cut and stab with a knife, and thereby killed, ———, the deceased, as charged in the indictment, on the ——— day of ———, you will find the defendant guilty of manslaughter, and assess his punishment at confinement in the state penitentiary for any term of years not less than ——— nor more than ——— years. You are instructed that if the deceased, with a knife or other sharp weapon, did about the time or just prior to the killing (if defendant killed him) cut the defendant on the hand or elsewhere, or make any other assault or battery, on the defendant, producing pain or bloodshed, this would be adequate cause.[38]

The jury are instructed that any condition or circumstance which is capable of creating and does create sudden passion, such as anger, rage, sudden resentment or terror, rendering the mind inca-

[37] Albrecht v. State, 215 S. W. 327, 85 Tex. Cr. R. 519.

[38] Wheeler v. State, 125 S. W. 29, 58 Tex. Cr. R. 296.

pable of cool reflection, whether accompanied by bodily pain or not, is deemed adequate cause; and where there are several causes to arouse passion, although no one of them alone constitutes adequate cause, it is for you to determine whether or not all such causes combined might be sufficient to do so. In passing upon the sufficiency of the provocation and on the effects of the passion upon the mind of the defendant, you may consider all the evidence in this case.[39]

You are instructed that by the expression "adequate cause" is meant such as would commonly produce a degree of anger, rage, sudden resentment, or terror in a person of ordinary temper sufficient to render it incapable of cool reflection. The following are deemed adequate causes: (1) Adultery of the person killed with the wife of the person guilty of the homicide, provided the killing occurred as soon as the facts of an illicit connection is discovered; (2) insulting words or conduct of the person killed towards the wife of the party guilty of the homicide, provided the killing takes place immediately upon the happening of the insulting conduct; (3) any condition or circumstance which is capable of creating, and which does create, in the mind of the person guilty of the homicide such a degree of anger, rage, sudden resentment, or terror as to render it incapable of cool reflection, is adequate cause.[40]

The jury are instructed that in this case, if you should find from the evidence that the defendant shot and killed ———, and that at the time he did so the actions and words of ———, taken in connection with the words and actions of ———, the age and relative strength of the parties, the weapons used by each, if any, and the demonstrations, if any, made by either at the time, was of such a nature as to produce adequate cause as above explained, and did produce such adequate cause, sufficient to render defendant's mind incapable of cool reflection; and, if, under the immediate influence of anger, rage, sudden resentment, or terror, the defendant shot and killed ———; and if you are satisfied from the evidence, beyond a reasonable doubt, that the defendant did not kill said ——— in self-defense—then you may find him guilty of manslaughter.[41]

You are instructed that any condition or circumstance which is capable of creating, and does create, sudden passion, such as anger, rage, sudden resentment, or terror, rendering the mind incapable of cool reflection, whether accompanied by bodily pain or not, is deemed adequate cause.[42]

[39] Dobbs v. State, 113 S. W. 923, 54 Tex. Cr. R. 550.

[40] Brown v. State, 75 S. W. 33, 45 Tex. Cr. R. 139.

[41] Norris v. State, 61 S. W. 493, 42 Tex. Cr. R. 559.

[42] Bibb v. State, 215 S. W. 312, 86 Tex. Cr. R. 112; Norris v. State, 61 S. W. 493, 42 Tex. Cr. R. 559.

§ 2860. Looks, gestures or words as constituting provocation

§ 2860(1). Alabama

The court charges the jury that the law is well established and settled in our country that passion aroused by mere words cannot reduce homicide below the offense of murder in the second degree.[43]

The court charges the jury that mere words, however offensive, cannot reduce the offense of homicide to manslaughter, but only to murder in the second degree.[44]

The court charges the jury that in the case of homicide no mere words used by the deceased towards the defendant, however abusing or insulting, will reduce the offense or degree of homicide to less than murder.[45]

§ 2860(2). California

The jury are instructed that adequate provocation is not produced by opprobrious, contemptuous actions or gestures, without an assault upon the person, or trespass against lands or goods.[46]

§ 2860(3). Delaware

The court instructs the jury that no looks or gestures, however insulting, no words, however opprobrious or offensive, can amount to a provocation sufficient to excuse or justify even a slight assault.[47]

§ 2860(4). Georgia

The court instructs the jury that if you believe that to be the truth of the case—that the homicide was committed in that way, that it was the result of an intentional firing by this defendant of his pistol at and towards his wife, and that there was no provocation therefor other than the said remark—you would be authorized to find the defendant guilty of the crime of murder, for the reason that neither words nor threats nor menaces shall be sufficient to reduce a homicide from murder to a lower offense than murder. The words thus spoken to him, if in consequence of those words thus spoken he deliberately drew his pistol, intentionally fired, and shot into her body, which caused her death, would not be provocation which under the law would reduce that act from murder to a lower grade of homicide than murder; and if you believe that the homicide was committed in that way, you would be authorized to find the defendant guilty of the crime of murder.[48]

[43] Weaver v. State, 55 So. 956, 1 Ala. App. 48.

[44] Raines v. State, 40 So. 932, 147 Ala. 691.

[45] Bondurant v. State, 27 So. 775, 125 Ala. 31.

[46] People v. Chutuk, 124 P. 566, 18 Cal. App. 76[illegible].

[47] State v. Creste, 86 A. 214, 4 Boyce, 118; State v. Cephus, 67 A. 150, 6 Pennewill, 160.

[48] Toomer v. State, 60 S. E. 198, 130 Ga. 63.

The jury are instructed that words, threats, menaces, or contemptuous gestures shall not be sufficient to reduce a killing from murder to manslaughter. There must be an assault, or other equivalent circumstances, sufficient, in the opinion of the jury, to excite the passion and exclude all idea of deliberation whatever.[49]

§ 2860(5). Illinois

The jury are instructed that no provocation, by words only, addressed to the person killing, or to another in his presence, however opprobrious, will mitigate an intentional killing so as to reduce the killing to manslaughter; and although the jury may believe, from the evidence, that opprobrious epithets were used by the deceased to the defendant W. M. in defendant B. M.'s presence, yet if the jury further believe, from the evidence, beyond a reasonable doubt, that the defendants immediately or soon thereafter revenged themselves by the use of a dangerous and deadly weapon in a manner likely to cause the death of the deceased, and did thereby cause his death as charged, then the defendants are guilty of murder, and the jury ought so to find, unless they shall further believe, from the evidence, that said killing was reduced to manslaughter or was justifiable upon other grounds, or by other than the use by the deceased of such opprobrious language.[50]

§ 2860(6). Indiana

You are instructed that, if homicide be committed in a sudden heat, by the use of a deadly weapon, no provocation by mere words will reduce the killing to manslaughter. The question should never be: Was there anger merely? But: Was there legal provocation to such anger? The use of a dangerous weapon under a provocation by words only, or under no provocation, is always evidence of malice aforethought.[51]

§ 2860(7). Kansas

The court instructs the jury that no words, however abusive and insulting, will justify an assault, or will constitute a sufficient provocation to reduce to manslaughter what would otherwise be murder.[52]

§ 2861. Assault or assault and battery as cause for provocation

§ 2861(1). Alabama

The court charges the jury that if they believe from the evidence that the killing in this case resulted from the heat of passion, engendered in the defendant by the blow struck him by the deceased at the time of the fatal difficulty, and that the killing resulted solely

[49] Robinson v. State, 44 S. E. 985, 118 Ga. 198.

[50] McCoy v. People, 51 N. E. 777, 175 Ill. 224.

[51] Welty v. State, 100 N. E. 73, 180 Ind. 411.

[52] State v. Buffington, 81 P. 465, 71 Kan. 804, 4 L. R. A. (N. S.) 154.

from anger or heat of passion so engendered, the defendant cannot be convicted of murder, but of manslaughter, at the most.[53]

§ 2861(2). Delaware

You are instructed that a slight assault cannot excuse the killing of the assailant with a deadly weapon, so as to reduce the offense from the grade of murder to that of manslaughter.[54]

§ 2861(3). Missouri

The jury are instructed that, if you believe from the evidence that the deceased struck the defendant with his crutch, such striking would be a sufficient provocation to reduce the grade of the offense, if the jury should find from the evidence that the defendant, by reason of such provocation, and in a heat of passion aroused by it, wtihout malice and premeditation, shot and killed the deceased, but not in necessary self-defense, as it is defined in other instructions, and the offense would be that of manslaughter of the fourth degree.[55]

The jury are instructed that, if you find from the evidence that at the county of ——— and state of ———, at any time within ——— years next before ———, ——— approached the defendant in a threatening manner, and assumed an attitude which gave the defendant good reason to believe, and he did believe, that the said ——— was then and there about to assault with an iron weight, but not under such circumstances as to justify the defendant on the grounds of self-defense, as defined in these instructions, and that such assault by said ——— provoked on the part of the defendant a sudden heat of passion, and that in such heat of passion the defendant shot the said ———, from which said shooting the said ——— within one year thereafter died, then you will find the defendant guilty of manslaughter in the fourth degree, and assess his punishment at imprisonment in the penitentiary for a term of ——— years, or at imprisonment in the county jail not less than ——— nor more than ——— months, or a fine of not less than $———, or at both a fine of not less than $——— and imprisonment in the county jail not less than nor more than ——— months.[56]

§ 2861(4). Texas

In this connection you are instructed that an assault and battery causing pain or bloodshed is deemed in law adequate cause to produce passion. Therefore you are instructed that if you believe from the evidence that on the occasion in question the deceased struck the defendant with his hand or fist, and that said blow, if any, caused the defendant pain or bloodshed, and you further believe

[53] Caldwell v. State; 84 So. 272, 203 Ala. 412.

[54] State v. Cephus, 67 A. 150, 6 Pennewill, 160.

[55] State v. Brown, 87 S. W. 519, 188 Mo. 451.

[56] State v. Hudspeth, 60 S. W. 136, 159 Mo. 178.

that said assault alone or in connection with the conduct and words, if any, of the deceased and his mother, Mrs. ———, or either of them, at the time were not sufficient when, coupled with all the other antecedent circumstances and circumstances at the time, to create in the mind of the defendant, viewing the same as it reasonably appeared to him from his standpoint at the time, that he was in danger of death or serious bodily injury at the hands of the said deceased, but if you further find and believe from the evidence that said assault alone or in connection with the conduct and words, if any, of said deceased, and said Mrs. ——— or either of them, at the time, coupled with all the antecedent facts and circumstances and facts and circumstances at the time, aroused in the mind of the defendant a sudden passion either of anger, rage, sudden resentment, or terror, rendering the mind incapable of cool reflection, and acting under the influence of such passion, if any, and not in his own justifiable self-defense, as self-defense is hereinafter defined in this charge, he, the defendant, with the intent to kill, cut the deceased with a knife and thereby killed said deceased, then his offense would not be of a higher grade than manslaughter.[57]

You are instructed that the following are deemed adequate causes: An assault and battery producing pain or bloodshed. But an assault or assault and battery so slight as to show no intention to inflict pain or bloodshed is not deemed adequate cause.[58]

You are charged that if you believe from the evidence, beyond a reasonable doubt, that the defendant shot and killed ——— and not under his right of self-defense, as self-defense is explained in the general charge, and yet you further believe from the evidence that such killing took place under the immediate influence of sudden passion, such as anger, rage, resentment, or terror, or other emotions of the mind of the defendant arising from deceased having struck him or slapped him or struck at him or slapped at him, if he did so strike or slap, rendering the mind of defendant incapable of cool reflection, you will find the defendant only guilty of manslaughter, and so say by your verdict.[59]

You are instructed that an assault and battery by deceased upon defendant, causing either pain or bloodshed, would in law constitute adequate cause. So any condition or circumstance, or combination of conditions and circumstances, considered alone or collectively, capable of producing, or which creates sudden passion, anger, rage, resentment, or sudden terror, rendering the mind for the time incapable of cool reflection, would constitute adequate cause. Where there are several causes to arouse sudden passion,

[57] Gatlin v. State, 217 S. W. 698, 86 Tex. Cr. R. 339.

[58] Snowberger v. State, 126 S. W. 878, 58 Tex. Cr. R. 530.

[59] Best v. State, 125 S. W. 909, 58 Tex. Cr. R. 327.

although no one, when considered alone, might constitute adequate cause, it is for you to determine whether or not all such causes might or might not be sufficient to constitute adequate cause.[60]

The jury are instructed that if the jury believe from the evidence that defendant was engaged in a difficulty with B., in which defendant struck him, and that defendant brought on said difficulty, if you further find that said difficulty had ended, and at that juncture deceased, a brother of said B., attacked, either with a knife or ax handle, defendant, and that said attack was adequate cause to produce and did produce that state of mind referred to—that is, of anger, rage, sudden resentment, or terror—sufficient to render it incapable of cool reflection, and if you further believe that in a few seconds thereafter, before there was time for the mind to become cool and deliberate, defendant did shoot and kill deceased, if he was not justified, then he is guilty of manslaughter.[61]

§ 2862. Killing in quarrel originally provoked by defendant

The jury are instructed that, if the defendant went with the gun under such circumstances as to make ——— believe, and ——— did believe, that he was about to take his (———'s) life, and ——— ran at the defendant to protect his own life, and when ——— ran at him the defendant shot ———, the defendant would be guilty of manslaughter in the first degree.[62]

The jury are instructed that if the jury believe from the evidence that, when ——— went around the corner, the defendant followed him with the shotgun, being ready and willing to fight, and ——— believed that the defendant was about to shoot him, and, so believing, started at the defendant to protect himself, and the defendant shot at him when he was coming at him, the defendant would be guilty of manslaughter in the first degree.[63]

§ 2863. Mutual combat

§ 2863(1). Alabama

You are instructed that, if the defendant followed ———, after ——— had threatened to go and get his gun, the defendant being willing and ready to meet ———, and fight him with deadly weapons, and the defendant killed ——— under these circumstances, it would then be manslaughter in the first degree.[64]

§ 2863(2). Florida

The court instructs the jury that if you believe from the evidence, beyond a reasonable doubt, that the defendant, in the county

[60] Hancock v. State, 83 S. W. 696, 47 Tex. Cr. R. 3.

[61] Morgan v. State, 67 S. W. 420, 43 Tex. Cr. R. 543.

[62] Dolan v. State, 1 So. 707, 81 Ala. 11.

[63] Dolan v. State, 1 So. 707, 81 Ala. 11.

[64] Dolan v. State, 1 So. 707, 81 Ala. 11.

of ——— and state of ———, at any time within ——— years prior to the finding of the indictment, shot and killed the deceased, and that he did so in a mutual combat between the defendant and the said deceased, both of them being at fault, and neither being the aggressor more than the other, it will be your duty to find the defendant guilty of manslaughter.[65]

§ 2863(3). Georgia

You are instructed that, if the jury believe that the evidence establishes beyond a reasonable doubt that the defendant and the deceased had a quarrel with each other about the woman ———, and that the defendant and deceased had pistols in their hands at that time, and that, in consequence of controversy about the woman, there arose at that time great heat of blood between the parties, and the mutual combat intent to fight, and that both, being in a sudden heat of passion, then and there fought with their pistols, and the defendant, being quicker than the deceased, fired and killed the deceased, the jury would be authorized to find the defendant guilty of the crime of voluntary manslaughter.[66]

§ 2863(4). Illinois

The jury are instructed that, if you find that defendant voluntarily got into the difficulty or fight with the deceased but did not intend to kill at the time, and did not decline further fighting before the mortal blow was struck by him, and then drew his knife and with it struck and killed ———, you will find defendant guilty of manslaughter, though the cutting and killing were in order to prevent an assault upon him by ——— or to prevent deceased from getting the advantage in the fight.[69]

§ 2863(5). North Carolina

You are instructed that if you should find from the evidence that the prisoner willingly engaged in a fight with the deceased, and that the deceased threw his hand to his hip pocket, and advanced upon the prisoner in a threatening manner, and that the prisoner, being willing to fight, seized a pistol, and shot the deceased, and the deceased died from the wound then inflicted by the prisoner, the prisoner would be guilty of manslaughter, provided that you should find from the evidence that the appearance and manner of the deceased were such as to cause the prisoner to believe that the deceased was armed with a deadly weapon, and that the prisoner did believe he was armed with a deadly weapon, and was about to harm him with it.[70]

[65] Disney v. State, 73 So. 598, 72 Fla. 492.

[66] Roark v. State, 32 S. E. 125, 105 Ga. 736.

[69] Adams v. People, 47 Ill. 376.

[70] State v. Exum, 50 S. E. 283, 138 N. C. 599.

§ 2863(6). Oklahoma

The court instructs the jury that the true nature of manslaughter is that it is a homicide mitigated out of tenderness to the frailty of human nature. Every man, when assailed with violence or great rudeness, is inspired with a sudden impulse of anger, which puts him upon resistance before time for cool reflection. If, during that period, he attacks his assailant with a weapon likely to endanger life, and death ensues, it is regarded as done through heat of blood and violence of anger, and not through malice. The same rule applies to a homicide in mutual combat, which is attributed to sudden and violent anger occasioned by the combat, and not to malice. Where two meet, not intending to quarrel, and angry words suddenly arise, and a conflict springs up, in which blows are given on both sides, it is a mutual combat, without much regard to who is the assailant; and if no unfair advantage be taken in the outset, and an occasion is not sought for the purpose of gratifying malice, and one seizes a weapon and strikes a deadly blow, it is regarded as homicide in the heat of blood, and under our statute is manslaughter in the first degree.[71]

§ 2863(7). Texas

You are further instructed, gentlemen, that if the defendant voluntarily engaged in a combat with deceased, knowing that it would or might result in the death or such serious bodily injury as might probably produce the death of either himself or the deceased, he cannot claim self-defense. Now, if you believe from the evidence in this case, beyond a reasonable doubt, that the defendant met the deceased at the latter's gate, and that a quarrel ensued between them at said place, or that the deceased became angry and told the defendant he could whip him, and that the defendant then invited the deceased to go with him (the defendant), away from deceased's house and gate, for the purpose and with the intention on the part of the defendant of engaging in a fight with the deceased, and for the purpose and with the intention on the part of the defendant to use the knife exhibited in evidence before you, in said fight, and that they (the defendant and deceased) for the purpose and with the intention of engaging in a fight with each other, left the yard gate and house of deceased, and walked together a distance of ——— or ——— yards, and that after they reached said distance from the yard gate and house of the deceased they voluntarily engaged in a combat, and that deceased used the large stick exhibited in evidence, or some other stick, and that the defendant used the knife exhibited in the evidence in said combat; and if you further believe from the evidence in this case, beyond a reasonable doubt,

[71] Robinson v. Territory, 85 P. 451, 16 Okl. 241.

that said stick and said knife, from the manner in which each was used, were deadly weapons, and that when the defendant agreed to engage in said combat (if he did so agree), and did engage in said combat with the deceased under such circumstances, if he did do so, he knew that it would or might result in the death or serious bodily injury as would probably produce the death of either the deceased or himself (the defendant), and that in such combat the defendant did kill the deceased by cutting and stabbing him with the knife exhibited in evidence—then such killing would not be justifiable, no matter who brought on the attack or struck the first blow. You are further instructed that if the defendant's mind was calm and sedate, and capable of contemplating the consequences of the act proposed to be done by him at the time he formed the design or agreed to engage in such combat with the deceased, and to use his knife therein, if he did form such design, or agree to engage in such combat, then he would be guilty of murder in the first degree, or if at the time he agreed to engage in such combat with the deceased, and formed the design to do so, if he did so agree, the defendant's mind was agitated and disturbed, and he was laboring under the influence of passion, producing in his mind such a degree of anger, rage, resentment, or terror as to render it incapable of cool reflection, but such condition of mind was not aroused by an adequate cause, as that term is hereinbefore defined to you, then said killing would be murder in the second degree. But if at the time the defendant agreed to engage in such combat, if he did do so, he was laboring under the immediate influence of sudden passion, such as anger, rage, sudden resentment, or terror, rendering his mind incapable of cool reflection, and such passion was aroused by an adequate cause, as that term is hereinbefore defined, and that under such circumstances he engaged in such combat, then said killing would not be of a higher grade of offense than manslaughter.[72]

§ 2863(8). Virginia

The jury are instructed that, if you believe from the evidence that the deceased and the defendant were engaged in a sudden and mutual combat in which no weapon, dangerous in itself, was used and during the progress of the fight the defendant struck the deceased an ordinary blow or blows with his fists or feet, without any intention, either to kill the deceased or to do him any great bodily harm, and that the death of deceased was caused thereby, accidentally and apart from defendant's intention, then defendant is guilty of involuntary manslaughter. If, however, although no weapon dangerous in itself was used, but only the fists and feet, yet if the

[72] Anthony v. State, 186 S. W. 1097, 62 Tex. Cr. R. 138.

jury, from the evidence, believe beyond a reasonable doubt that the manner of inflicting the blows was cruel and unusual, and exceeded in number and violence what was reasonably necessary, or what the defendant might under all the circumstances reasonably believe to be necessary, to repel the deceased, and the deceased died of such beating, then defendant is guilty of voluntary manslaughter.[73]

§ 2863(9). West Virginia

The court tells the jury that if they believe from the evidence in the case that on the day that ——— was killed, and before he was killed, the prisoner and one ——— went to the machine shops referred to in the evidence, and that the prisoner went there at the request of the said ———, as detailed in his evidence, and that after the prisoner got to the said machine shops he became engaged in a quarrel with the said deceased, which resulted in a fight between them, and that while engaged in said quarrel and fight the said deceased and the prisoner were excited, angry, and that their passions were aroused, and that in said fight, while the prisoner was excited, angry, and his passions aroused, he shot and killed the said deceased, they cannot find the prisoner guilty of anything higher than voluntary manslaughter.[74]

§ 2864. Renewal of prior contest by mutual consent

The court instructs the jury that if you believe from the evidence, beyond a reasonable doubt, that, prior to the killing of the deceased, the defendant and deceased had had a difficulty, and after such difficulty went off and armed themselves with deadly weapons and returned to renew the contest, and did renew the contest, in which the deceased was killed by the defendant, then you should convict the defendant of murder in the second degree, or manslaughter. Murder in the second degree if sufficient time had elapsed for passion to cool and reason to be restored. Manslaughter if the difficulty was renewed and the deceased was killed, not in a spirit of revenge, but in the heat of passion caused by a provocation apparently sufficient to render the passion irresistible, and before a sufficient time had elapsed for reason to be restored.[75]

§ 2865. Killing officer attempting to arrest defendant without warrant

The jury are instructed that the killing by reason of provocation, in the attempt unlawfully to arrest, would be deemed by the law to be killing without malice aforethought. That is the rule where no other facts appear except the fact of an attempt to arrest without authority of the law, where the person making the arrest is proceed-

[73] Bull's Case, 14 Grat. 613.

[74] State v. Dodds, 46 S. E. 228, 54 W. Va. 289.

[75] Lindsey v. State, 189 S. W. 163, 125 Ark. 542.

ing in an orderly and proper manner, for the purpose of making the arrest, where he is resisted. In the case where the person attempting to make the arrest uses unnecessary violence, an unreasonable degree of force, that action on the part of the person attempting to make the arrest justifies on the part of the person who is sought to be arrested a right to use force to meet the unnecessary violence. The simple rule in the case that I have stated is that, where a peace officer, attempting, without a warrant and unlawfully, to arrest a person, and proceeding in an orderly manner to effect the arrest, is resisted, and in the course of the resistance the person sought to be arrested kills the officer, although it is an unlawful act, no other facts appearing than those I have stated to you, the law says that it is not homicide with malice aforethought, which is necessary to constitute murder, but will, in contemplation of law, be manslaughter. Of course, in any case, other facts might appear which would show that the defendant had a right to resist on ground of self-defense or otherwise, and if acting within the right of self-defense, he proceeded to the extremity of killing, on the ground of self-defense, then there would be no criminal liability whatever. But in an unlawful arrest, where the officer or person seeking to make the arrest proceeds in the usual ordinary manner, for the purpose of taking the person sought to be arrested into custody, that is not a kind of violence, if nothing more appears, which justifies the taking of life to prevent it. Doing so is an unlawful act, nothing more appearing, but the law deems the attempt to arrest by one having no authority a provocation which, in concession to the frailty of human nature, leads to a mitigation of the offense and to the treatment of it, not as a homicide with malice aforethought, but the lesser crime, namely manslaughter.[76]

§ 2866. Insulting conduct towards defendant's wife

§ 2866(1). Oklahoma

The jury are instructed that no provocation by words only addressed to the person killing or to another in his presence, however opprobrious or insulting, will mitigate an intentional killing, so as to reduce the killing to manslaughter; and although the jury may believe from the evidence that insulting epithets were used by the deceased to the wife of the defendant in the defendant's presence, yet if the jury further believe from the evidence, beyond a reasonable doubt, that the defendant immediately thereafter shot and killed the deceased, then the defendant is guilty of murder, unless the jury shall further believe from the evidence that said killing was reduced to manslaughter, or was justifiable upon other grounds, or

[76] Commonwealth v. Phelps, 95 N. E. 868, 209 Mass. 396, Ann. Cas. 1912B, 566.

by other causes than the use by deceased of such opprobrious and insulting language. And in this connection I instruct you that if you believe from the evidence in this case that the defendant, when he fired the shot which caused the death of ———, was in a heat of passion produced by opprobrious and insulting words directed toward the wife of the defendant, and while so in that heat of passion slew the deceased, then the defendant would not be guilty of murder, but of manslaughter in the first degree, provided that you find further that the killing of the deceased was without design on the part of the defendant.[77]

§ 2866(2). Texas

In this connection you are further instructed that if the defendant reasonably believed that the deceased had been prior to or at the time of the homicide guilty of insulting conduct towards defendant's wife, and that such belief produced in the mind of defendant such a degree of anger, rage, resentment, or terror as to render it incapable of cool reflection, and if defendant upon forming the belief of such insulting conduct, if any, immediately, or upon his first meeting with the deceased after he had formed the belief of such insulting conduct, if he did form same, and while under the influence of such passion, rendering his mind incapable of cool reflection caused by such belief (if he in fact so believed) did shoot the deceased with a gun with the intention of killing him, and that the shot, or shots, if any, so fired by him struck and thereby killed the deceased, then and in such event, in case you find the defendant guilty, it should be of no higher grade of offense than manslaughter.[78]

§ 2867. Assault on wife of defendant

The jury are instructed that the information received by defendant of ———'s assault upon his (defendant's) wife would not be sufficient provocation to reduce the offense to manslaughter, and that if, after having time to reflect on the matter after seeing ———, he followed him to the bridge, and brought on the conflict by his own act, out of resentment for the supposed injury to his wife, he would be guilty of murder in the second degree.[79]

§ 2868. Adultery by deceased with wife of defendant

You are instructed that manslaughter is voluntary homicide, committed under the immediate influence of sudden passion, arising from an adequate cause, but neither justified nor excused by law.

[77] Atchison v. State, 105 P. 387, 3 Okl. Cr. 295. The proviso embodied in the last clause of the above instructions is based upon a statutory provision defining manslaughter in the first degree.

[78] Bibb v. State, 215 S. W. 312, 86 Tex. Cr. R. 112. The instructions in this case were said to be favorable to defendant.

[79] State v. Bone, 87 N. W. 507, 114 Iowa, 537.

By the expression "adequate cause" is meant such as would commonly produce a degree of anger, rage, resentment, or terror in a person of ordinary temper sufficient to render the mind incapable of cool reflection. The following is deemed adequate cause: Adultery of the person killed with the wife of the person guilty of the homicide, provided the killing occur as soon as the fact of an illicit connection is discovered. The law itself makes the above adequate cause.[80]

You are instructed that, if you believe from the evidence that ——— had been guilty of adultery with the wife of defendant, or if you believe from the evidence that the defendant had been informed that ——— had been guilty of adultery with his wife, and that he believed it, and that defendant shot and killed ——— the first time he met him after he was so informed and believed it, then this would be adequate cause to reduce the killing to manslaughter. It makes no difference whether ——— had in fact been guilty of adultery with the wife of defendant; if defendant was so informed and believed it, then it is just the same, as if he was in fact guilty of adultery with the wife of defendant. If defendant had been informed that ——— had been guilty of adultery with his wife and believed it was true, then to make this adequate cause you must believe from the evidence that defendant shot and killed deceased the first time he met him after being so informed and after he believed it was true. In such cases the provocation does not arise at the time of the killing, but it arises before the act of killing.[81]

I further charge you, as a part of the law of adequate cause, the following: If you believe from the evidence, that defendant had been informed that ———, had been guilty of adultery with his wife and thereafter he sent her off to ———, and that he was afterwards informed that ——— had gone to ——— to visit his wife and that when he met ——— thereafter he spoke to him and asked him about it and that ——— told him in substance that he had been to ——— and had seen his wife, and from all that he said and his manner of talking and from all the evidence in this case you believe that what he said, taken in connection with all the evidence in this case, would have commonly produced a degree of anger, rage, resentment, or terror in the mind of a person of ordinary temper sufficient to render it incapable of cool reflection, then this would be adequate cause to reduce the killing to manslaughter.[82]

You are instructed that, if you believe from the evidence in this case that defendant had heard of the adultery of ———. with his

[80] Giles v. State, 132 S. W. 359, 60 Tex. Cr. R. 436.

[81] Giles v. State, 132 S. W. 359, 60 Tex. Cr. R. 436.

[82] Giles v. State, 132 S. W. 359, 60 Tex. Cr. R. 436.

wife, and that as soon as the fact of the illicit connection was discovered he shot and killed the said ———, in said county and state, about ———, and you further find that at the time of the killing there was aroused in the mind of defendant such a degree of anger, rage, sudden resentment, or terror which rendered it incapable of cool reflection, then you will find defendant guilty of manslaughter. Or if you find from the evidence that defendant saw deceased use insulting conduct towards his wife, and that he immediately, upon the happening of the insulting conduct, shot with a gun and killed deceased at time and place mentioned in the indictment; or if he had been informed of insulting conduct of deceased towards his (defendant's) wife, and that as soon thereafter as defendant met deceased he shot with a gun and killed said deceased at time and place in indictment charged; and if you further find that at the time of the killing his mind was aroused to such a degree of anger, rage, sudden resentment, or terror as to render it incapable of cool reflection—then you will find defendant guilty of manslaughter. Or if you believe from the evidence that from any condition or circumstance which was capable of creating in the mind of a person of ordinary temper such a degree of anger, rage, sudden resentment, or terror as to render it incapable of cool reflection, and if you further believe that such condition or circumstance, whatever it may have been, did arouse in the mind of defendant such a degree of anger, rage, sudden resentment, or terror as to render it incapable of cool reflection, and that while in such state of mind he shot and killed ——— at time and place in indictment alleged, then you will find him guilty of manslaughter.[83]

§ 2869. Insults to female relatives of defendant

You are instructed that, if you believe from the evidence ——— was informed that the deceased ——— had used insulting words or had been guilty of insulting conduct towards his daughter, and that he believed it to be true, and that he killed him the first time he met him after being so informed, then this would be adequate cause.[84]

You are instructed that, if you believe from the evidence before you that defendant shot and killed ——— at the time and place alleged in the indictment, yet if you should further believe, that prior to the time of the killing, the said ——— had used insulting words or conduct towards defendant's daughter or wife, or either of them, and that defendant had been informed or knew of such insulting words or conduct, and that such insulting words or conduct created in the mind of defendant such a degree of anger, rage, sudden re-

[83] Brown v. State, 75 S. W. 83, 45 Tex. Cr. R. 139.

[84] Proctor v. State, 112 S. W. 770, 54 Tex. Cr. R. 254.

sentment, or terror as to render his mind incapable of cool reflection, and that defendant immediately, or upon the first meeting between him and said ———, after learning or being informed of such insulting words or conduct, shot and killed the said ———, then, if you do not find defendant justifiable under the evidence before you and instructions given, he would not be guilty of any higher grade of offense than manslaughter.[85]

But in this connection you are instructed that, if you believe from the evidence that the defendant had heard that deceased had used insulting words towards or concerning defendant's female relations, and that upon meeting deceased defendant asked him about it and he replied as above mentioned, but believe that neither such information as to insulting words, nor the reply of the deceased, nor any other fact or circumstance, produced at that time the degree of passion herein defined as being necessary to reduce a homicide to the degree of manslaughter, but that in the absence of and without any such passions, and not in his self-defense, defendant kicked the deceased, with the intention of bringing on a difficulty, for the purpose of killing the deceased in such a difficulty, or inflicting serious bodily harm upon him, and that during such difficulty defendant, in pursuance of such intention, if any, did shoot and kill deceased, then the homicide would not be manslaughter, but would be murder; and, if you find such was the case—that is, that such was the state of facts, and such was the state or condition of defendant's mind, and such was the intention of defendant at the time he kicked deceased —then the killing would not be manslaughter, but would be murder, no odds to what extremity defendant may have been reduced during the progress of the difficulty, and no odds what passion may have been aroused during the difficulty.[86]

§ 2870. Insulting words towards female friend of defendant

You are instructed that, if you believe from the evidence beyond a reasonable doubt that before the homicide the defendant had had sexual intercourse with K. C., and was the father of a child subsequently born to her, and you further believe from the evidence beyond a reasonable doubt that defendant killed deceased (if he did) not because, or partly because, of insulting words uttered by deceased towards B. C., but solely because what deceased may have said imputed a want of chastity to K. C., then, in such event, the homicide would not be reduced to manslaughter, although the defendant had been informed that deceased had stated that K. C. was in a family way and six months gone, and that defendant was the father of the unborn child, or even though deceased had repeated

[85] McComas v. State (Tex. Cr. App.) 81 S. W. 1212.

[86] Fossett v. State, 55 S. W. 497, 41 Tex. Cr. R. 400.

said statements or admitted that he had so stated in the presence of the defendant at the time of the killing. If, however, you believe the defendant had not had sexual intercourse with said K. C., or if you have a reasonable doubt as to whether he so had, and if you should further believe that prior to the homicide defendant had been informed that deceased had used insulting words imputing a want of chastity to K. C. or B. C., both or either, and subsequent thereto he met the deceased and did not act on the information he then had, but that, after such meeting or meetings (if any), he was informed of further insulting words that deceased had used towards said K. or B. C., both or either, and the defendant acted upon such information and killed said ——— as soon as he met him after having been informed of such additional insulting words (if any), and that such additional words, either alone or in connection with the words of which he was first informed, were the cause which induced the defendant to kill deceased, and by reason thereof his mind was inflamed to such a degree as to render it incapable of cool reflection, then the same would be "adequate cause," and if you believe that while defendant's mind was in such condition (if it was), or if you have a reasonable doubt thereof, that the defendant shot and killed said ———, and you find defendant guilty, it could be of no higher grade of homicide than manslaughter; or if you believe defendant, after having been informed that deceased had used insulting words towards K. or B. C., both or either, sought the deceased in order to talk over the matter of such reports and try to adjust or settle them, and that deceased repeated the said words or admitted that he had used them, and that, on account of such fresh provocation in defendant's presence, either alone or in connection with the former information which had reached him, the defendant's mind became inflamed to such a degree as to render it incapable of cool reflection, then the same would be "adequate cause," and if you believe that while defendant's mind was in such condition (if it was), or if you have a reasonable doubt thereof, the defendant shot and killed said ———, and you find defendant guilty, it could be of no higher grade of homicide than manslaughter.[87]

§ 2871. Provocation by assault upon relative

The court charges the jury that if the father of defendant in good faith went to where the deceased was to keep him from returning to a quarrel, or to keep him from committing a breach of the peace, and that the deceased did assault him and knocked him down, and that the defendant was near by, seeing his father thus knocked down, and if he himself was free from fault in bringing on such diffi-

[87] Redman v. State, 149 S. W. 670, 67 Tex. Cr. R. 374.

culty, and that his passion was by such knocking down of his father by ——— suddenly aroused, and that he without premeditation and without malice, but prompted only by such sudden passion, shot and killed the deceased, he would only be guilty of manslaughter in the first degree.[88]

The court charges the jury that if the father of defendant was not free from fault, yet if you believe from a consideration of all the evidence or you are reasonably satisfied that the defendant was free from fault in provoking the difficulty, and that, seeing his father suddenly knocked down by the deceased and acting under a sudden passion thus aroused, and without malice, he shot and killed the deceased, he would not be guilty of any greater offense than manslaughter in the first degree.[89]

§ 2872. Trespass on premises of another as provocation

§ 2872(1). Delaware

We think it proper to say to you that no mere trespass on the premises of another, however annoying or provoking it may have been to him, could constitute in law a sufficient provocation to reduce the killing of such a trespasser or wrongdoer by the owner of the premises from murder to manslaughter when it is done with a deadly weapon or any other means likely to produce death.[90]

§ 2872(2). Massachusetts

The jury are instructed that it is a rule of law that, where a trespass is merely against the property of another not his dwelling house, it is not a provocation sufficient to warrant the owner in using a deadly weapon, and if he do, and with it kill the trespasser, this will be murder, because it is an act of violence beyond the degree of provocation, but if the beating be with an instrument, and in a manner not likely to kill, and the trespasser should notwithstanding happen to be killed, it will be no more than manslaughter.[91]

§ 2873. Condition of defendant's mind at time of killing

§ 2873(1). Texas

The jury are instructed that, in order to reduce a voluntary homicide to the grade of manslaughter, it is necessary, not only that "adequate cause" existed to produce the state of mind referred to—that is, of anger, rage, sudden resentment, or terror—sufficient to render the mind incapable of cool reflection, but, also, that such

[88] Vaughan v. State, 78 So. 378, 201 Ala. 472.

[89] Vaughan v. State, 78 So. 378, 201 Ala. 472.

[90] State v. Naylor. 90 A. 880, 5 Boyce, 99.

[91] Commonwealth v. Drew, 4 Mass. 391.

state of mind did actually exist at the time of the commission of the offense.[92]

The jury are instructed that, although the law provides that the provocation causing the passion must arise at the time of the killing, it is your duty, in determining the adequacy of the provocation, if any, or cause, if any, to consider all the facts and circumstances in evidence in the case, and if you find that, by reason thereof, the defendant's mind was, at the time of the killing, incapable of cool reflection, and that such facts and circumstances were sufficient to produce such state of mind in a person of ordinary temper, then the proof as to the sufficiency of the provocation or cause satisfies the law; and so, in this case, you will consider all the facts and circumstances in evidence in determining the condition of the defendant's mind at the time of the killing, if any, and you are instructed that, if, by reason thereof, the defendant's mind was at the time in such state of mind, above referred to, as to be incapable of cool reflection, then you are instructed to find that adequate cause existed to produce such passion and to reduce the homicide, if any, to the grade of manslaughter.[93]

You are instructed that, in order to reduce a voluntary homicide to the grade of manslaughter, it is necessary not only that adequate cause existed to produce the state of mind referred to, that is, of anger, rage, sudden resentment, or terror sufficient to render it incapable of cool reflection, but also that such state of mind did actually exist at the time of the commission of the offense. It is your duty in determining the adequacy of the last provocation to consider in connection therewith all the facts and circumstances in evidence in the case, and if you find that by reason thereof the defendant's mind at the time of the killing was incapable of cool reflection, and that said fact and circumstances were sufficient to produce such state of mind in a person of ordinary temper, then the proof as to the sufficiency of the past provocation satisfies the requirements of the law, and so in this case you will consider all the facts and circumstances in evidence in determining the condition of the defendant's mind at the time of the alleged killing, and the adequacy of the last particular cause to produce such condition. If you believe from the evidence, beyond a reasonable doubt, that the defendant, with a gun, in a sudden passion aroused by adequate cause, as the same is herein explained, and not in defense of himself as the law of self-defense is defined to you in this charge hereafter, did shoot and thereby kill ———, the deceased, as charged in the indictment, you will find the defendant guilty of manslaugh-

[92] Burns v. State, 145 S. W. 356, 65 Tex. Cr. R. 175.

[93] Burns v. State, 145 S. W. 356, 65 Tex. Cr. R. 175.

ter, and assess his punishment in the state penitentiary for any term of not less than ——— nor more than ——— years.[94]

You are instructed that, although the law provides that the provocation causing the sudden passion must arise at the time of the killing, it is your duty, in determining the adequacy of the provocation, if any, to consider in connection therewith all the facts and circumstances in evidence in the case; and if you find that, by reason thereof, defendant's mind at the time of the killing was incapable of cool reflection, and that said facts and circumstances were sufficient to produce such state of mind in a person of ordinary temper, then the proof as to the sufficiency of the provocation satisfies the requirements of the law; and so in this case you will consider all the facts and circumstances in evidence in determining the condition of defendant's mind at the time of the alleged killing, and the adequacy of the cause, if any, producing such condition.[95]

§ 2873(2). Virginia

You are instructed that, to sustain provocation as a defense to murder, it must be shown that the prisoner, at the time of the fatal blow, was deprived of the power of self-control by the provocation received, and in deciding this question, whether this was or was not the case, regard must be had as to the character of the provocation, to the nature of the act by which death was caused, to the time which elapsed between the provocation and the act which caused death, to the prisoner's conduct during the interval, and to all the circumstances tending to show the state of her mind at the time she committed the offense.[96]

§ 2873(3). Washington

I now direct your attention to the crime of manslaughter, which is included within the crimes charged in the information; and I instruct you as a matter of law that if you are satisfied beyond a reasonable doubt from the evidence that the defendant did shoot and kill the deceased in the manner alleged in the information, in this county and state, and further find that such killing was not purposely done, and was not done upon deliberation and with a premeditated design to effect the death of deceased, but was done by the defendant without any design to effect his death, and that it was done either voluntarily upon sudden heat, or involuntarily but in the commission of some unlawful act, and are satisfied beyond a reasonable doubt that it was not in self-defense, then your verdict should be that the defendant is guilty of manslaughter. In order to reduce voluntary homicide to the grade or degree of man-

[94] Giles v. State, 132 S. W. 359, 60 Tex. Cr. R. 436.

[95] Chism v. State (Cr. App.) 78 S. W. 949.

[96] Hodges v. Commonwealth, 15 S. E. 513, 89 Va. 265.

slaughter, it is necessary, not only that adequate cause exist to produce a degree of anger, rage, and sudden resentment or terror sufficient to render the mind incapable of cool reflection, but also that such a state of mind did actually exist at the time of the commission of the offense.[97]

§ 2874. Killing under immediate influence of sudden passion

The jury are instructed that by the expression "under the immediate influence of sudden passion" is meant: (a) The provocation must arise at the time of the commission of the offense, and that the passion is not the result of a former difficulty or provocation. (b) The act must be directly caused by the passion arising out of the provocation. It is not enough that the mind is merely agitated by the passion arising from some other difficulty or provocation, or a provocation given by some other person than the person killed. (c) The passion intended is either of the emotions of the mind known as anger, rage, sudden resentment, or terror, rendering it incapable of cool reflection.[98]

§ 2875. Cooling time

§ 2875(1). California

The jury are instructed that, if the jury believe from the evidence that there was first an affray on the porch of the store, and that the deceased pushed the defendant down with the iron hook, and that then the deceased returned to the store, and the affray then ceased for a sufficient length of time for reason to have resumed its sway, and the defendant had sufficient time to realize the situation before anything further was done by the contending parties and that then the defendant went into the store and there attacked the deceased, and then killed him as charged in the information, and not in necessary self-defense, then I charge you that the defendant was not justifiable in inflicting the mortal blow.[99]

§ 2875(2). Colorado

You are instructed that the law in relation to provocation is that no provocation will justify a man in killing another, nor will it excuse him; hence killing upon provocation will be either manslaughter or murder, according to the degree of provocation, and its effect upon the person killing. To reduce the killing to manslaughter it must have been done upon a sudden heat of passion, caused by a provocation apparently sufficient to make the passion irresistible or involuntary; and it must have been done without malice, express or implied, and without any deliberation whatever.

[97] State v. Totten, 121 P. 70, 67 Wash. 192.

[98] Burns v. State, 145 S. W. 356, 65 Tex. Cr. R. 175; Kemp v. State, 13 Tex. App. 561.

[99] People v. Robertson, 8 P. 600, 67 Cal. 646.

Our statute declares that if there should appear to have been an interval between the assault or provocation given and the killing, sufficient for the voice of reason and humanity to be heard, the killing shall be attributed to deliberate revenge and punished as murder. This is our statutory definition of what may be termed "cooling time." [1]

§ 2875(3). New Jersey

The jury are instructed that the object of the law is to have passion controlled and subdued, and not permit it to become the excuse or palliation of crime. To mitigate the offense to manslaughter, the facts must show that the act was done in the excitement of passion; it must appear that the killing resulted from passion or heat of blood produced by a reasonable provocation. It is not every provocation that will reduce a killing from murder to manslaughter. The provocation must be of such a character, and so close upon the act of killing, that for the moment the prisoner could be considered as not master of his own understanding. If such an interval of time elapsed between the provocation and the act of killing as is reasonably sufficient for reason to resume its sway, the offense is not mitigated to manslaughter. I have said the provocation must be reasonable, and must be recent, and the act of killing must be done in a sudden transport of passion. Whether the provocation was reasonable, and whether sufficient time elapsed between the provocation given and the act of killing for the accused to subdue or control his passion, are questions of fact, to be determined by the jury on a consideration of the circumstances of the particular case before them.[2]

§ 2876. Consideration of prior circumstances in determining sufficiency of provocation

Gentlemen of the jury, you are further instructed that, while by the expression "under the immediate influence of sudden passion" is meant that the provocation must arise at the time of the killing, and that the passion is not the result of a former provocation, still, in determining whether or not the provocation arising at the time of the killing was sufficient to produce sudden passion, as defined in the main charge, the jury should consider all the other words, acts, and conduct of the deceased toward the defendant occurring prior to the killing, and the words, acts, and conduct of ——— and ——— and their father at the time of and just prior to the killing; and, if the provocation arising at the time of the killing, when viewed and taken in connection with all the preceding acts, con-

[1] May v. People, 6 P. 816, 8 Colo. 210.

[2] Brown v. State, 42 A. 811, 62 N. J. Law, 666.

duct, and words of the deceased, and all the words, acts, and conduct of the said ———, ———, and their father toward defendant, was sufficient to produce the sudden passion as herein defined, then such provocation would be sufficient.[3]

§ 2877. Same—Consideration of effect of intoxication

You are instructed that, although the law provides that the provocation causing the sudden passion must arise at the time of the commission of the unlawful act, it is your duty, in determining the adequacy of the provocation, if any there was, to consider in connection therewith all the facts and circumstances in evidence in the case, and the condition of the defendant's mind from the recent use of intoxicating liquors; and if you find that by reason thereof the defendant's mind at the time of the commission of the unlawful act was incapable of cool reflection, and that said facts and circumstances were sufficient to produce such state of mind in a person of ordinary temper, then the proof as to the sufficiency of the provocation satisfies the requirements of the law; and so in this case you will consider all the facts and circumstances in evidence in determining the condition of the defendant's mind at the time he cut and stabbed the deceased, if he did so, and the adequacy of the cause, if any there was, producing such condition; and if you should believe that the defendant committed the act in a sudden transport of passion, sufficient to render the mind for the time incapable of cool reflection, and that such passion was aroused by adequate cause, as adequate cause is hereinbefore explained, then and in such case, or if you have a reasonable doubt whether he so acted or not, in either event you could not find the defendant guilty of a higher grade of homicide than that of manslaughter.[4]

§ 2878. Effect of coexistence of malice and suddenly aroused passion

See, also, ante, § 2822.

§ 2878(1). Alabama

You are instructed that homicide may be committed in the heat of passion suddenly aroused by a blow, and yet be done maliciously, and be murder in the second degree. Suddenly aroused passion and malice may coexist, and both cause the act. When this is the case, the homicide, otherwise indefensible murder, is not reduced to manslaughter by reason of the passion.[5]

[3] Cotton v. State, 217 S. W. 158, 86 Tex. Cr. R. 387.

[4] Hancock v. State, 83 S. W. 696, 47 Tex. Cr. R. 8.

[5] Smith v. State, 40 So. 957, 145 Ala. 17.

§ 2878(2). Oklahoma

You are instructed that both murder and manslaughter are unlawful killings. The distinction is that in murder there is a premeditated design to effect death; in manslaughter there is no premeditated design. If there is a premeditated design to effect death, homicide is murder, no matter how angry the slayer may be at the time of the homicide.[6]

§ 2879. Mutual agreement to commit suicide

You are instructed that, if the jury believe from the evidence that the defendant procured a pistol with which he and the deceased intended to commit suicide, and afterwards changed his mind and tried to escape from the consequences of such an agreement, but deceased refused to permit him to escape therefrom, and on account of physical weakness he could not by force leave her, and that she did the shooting, then defendant did not deliberately assist her to commit self-murder, and is not guilty of manslaughter in the first degree.[7]

§ 2880. Shooting at party offering provocation and killing another

The jury are instructed that, if the jury believe that defendant was struck and knocked down by K., and that such blow or blows produced pain or bloodshed, and that at the time he was using eyeglasses, and that said glasses were removed from his eyes, and that without such glasses his sight was impaired, and that, when he arose to his feet, blood was running from the wounds produced, and he started to, and did, leave the house, and go to the front door, and that when he reached that point, or thereabouts, he turned and fired his pistol, with the intent and believing that he was shooting at K., and that, when he left the room in which he was knocked down, the said K. was in said house, and, at the time defendant shot, he was in such passion, of either anger, rage, or sudden resentment or terror, as to render his mind incapable of cool reflection, and that he believed said K. was still in the house when he shot, and that it was his intent to kill K., and not ———, then he would be guilty of manslaughter.[8]

§ 2881. Killing by wanton and reckless firing of pistol

The jury are instructed that, if they believe from the evidence beyond a reasonable doubt that the defendant, in said county and before the finding of this indictment, intentionally, or in a wanton and reckless manner, without previous malice, fired off and discharged his pistol, and thereby shot and killed ———, they will

[6] McDaniel v. State, 127 P. 358, 8 Okl. Cr. 209.

[7] State v. Webb, 115 S. W. 998, 216 Mo. 378, 20 L. R. A. (N. S.) 1142, 129 Am. St. Rep. 518, 16 Ann. Cas. 518.

[8] White v. State, 72 S. W. 173, 44 Tex. Cr. R. 346, 63 L. R. A. 660.

find him guilty of voluntary manslaughter, and fix his punishment at confinement in the penitentiary for not less than ——— nor more than ——— years.[9]

§ 2882. Killing in procuring, or attempt to procure, an abortion

The court instructs the jury that the word "willful," as used in this instruction, means "intentional; not accidental." The phrase "malice aforethought" means a predetermination to do the act of killing without legal excuse, and it is immaterial how suddenly or recently before the killing such determination was formed. The killing of another in an act not in itself dangerous to life, but which results in death, contrary to the will and design of the doer, when committed in procuring or attempting to procure an abortion, is voluntary manslaughter.[10]

The jury are instructed that, if you should believe from the evidence in this case beyond a reasonable doubt that the defendant, in ——— county, before the ——— day of ———, unlawfully and willfully, but with the consent of ———, for the purpose and with the intention of producing or causing the said ——— to abort or miscarry a child, when she was by the said defendant believed to be then pregnant, whether she was or was not pregnant, thrust, forced, or inserted any catheter, wire, rubber, or other instrument into the womb or private parts of the person of the said ———, and thereby, and by reason of said thrusting, forcing, or inserting of any of the instruments aforesaid, the womb or private parts of the said ——— were injured, punctured, bruised, or lacerated, and as a result of such injury, puncture, laceration, or bruise she became mortally sick, and died from such injury and sickness before the ——— day of ———, you will find the defendant guilty of voluntary manslaughter, and fix his punishment at confinement in the state penitentiary for not less than ——— nor more than ——— years.[11]

§ 2883. Killing through gross negligence in medical treatment

The jury are instructed that injurious acts resulting from gross carelessness or foolhardy presumption, without intent to injure, may constitute an assault. If persons who are engaged in operating steam engines are guilty of gross carelessness or foolhardy presumption, and injuries result, they are criminally liable. So, with apothecaries, if a person without knowledge and skill deals with deadly drugs, he may be guilty of gross carelessness amounting to presumption, and be criminally liable. Whenever men are called

[9] Brown v. Commonwealth, 92 S. W. 542, 122 Ky. 626, 28 Ky. Law Rep. 1335.

[10] Clark v. Commonwealth, 63 S. W. 740, 111 Ky. 443, 23 Ky. Law Rep. 1029.

[11] Wilson v. Commonwealth, 60 S. W. 400, 22 Ky. Law Rep. 1251.

upon to act with dangerous agencies, the law holds them to some degree of criminal responsibility. If they are grossly careless, or reckless and presumptuous, they are guilty. The same general principle applies to medical treatment. The government must show, not merely the absence of ordinary care, but gross carelessness amounting to recklessness. A man is not to be convicted of manslaughter merely because of his ignorance. His ignorance is only important as bearing upon the question whether his conduct in the care and treatment of the patient was marked by foolhardy presumption or gross and reckless carelessness. The defendant in this case is to be tried by no other or higher standard of skill or learning than that which he necessarily assumed in treating her; that is, that he was able to do so, without gross recklessness or foolhardy presumption in undertaking it. It is not necessary to show an evil intent; if, by gross and reckless negligence, he caused the death, he is guilty of culpable homicide. The question is whether the kerosene (if it was the cause of the death), either in its original application, renewal, or continuance, was applied as the result of foolhardy presumption or gross negligence on the part of the defendant.[12]

3. *Involuntary Manslaughter*

§ 2884. Elements of offense

§ 2884(1). Arkansas

You are instructed that if the jury believe from the evidence beyond a reasonable doubt that the defendant struck the deceased with a binding pole, and knocked him off the wagon, or the deceased fell from the wagon as a result of the blow, and the wagon wheel ran over the deceased, and the deceased died in consequence of such striking and being run over by the wagon wheel, then the defendant would be guilty, provided you believe such striking was done without legal excuse or justification.[13]

§ 2884(2). Delaware

You are instructed that involuntary manslaughter, which is less common and perhaps less familiar, is where a person in committing an unlawful act, not felonious or tending to great bodily harm, or in committing a lawful act without proper caution or requisite skill, unguardedly or undesignedly kills another. Manslaughter may arise, as you see, from an unlawful act, or from a lawful act done without proper caution or skill. So you can understand what the state means by the charge that the defendant is guilty of involuntary manslaughter because he killed ——— in committing the unlawful

[12] Commonwealth v. Pierce, 138 Mass. 165, 52 Am. Rep. 264.

[13] Gilmore v. State, 122 S. W. 493, 92 Ark. 205.

act of running his car at a greater speed than the law allows, or in the performance of the lawful act of running his car within the speed limit, but without proper caution and care, and in disregard of the safety of others.[14]

§ 2884(3). Illinois

The court further instructs the jury that "involuntary manslaughter shall consist in the killing of a human being without any intent to do so, in the commission of an unlawful act, or a lawful act, which probably might produce such a consequence, in an unlawful manner.[15]

§ 2884(4). Indian Territory

You are instructed that involuntary manslaughter consists in the killing of a human being, without any intent to do so, in the commission of an unlawful act, or a lawful act, which probably might produce such a consequence, in an unlawful manner.[16]

§ 2884(5). Montana

The jury are instructed that involuntary manslaughter is the killing of a human being by another, without any intention to do so, in the performance of an unlawful act not felonious, or which would not naturally tend to destroy human life, or in the performance of a lawful act without that due care and caution which every reasonable man should exercise in doing any act which might result in the destruction of human life.[17]

§ 2885. Unintentional killing while doing unlawful act

§ 2885(1). Connecticut

You are instructed that unlawfulness is, of course, an essential element of all manslaughter. Where one assaults or attacks another without intending to kill, and causes the other's death, the killing, though unintentional, is unlawful because of the unlawful act which produced it. The same would be true even if the act which produced the death was not consciously directed against him or her whose death resulted if the act was in itself unlawful. So it is a general principle that one who without intention to take life causes the death of another by his own unlawful act, is criminally responsible for the killing. It is a sufficiently accurate statement for any purpose of yours to say that when one causes the death of another without an intention to take life and while engaged in doing some act in itself unlawful, the killing will be manslaughter. At the time in question it was unlawful for any person to operate a motor vehicle in any public highway of this state recklessly or

[14] State v. Long (O. & T.) 108 A. 36, 7 Boyce, 397.

[15] Greschia v. People, 53 Ill. 295.

[16] Bias v. United States, 53 S. W. 471, 3 Ind. T. 27.

[17] Territory v. Manton, 19 P. 387, 8 Mont. 95.

at a rate of speed greater than was reasonable and proper having regard to the width, traffic, and use of such highway, or to operate such motor vehicle so as to endanger the life or limb of any person.[18]

§ 2885(2). Michigan

You are instructed that, if you find that the defendant was chasing ——— in the highway, with the intention to compel him to seek a place of shelter from the defendant, and for the purpose of frightening him he discharged a pistol, not intending to inflict any personal injury upon ———, but only to frighten him, the defendant was engaged in an unlawful act; and if you find the shot did inflict an injury from which ——— died, the defendant is guilty of manslaughter. If you find that the defendant was chasing ——— in the highway, intending to overtake him and inflict some personal chastisement on him, and while so chasing him designedly discharged a pistol, not intending to inflict any injury on ——— by such discharge, but only to frighten him, and as a result of the shot a wound was inflicted on the person of ——— from the effects of which he died, the defendant is guilty of manslaughter.[19]

§ 2885(3). Oklahoma

You are further instructed that under the laws of ——— it is unlawful for any person to point any pistol or any other deadly weapon, whether loaded or not, at any other person or persons, either in anger or otherwise, and that any person guilty of so doing would be guilty of a misdemeanor under the law. You are further instructed that the law of ——— is that every person who willfully assists any prisoner in escaping or attempting to escape from the custody of any officer or person having the lawful charge of such prisoner under any process of law, or under any lawful arrest, is guilty of a misdemeanor.[20]

§ 2885(4). Texas

You are instructed that if you shall find from the evidence, beyond a reasonable doubt, that the defendant did unlawfully attempt to commit and was committing an assault upon ———, with a gun without any intention to kill him, the said ———, and while so assaulting the said defendant, did cause the death of the said ———, by then and there shooting the said ——— with a gun whereby he was killed, there being no apparent danger then and there of causing the death of said ——— thereby, but with no intent to murder him, the said ———, as murder has been hereinbefore defined in

[18] State v. Goetz, 76 A. 1000, 83 Conn. 437, 30 L. R. A. (N. S.) 458.

[19] People v. Stubenvoll, 28 N. W. 883, 62 Mich. 329.

[20] Kent v. State, 126 P. 1040, 8 Okl. Cr. 188.

this charge, you will find the defendant guilty of negligent homicide of the second degree, and assess his punishment therefor as aforesaid; but if you shall not so find, bearing in mind that the burden of proof is upon the state to prove this issue beyond a reasonable doubt as in every other issue, you will find the defendant not guilty of this offense.[21]

§ 2886. Killing in assault with intent to inflict merely bodily injury

The jury are instructed that, if they find that the defendant struck the blow that killed ———, and that the defendant only intended to make an assault and battery upon the person of said ———, or to inflict a great bodily injury upon his person, but that, as a result of said assault, said ——— did die without the defendant having intended to kill him, then the defendant would be guilty of manslaughter.[22]

§ 2887. Homicide occurring while pointing a pistol at another in violation of statute

See, also, ante, § 2885(3).

§ 2887(1). Alabama

You are instructed that there can be no unlawful presentation of a gun at a person, unless the presentation is intentional.[23]

§ 2887(2). Delaware

You are instructed that under a statute of this state it is made unlawful for any person, in jest or otherwise, intentionally to point a gun towards any other person at any time or place, and if any person commits such unlawful act and death results from the discharge of the gun so pointed, the person pointing the same shall be guilty of manslaughter when such killing does not amount to murder. So that if you believe beyond a reasonable doubt that the defendant pointed the gun towards the deceased, and that he did it intentionally, and also believe that the death of the boy resulted from the discharge of the gun so pointed, and that the killing did not amount to murder, your verdict should be, guilty of manslaughter.[24]

§ 2887(3). Georgia

The court instructs the jury that, if you believe the truth of the case is that the defendant was guilty of killing his wife without any intention to do so, but that he killed her in the commission of an unlawful act, then you would be authorized to investigate the question as to whether or not the defendant is guilty of the offense

[21] Ford v. State, 142 S. W. 6, 64 Tex. Cr. R. 14.

[22] State v. Walker, 110 N. W. 925, 133 Iowa, 489.

[23] McDaniel v. State, 46 So. 988, 156 Ala. 40, 21 L. R. A. (N. S.) 678, 130 Am. St. Rep. 74.

[24] State v. Naylor, 90 A. 880, 5 Boyce, 99.

of involuntary manslaughter in the commission of an unlawful act. That is an offense which is punished by confinement in the penitentiary for a term not less than ——— nor longer than ——— years. And on that subject I charge the jury this: That if you believe the defendant, having no intention to fire the pistol at his wife, yet pointed it towards her intentionally, whether loaded or unloaded, and that such pointing was not done in self-defense or under circumstances of justification enumerated in the Code, that he, under the impression the pistol was not loaded, snapped it at her, thinking that the pistol was not loaded, and that her death was produced by the firing upon her unintentionally on his part, by the explosion of the cartridge in there, when he thought there was none there, yet as the result of the doing on his part of the unlawful act of the intentional pointing the pistol at her, and in that way her death resulted, you would be authorized to find the defendant guilty of involuntary manslaughter in the commission of an unlawful act.[25]

§ 2888. Criminal negligence

The jury are instructed that, if the act was unlawful in itself, a greater degree of care and caution is required to exempt from criminal liability, and, as a necessary corollary of this rule, it follows that a less degree of negligence is required to make it criminal. The more dangerous the act done the greater degree of care and caution to guard against injury is required.[26]

§ 2889. Same—Killing through explosion of boiler

You are instructed that the fact of the explosion, and even the possibility of guarding against it, do not necessarily make out a case of culpable negligence. Very few acts in life are done with such care as to prevent accidents, or make them impossible. The law only requires of any one that degree of care and prudence which persons who are reasonably careful ordinarily observe. To require more would be to put every one under restraints in the management of his business and in his dealings with others, which would be more hurtful in the embarrassments they would cause than beneficial in the protection they would give against injuries.[27]

You are instructed that whether the absence of the defendant from the boiler room at the time of the explosion was negligent depends upon circumstances. If we find that the defendant, from his past experience, from his knowledge of the boiler, and the flow of oil, and of the burner, had reason to believe, and in fact did believe, that it was consistent with safety to be absent from the boil-

[25] Toomer v. State, 60 S. E. 198, 130 Ga. 63.

[26] State v. Irvine, 52 So. 567, 126 La. 434.

[27] People v. Thompson, 81 N. W. 344, 122 Mich. 411.

er, as he was at the time of the explosion, then he was not, in law, guilty of criminal negligence by reason of such absence.[28]

§ 2890. Same—Careless handling of firearms

§ 2890(1). Kentucky

You are instructed that if the jury believe from the evidence that defendant had reasonable grounds to believe and did believe there was no danger in handling the pistol as he did, and that it was done without any purpose of harm upon his part, but if they further believe from the evidence, to the exclusion of a reasonable doubt, that the killing resulted from his careless use of the weapon, and in ——— county, and within ——— months before the finding of the indictment in this prosecution, then they should find him guilty of involuntary manslaughter and fix his punishment at a fine in any sum in their discretion, or confinement in the county jail for any length of time in their discretion, or they may both so fine and imprison him in their discretion.[29]

You are instructed that if the jury believe from the evidence that the accused had reasonable grounds to believe and did believe there was no danger in handling the pistol as he did, and that it was done without any purpose of harm upon his part, and further believe from the evidence, to the exclusion of a reasonable doubt, that the killing resulted from the careless use of the weapon, they should find him guilty of involuntary manslaughter, and fix his punishment at a fine or imprisonment in the county jail, either or both, in your discretion; but if they believe the killing was accidental, and without carelessness, he should be acquitted.[30]

§ 2890(2). Oklahoma

You are instructed that culpable negligence is the want of that usual and ordinary care and caution in the performance of an act usually and ordinarily exercised by a person under similar circumstances and conditions, and you are instructed that a person handling a deadly weapon will be required under the law to use a higher degree of care and circumspection than if using an instrument ordinarily harmless.[31]

§ 2891. Reckless and heedless firing of gun

§ 2891(1). Arkansas

You are instructed that if you find from the evidence that the defendant was justified in shooting at ———, and that he shot at ——— in a careless, reckless manner, and not with that caution

[28] People v. Thompson, 81 N. W. 344, 122 Mich. 411.

[29] Speaks v. Commonwealth, 149 S. W. 850, 149 Ky. 893.

[30] Blanton v. Commonwealth, 112 S. W. 594, 33 Ky. Law Rep. 1022.

[31] Kent v. State, 126 P. 1040, 8 Okl. Cr. 188.

that he should have done under the circumstances, you will convict him of involuntary manslaughter.[32]

§ 2891(2). Iowa

You are instructed that manslaughter is the unlawful killing of one human being by another without deliberation, premeditation, or malice, as where one engaged in an unlawful act, not amounting to a felony, unintentionally kills another, or, if one recklessly and heedlessly fires a gun and thereby kills another, he will not be excused, but his offense will be manslaughter, though the weapon was pointed in the direction of the deceased by accident with no design to wound or kill.[33]

You are instructed that the material averments of the indictment are that the defendant did, at the time and place therein alleged, handle the rifle therein described in a careless and reckless manner, and while so doing did unlawfully, carelessly, and recklessly shoot ——— in the head, thereby causing the death of said ———.[34]

You are instructed that the defendant, in handling a deadly and dangerous weapon, was bound to exercise such care as an ordinarily careful and prudent man would ordinarily exercise under like circumstances, and if he failed to do so he was guilty of negligence. He was not required to exercise the highest degree of care, but only such care as a reasonably prudent man should and ought to use under like circumstances. If he did so, then the killing of deceased would be excusable, and he should be acquitted; but if you find from the evidence beyond a reasonable doubt that he failed to exercise such degree of care and that he was guilty of negligently and recklessly using such weapon, whereby the deceased was shot and killed, such killing would be manslaughter.[35]

You are instructed that if you find from the evidence beyond a reasonable doubt that at the time and place alleged in the indictment the defendant was intending to shoot through the hat of deceased while the same was on his head, and that in so doing he was using a deadly and dangerous weapon recklessly, carelessly, and negligently, or so find that in aiming at or shooting at a nail head, if he was, defendant was shooting so close to deceased as that his act in so doing was a negligent, careless, and reckless use of a deadly weapon, and that by reason of such reckless and negligent use of such weapon said ——— was shot and killed, such killing would be manslaughter.[36]

You are instructed that if you find that at the time he fired the

[32] Scott v. State, 86 S. W. 1004, 75 Ark. 142.

[33] State v. Warner, 137 N. W. 466, 157 Iowa, 111.

[34] State v. Warner, 137 N. W. 466, 157 Iowa, 111.

[35] State v. Warner, 137 N. W. 466, 157 Iowa, 111.

[36] State v. Warner, 137 N. W. 466, 157 Iowa, 111.

fatal shot the defendant was aiming at a nail head, but further find from the evidence beyond a reasonable doubt that in so doing he recklessly pointed said gun so close to the deceased and fired the same under such circumstances as that he was not, in so doing, in the exercise of such care as an ordinarily careful and prudent man would exercise under the circumstances, and thereby the deceased was shot and killed, such killing would be manslaughter.[37]

You are instructed that, if you find from the evidence beyond a reasonable doubt that the defendant negligently, carelessly, and recklessly discharged the gun in question and thereby shot and killed the deceased, then the fact, if it be a fact, that the deceased moved or raised his head at the time or just prior to the firing of the shot, and that such act contributed to his death, if it did, would constitute no defense.[38]

You are instructed that, unless you find from the evidence beyond a reasonable doubt that defendant's use of said gun at the time of the shooting was negligent and reckless, you should acquit him.[39]

§ 2892. Negligence in driving automobile

§ 2892(1). Arkansas

You are instructed that, although every man has a right to drive an automobile on the streets, just as much right as a man has to drive a buggy in it, or to cross it on foot, no man has the right to use a public street of a city as a speedway, and wherever any man uses a dangerous machine, he must guard the exercise of that right with a proper care and due regard for the lives and safety of people who have an equal right to be upon the streets.[40]

§ 2892(2). Connecticut

You will observe the expression "criminal negligence," which is recklessness of conduct, gross or wanton carelessness or negligence. "Gross negligence" imports a thoughtless disregard of consequences. "Wantonness," in respect to human conduct, is doing a thing recklessly without regard to property or the rights of others. Do all the circumstances establish beyond a reasonable doubt a degree of carelessness amounting in itself to a culpable disregard of the rights and safety of others? If they do they establish criminal negligence. If they do not the homicide with which you are dealing is one that the law excuses as a misadventure. Now, your ultimate inquiry will be, was the defendant criminally negligent, and if so, did his criminal negligence cause the death of ———? If

[37] State v. Warner, 137 N. W. 466, 157 Iowa, 111.

[38] State v. Warner, 137 N. W. 466, 157 Iowa, 111.

[39] State v. Warner, 137 N. W. 466, 157 Iowa, 111.

[40] Madding v. State, 177 S. W. 410, 118 Ark. 506.

you are not satisfied beyond a reasonable doubt that the defendant at the time and place in question was criminally negligent in his conduct in the management of his auto car, and also that such negligence caused the death of ——— as charged, you should acquit him.[41]

§ 2892(3). Delaware

You are instructed that defendant is charged in this case with the crime of manslaughter. It is alleged in the indictment that on ——— in the present year, on the ——— in ———; in this county, he ran his automobile at a greater rate of speed than that allowed by the statute, and while so doing ran into and collided with a certain other automobile driven by one ———, and by reason thereof feloniously and willfully made an assault upon one ———, who was riding in the car driven by the defendant, whereby she was thrown upon the ground and received injuries which resulted in her death. The defendant denies that he was driving his automobile at the time of the collision at a rate of speed in excess of that permitted by the statute, or at a rate of speed, or in a manner, that was dangerous to others upon the highway, and therefore claims that he was not guilty of any negligence that caused the death of the child, ———. The defendant contends that the death of the child resulted from his car being struck from behind by another car, and that, therefore, it was by misadventure, and not from any criminal act or negligence. In the collision of the two cars, ——— and all the other occupants of defendant's car were thrown out, except himself, and a young child was thrown from ———'s car.[42]

You are instructed that it is the duty of the driver of an automobile on the public highway to run not only at a rate of speed permissible under the law, but at such speed as an ordinarily prudent and careful man would use under the circumstances, having regard at all times to the danger of the situation and the probability of injuring others. The statute governing the speed of automobiles provides that nothing therein contained "shall permit any person to drive a motor vehicle at a greater speed than is reasonable, having regard to the traffic, or so as to endanger the safety of any person or injure the property of any person."[43]

You are instructed that it is unlawful in this state to run an automobile upon any public street or highway, where the buildings are of greater distance apart than ——— feet, at a greater rate of speed than ——— miles an hour, or, as stated in the indictment and the statute, at a greater rate of speed than a mile in

[41] State v. Goetz, 76 A. 1000, 83 Conn. 437, 30 L. R. A. (N. S.) 458.

[42] State v. Long (O. & T.) 108 A. 36, 7 Boyce, 397.

[43] State v. Long (O. & T.) 108 A. 36, 7 Boyce, 397.

——— minutes and ——— seconds. Such being the law, we say to you that any one who, while driving his automobile at a higher rate of speed than the law allows, kills another by striking him with (or throwing him from) his car, is prima facie guilty of negligence; and such act will make the driver criminally liable and guilty of manslaughter, if it is clearly shown by the evidence that such unlawful speed was the cause of the death. But even though the jury should not be satisfied that the driver was running his car at a higher rate of speed than the law allows, he would, nevertheless, be guilty of manslaughter if the death was caused by gross negligence on his part, that is, by a wanton, careless and reckless disregard of the rights and safety of others. And we may say that the law we have stated for your guidance applies, whether the person killed is thrown from another car that was struck or from the car driven by the defendant. And we further instruct you that if the death resulted from the unlawful rate of speed, or from the careless and reckless driving of the car, the fact that the killing was unintentional on the defendant's part does not excuse him. It makes no difference how unintentional it may have been, if the death was caused by the defendant's criminal and gross negligence. As we have already told you, involuntary manslaughter exists when a person, in committing an unlawful act, or in committing a lawful act without proper caution or skill, undesignedly kills another. That is the definition of manslaughter.[44]

Now, gentlemen, summarizing and simplifying, as much as we can, the law already stated, we say: If you believe from the testimony that at the time of the collision of the two automobiles the defendant was driving his car in violation of the statute that governs the speed of automobiles, and that such act was the cause of the death of ———, your verdict should be guilty. And even if you do not believe that the defendant, at the time of the collision, was running his car in violation of said speed statute, but are satisfied that the child's death was caused by gross negligence on the part of the defendant, your verdict should be guilty. If you are not satisfied that the defendant is guilty of manslaughter, but believe that he is, under the evidence, guilty of an assault, you may find him guilty of assault only.[45]

§ 2892(4). Rhode Island

The court instructs the jury that, if the defendant gave no warning of his approach, and the driver of the tip cart in the middle of the street had no knowledge of the presence of the automobile un-

[44] State v. Long (O. & T.) 108 A. 36, 7 Boyce, 397.

[45] State v. Long (O. & T.) 108 A. 36, 7 Boyce, 397.

til it was right near the rear of his cart, and instinctively or in a sort of a panic turned his horse to the left to avoid a collision, and in consequence the tip cart and automobile came in contact, the defendant cannot shield himself by setting up as a defense this act of the driver, if it was the result of fright or alarm caused by the defendant's want of care.[46]

§ 2893. Homicide caused by driving automobile while intoxicated

You are instructed that our statute provides that any person who shall drive an automobile while in an intoxicated condition is guilty of a misdemeanor. If you find that the defendant was in an intoxicated condition while driving the automobile which struck ———, and that, because of some grossly negligent act or acts of defendant in the operation of the automobile occasioned by such condition of intoxication, ——— was killed, the defendant is guilty of manslaughter.[47]

4. *Degrees of Manslaughter*

§ 2894. Manslaughter in first degree

§ 2894(1). Alabama

You are instructed that manslaughter in the first degree is also embraced in this indictment. Manslaughter in the first degree is the unlawful killing of a human being without malice; that is, as the unpremeditated result of passion-heated blood, caused by a sudden, sufficient provocation. Now, if the defendant unlawfully, but without malice, killed ——— by shooting him with a pistol, and such killing was the result of passion-heated blood suddenly aroused without sufficient provocation, solely, then that would be manslaughter in the first degree.[48]

§ 2894(2). Oklahoma

Gentlemen of the jury, if after a consideration of all the evidence in this case there remains in your mind a reasonable doubt as to whether the defendant is guilty of the crime of murder as herein instructed, then you may next inquire of whether or not she is guilty of manslaughter in the first degree. Therefore, if you find and believe from the evidence in this case beyond a reasonable doubt that the defendant, in the county of ——— and state of ———, on or about the ——— day of ———, did unlawfully shoot and kill the deceased, but that such act of killing was perpetrated without a design to effect the death of the deceased, and in the heat of passion, but in a cruel and unusual manner or by means of a dangerous

[46] State v. Wagner, 86 A. 147.

[47] State v. Dugan, 89 A. 691, 84 N. J. Law, 603.

[48] Thomas v. State, 36 So. 734, 139 Ala. 80.

weapon, then you will find the defendant guilty of manslaughter in the first degree and so say by your verdict. On the other hand, if you have any reasonable doubt in your minds as to whether the defendant is guilty of either murder or manslaughter in the first degree as herein instructed you, then it will be your duty to acquit the defendant.[49]

The court instructs the jury that, if you have a reasonable doubt that the defendant is guilty of the crime of murder as herein submitted to you, then you may next inquire as to whether or not he is guilty of the crime of manslaughter in the first degree. If you believe from the evidence beyond a reasonable doubt that the defendant, in the county of ——— and state of ———, on or about the ——— day of ———, and anterior to the filing of this information on the ——— day of ———, did unlawfully shoot and kill the deceased, but that such act of killing was perpetrated without a design to effect the death of the deceased, but in a heat of passion and in a cruel and unusual manner, or by means of a dangerous weapon, then you will find the defendant guilty of manslaughter in the first degree, and so say by your verdict, unless you should find, or have a reasonable doubt thereof, that said killing was committed under such circumstances as constitute justifiable homicide, in which case you should acquit the defendant.[50]

You are instructed that, if you do not believe beyond a reasonable doubt that the defendants or either of them are guilty of murder, but believe from the evidence beyond a reasonable doubt that the defendant shot the deceased while in a heat of passion, and without a premeditated design to effect his death, then it will be your duty to convict the defendant of manslaughter in the first degree, unless you shall find the shooting was justifiable. If you convict the defendant of manslaughter, you will assess his punishment at imprisonment for any time not less than ——— years.[51]

You are instructed that homicide is manslaughter in the first degree when perpetrated without a design to effect death, and in a heat of passion, but in a cruel and unusual manner, or by means of a dangerous weapon, unless it is committed under such circumstances as constitute excusable or justifiable homicide.[52]

You are instructed that manslaughter in the first degree is defined as follows: When a homicide is perpetrated without a design to effect death by a person while engaged in the commission of a misdemeanor, or when perpetrated without a design to effect death, and in a heat of passion, but in a cruel and unusual manner or by

[49] Palmer v. State (Cr. App.) 187 P. 502.

[50] Brantley v. State, 175 P. 51, 15 Okl. Cr. 6.

[51] McDaniel v. State, 127 P. 358, 8 Okl. Cr. 209.

[52] McDaniel v. State, 127 P. 358, 8 Okl. Cr. 209.

means of a dangerous weapon, unless it is committed under such circumstances as to constitute excusable or justifiable homicide. Under the circumstances and evidence in this case a charge on justifiable homicide is unnecessary.[53]

You are further instructed that if you believe from the evidence and circumstances in the case beyond a reasonable doubt that the defendant killed said deceased, and that the killing was unlawful, and was not excusable homicide, as herein explained to you, but you have under the evidence and circumstances in the case a reasonable doubt as to whether the defendant is guilty of murder, as herein defined to you, then it would be necessary for you to consider whether or not the defendant is guilty of manslaughter in either the first or second degree, as herein defined to you, both of which are lower degrees of homicide, and which are included in and may be considered under an information charging murder. To constitute manslaughter in the first degree, as herein defined to you, it is essential that the homicide be committed by the accused, that the killing be unlawful; that is, that it was not justifiable or excusable under the law. If the killing be purposely and unlawfully done, without a design to effect death, and in a heat of passion, but in a cruel and unusual manner, or by means of a dangerous weapon, or while the person doing the killing was engaged in the commission of a misdemeanor, then, under such circumstances, the homicide would be manslaughter in the first degree. You are further instructed that if, under all the evidence and circumstances in the case you have a reasonable doubt as to whether or not the defendant is guilty of murder, the defendant is entitled to the benefit of that doubt, and you cannot convict him of murder, but if from all the evidence and circumstances in the case you believe beyond a reasonable doubt that the defendant killed said deceased, as alleged in the information, in ——— county, state of ———, and that the killing was unlawful, and purposely done, as alleged in the information, by the defendant, without a design to effect death, and in a heat of passion, but in a cruel and unusual manner, or by means of a dangerous weapon, or while the defendant was engaged in the commission of a misdemeanor, and under such circumstances as not to be excusable under the law, as herein given to you, then the defendant would be guilty of manslaughter in the first degree, and you should so find, and you may assess the punishment therefor, should you find him guilty of manslaughter in the first degree; that punishment being imprisonment in the state penitentiary for any definite period of time not less than ——— years.[54]

[53] Kent v. State, 126 P. 1040, 8 Okl. Cr. 188.

[54] Kent v. State, 126 P. 1040, 8 Okl. Cr. 188.

The jury are instructed that if the killing of ——— was not justifiable as defined in these instructions, and you entertain a reasonable doubt as to whether the shooting of the said ——— was done with a premeditated design to effect his death, and you do believe from the evidence beyond a reasonable doubt that the defendant fired the fatal shot while in the heat of passion, and with no premeditated design to kill the said ———, you will then find him guilty of manslaughter in the first degree.[55]

The court instructs the jury that, if the shooting of ——— with the revolver was not justifiable on the grounds of self-defense, and you find from the evidence, beyond a reasonable doubt, that the defendant fired said shot in a heat of passion, and without any design to effect the death of ———, you will then find him guilty of manslaughter in the first degree. Or if he was not justifiable in shooting ——— with the revolver after he had got out of the wagon, and you find from the evidence, beyond a reasonable doubt, that the deceased, ———, had made an attack upon the defendant with a deadly weapon, and that the defendant killed him unnecessarily after such attack had failed, you will then find him guilty of manslaughter in the first degree.[56]

§ 2895. Manslaughter in second degree

You are instructed that homicide is manslaughter in the second degree when caused by the act, procurement, or culpable negligence of another, which, under the law, is not murder or manslaughter in the first degree, nor excusable nor justifiable homicide.[57]

The court further instructs you that if you believe from the evidence and circumstances in the case beyond a reasonable doubt that the defendant killed deceased, as alleged in the information, and that the killing was unlawful, and was not excusable homicide, as herein explained to you, but you have under the evidence and the circumstances a reasonable doubt as to whether the defendant is guilty of murder or manslaughter in the first degree, as herein defined to you, then it would be necessary for you to consider whether or not the defendant is guilty of manslaughter in the second degree, as herein defined to you, and which is a lower degree of homicide than the other two degrees, and which is included in and may be considered under an information charging murder.[58]

You are instructed that, to constitute manslaughter in the second degree, as herein defined to you, it is essential that the homicide be committed by the accused; that the killing be unlawful; that is,

[55] Atchison v. State, 105 P. 387, 3 Okl. Cr. 295.

[56] Morris v. Territory, 99 P. 760, 1 Okl. Cr. 617. This is correct as far as it goes.

[57] Kent v. State, 126 P. 1040, 8 Okl. Cr. 188.

[58] Kent v. State, 126 P. 1040, 8 Okl. Cr. 188.

that it was not justifiable or excusable under the law. If the killing be purposely and unlawfully done without a design to effect death, but by the act, procurement or culpable negligence of another, which, under the law as herein given to you, is neither murder nor manslaughter in the first degree, nor excusable nor justifiable homicide, then, under such circumstances, the homicide would be manslaughter in the second degree. On this phase the court instructs you that, if under all the evidence and circumstances you have a reasonable doubt as to whether or not the defendant is guilty of murder or of manslaughter in the first degree, then the defendant is entitled to the benefit of that doubt, and you cannot convict him of either of those degrees of homicide. But if from all the evidence and circumstances in the case you believe, beyond a reasonable doubt, that the defendant killed the said deceased, as alleged in the information, in ——— county, state of ———, and that the killing was unlawful and purposely done, as alleged in the information, without a design to effect death, but by the act, procurement, or culpable negligence of the defendant, which, under the provisions of the law, and these instructions, is neither murder nor manslaughter in the first degree, nor excusable nor justifiable homicide, and was not done by accident or misfortune, in the doing of a lawful act by lawful means, with usual and ordinary caution, and without any criminal intent, then the defendant would be guilty of manslaughter in the second degree, and you should so find, and, if you find the defendant guilty of manslaughter in the second degree, you may assess the punishment therefor, that being imprisonment in the state penitentiary for not more than ——— years and not less than ——— years, or by imprisonment in the county jail not exceeding ——— year, or by fine not exceeding $———, or by both fine and imprisonment.[59]

§ 2896. Manslaughter in third degree

§ 2896(1). Missouri

The court instructs the jury that if they find and believe from the evidence that at ——— county, state of ———, on ———, within ——— years prior to the filing of this indictment, defendant intentionally and feloniously struck the deceased, on the head with a pistol, which said defendant then and there held in his hand, and that said ——— died on ———, and prior to the finding of this indictment, from the effect of such blow, and that such blow was struck by said defendant in a heat of passion, without a design to effect the death of said ———, and that said pistol so used was then and there a dangerous weapon, you will find the defendant

[59] Kent v. State, 126 P. 1040, 8 Okl. Cr. 188.

guilty of manslaughter in the third degree, unless you find that such killing, if done by defendant, was under such circumstances as to be justifiable under the law as given by the court. If you find the defendant guilty of manslaughter in the third degree, as above defined, you will assess his punishment at imprisonment in the penitentiary not exceeding ——— years, or imprisonment in the county jail not less than ——— months, or by a fine not less than $———, or both a fine not less than $——— and imprisonment in the county jail not less than ——— months.[60]

§ 2896(2). Wisconsin

You are instructed that if you find from the evidence, beyond a reasonable doubt, that at the time and place charged the defendant shot ———, thereby causing his death, but do find, beyond a reasonable doubt, that the homicide was committed while the defendant was in the heat of passion, such passion as amounted to temporary obscurement of reason, as hereinbefore explained, rendering him incapable of forming a deliberate, premeditated design to kill, and further find that such homicide was committed by a dangerous weapon, without any design to effect death, then you are at liberty to find the defendant guilty of manslaughter in the third degree, unless you find that such homicide was justifiable or excusable as hereinafter explained.[61]

§ 2897. Manslaughter in fourth degree

§ 2897(1). Kansas

You are instructed that manslaughter in the fourth degree consists in the unlawful killing of a human being without design to effect death and without malice aforethought by an unlawful act of a dangerous character.[62]

§ 2897(2). Missouri

The court instructs the jury that if they find, from the evidence in the cause, that on the ———, at the county of ———, in the state of ———, in the difficulty between defendant and ———, in which said ——— was killed, if so the jury find, the said ——— was the aggressor and struck defendant, or approached defendant in a threatening manner, and while within striking distance of defendant raised his hand or arm as though about to strike defendant, and that such conduct, if any, on the part of said ——— provoked in defendant a sudden violent passion and that in said heat of passion, if any, the defendant then and there with a loaded pistol shot and killed ———, but not under such circumstances as to justify the

[60] State v. Lane, 59 S. W. 965, 158 Mo. 572.

[61] Dillon v. State, 119 N. W. 352, 137 Wis. 655, 16 Ann. Cas. 913. "Deliberate" and "premeditated" may be used interchangeably.

[62] State v. Ireland, 83 P. 1036, 72 Kan. 265.

defendant on the ground of self-defense, as defined in other instructions, then you will find the defendant guilty of manslaughter in the fourth degree.[63]

The court instructs the jury that if the jury believe from the evidence beyond a reasonable doubt that the defendant, at the county of ——— and state of ———, on or about the ———, intentionally shot and killed ———, in a heat of passion, suddenly aroused by reason of said ——— threatening or attempting to pass through his house against his consent, then the law presumes that such killing was not done with malice, but was the result of such passion, and in such case you cannot find the defendant guilty of murder in either degree, but you should find him guilty of manslaughter in the fourth degree, and assess his punishment at ——— years' imprisonment in the penitentiary, or by imprisonment in the county jail not less than ——— months, or by fine of not less than $———, or by both a fine of not less than $——— and imprisonment in the county jail not less than ——— months.[64]

The court further instructs the jury that if the defendant and deceased had a difficulty at the depot, and the deceased went to his house and armed himself with a shotgun, but that deceased thereafter withdrew from said difficulty, and that the defendant, after the deceased had so withdrawn, voluntarily renewed said difficulty, but without the intention of killing or inflicting great personal injury upon the deceased, and that during said difficulty it became necessary for defendant to kill deceased to save himself from being killed or receiving great personal injury, then the defendant cannot be entirely excused on the ground of self-defense, but in that case you should find him guilty of manslaughter in the fourth degree.[65]

You are instructed that, if you shall believe from the evidence that the defendant shot and killed ——— while the defendant was in a violent passion, suddenly aroused by reason of ——— having shoved him, or struck him with his fist or hand, or with a rock, or while resisting arrest, in which he used more force than was necessary to accomplish the same, you cannot find him guilty of murder in either degree, for in that case the law presumes that such shooting and killing was not done of defendant's malice, but by reason of such passion. On the other hand, although you may believe that defendant shot and killed ——— while in a violent passion, suddenly aroused by a shove or a blow from ———, yet, if you shall further believe from the evidence that such shooting and killing was not necessary in order for the defendant to arrest ———, as

[63] State v. Sharp, 82 S. W. 134, 183 Mo. 715.

[64] State v. Palmer, 61 S. W. 651, 161 Mo. 152.

[65] State v. Hudspeth, 60 S. W. 136, 159 Mo. 178.

hereinafter explained, you will find him guilty of manslaughter in the fourth degree.[66]

§ 2898. Conviction of aggravated assault and battery

I instruct you, as a part of the law in this case, that our statute provides: "Where a homicide occurs under the influence of sudden passion but by the use of means not in their nature calculated to produce death, the person killing is not deemed guilty of homicide unless it appear that there was an intention to kill, but the party from whose act the death resulted may be prosecuted for and convicted of any grade of assault and battery." So in this case I therefore charge you that, should you believe from the evidence that the defendant, killed deceased, ———, by striking or stabbing the said ——— with a knife, but you further believe from the evidence or have a reasonable doubt thereof, that the defendant was then laboring under the influence of sudden passion when he so killed deceased, if he did, and by the use of means not in their nature calculated to produce death and without any intent to kill, did then and there cut or stab ——— with a knife, and did thereby inflict serious bodily injury upon the said ———, and not in self-defense as herein charged, you will find him guilty of an aggravated assault, and assess his punishment at a fine of not less than $——— nor more than $——— or imprisonment in the county jail for not less than ——— nor more than ———, or both such fine and imprisonment.[67]

You are instructed that if you find that defendant struck ———, and thereby killed him, and do not find that he intended to kill him, then you may find defendant guilty of an aggravated assault and battery, if he was not justifiable, and if the evidence shows he was guilty of that offense.[68]

G. Assault with Intent to Murder or Kill

§ 2899. Elements of offense

§ 2899(1). Alabama

The court charges the jury that if they believe, from the evidence in this case, beyond a reasonable doubt, that the defendant on the ——— day of ———, assaulted ——— with the intent to murder him, then they must find the defendant guilty as charged.[69]

§ 2899(2). Arkansas

The court instructs the jury that, before you would be authorized to find the defendant guilty of an assault with intent to kill, it

[66] State v. Rose, 44 S. W. 329, 142 Mo. 418.

[67] Lozano v. State, 202 S. W. 510, 83 Tex. Cr. R. 174.

[68] Perrin v. State, 78 S. W. 930, 45 Tex. Cr. R. 560.

[69] Deal v. State, 34 So. 23, 136 Ala. 52.

must be shown from the evidence, beyond a reasonable doubt, that the defendant intentionally shot at ——— with malice aforethought and with a specific intent to kill said ———, and, if death had resulted, it would have been murder.[70]

The jury are instructed that, to constitute an assault with intent to kill and murder, it must appear from all the evidence in the case to a moral certainty that, had death ensued, it would have amounted to murder either in the first or second degree, and that there existed in the mind of the one making the assault a specific intent to take the life of the person assaulted, but it is not necessary that such intent be formed for any particular length of time before the assault, but it may be conceived in a moment before.[71]

§ 2899(3). Delaware

You are instructed that the charge is not only an assault, but also an intent to murder. In order to convict the accused as indicted, you must be satisfied beyond a reasonable doubt: (1) That the alleged assault was committed by the accused; (2) that it was committed by him with the intent to murder ———; that is, if the unlawful attempt to violence to ——— had been accomplished, and ——— had died from the effects of the injury so inflicted, the accused would have been guilty of murder. In order to explain the last requirement it is necessary to tell you briefly what would constitute the crime of murder. We think, however, it might confuse rather than help you if we should undertake to define the different kinds of felonious homicide, and degrees of murder.[72]

You are instructed that, in order to show that a person assaulted another with intent to murder him, the state must prove that the assault was committed maliciously.[73]

This charge, you observe, embraces not only an assault, but also an intent to murder. In order to convict the accused as indicted you must be satisfied from the testimony beyond a reasonable doubt (1) that the alleged assault was committed by the accused; (2) that it was committed by him with the intent to murder ———, and that if ——— had died from the effects of the injuries inflicted the accused would be guilty of murder.[74]

You are instructed that, if you are satisfied that the assault was committed by the accused maliciously, that is, with an intent to murder, your verdict should be guilty in manner and form as indicted.[75]

[70] Allen v. State, 174 S. W. 1179, 117 Ark. 432.

[71] Hankins v. State, 145 S. W. 524, 103 Ark. 28.

[72] State v. Lichter, 102 A. 529, 7 Boyce, 119.

[73] State v. Lichter, 102 A. 529, 7 Boyce, 119.

[74] State v. Rothwell, 92 A. 859, 5 Boyce, 312.

[75] State v. Rothwell, 92 A. 859, 5 Boyce, 312.

You are instructed that, if you find that the prisoner not only committed the alleged assault, but committed it with intent to murder ——, and that, if death had ensued, the prisoner would have been guilty of the crime of murder in either the first or second degree, your verdict should be guilty in manner and form as indicted.[76]

§ 2899(4). Georgia

You are instructed that, in order for you to find the defendant guilty, there must have been a specific intent to commit the crime at the time of the act. Neither mere words and threats, nor mere preparations, to commit a crime, are sufficient to constitute an attempt. It is essential that there shall be some overt act which will apparently result in the crime, unless interrupted by circumstances independent of the doer's will.[77]

You are instructed that intent is a question of fact, and must be inferred from the circumstances of the case; and, before you would be authorized to find the defendant guilty, you must believe beyond a reasonable doubt that there was an intent to commit this crime. Mere preparation to commit a crime upon the happening of an event which may or may not occur, and which depends upon an act to be done or not done by the person acted upon, is not an attempt to commit the offense of assault with intent to murder.[78]

§ 2899(5). Illinois

You are instructed that an assault with intent to kill may be defined as an attempt made by one person upon the life of another under such circumstances that, if the attempt so made should result in the death of the person assaulted, the person committing the assault would be guilty of deliberate murder; and, to sustain a conviction under such a charge, the proof of such facts must be made to the exclusion of every reasonable doubt in the minds of the jury, otherwise you must acquit of that charge.[79]

The jury are instructed that if they believe from the evidence, beyond a reasonable doubt, that the defendant pointed the revolver at the said ——, as charged in the indictment, and discharged the same either with malice aforethought, or with a reckless and total disregard of human life, and that the use of the said weapon, as used by the said defendant, was likely to kill the said ——, then the said defendant is guilty of an assault with intent to commit murder.[80]

You are instructed that if you believe from the evidence, beyond

[76] State v. De Paolo, 84 A. 213, 3 Boyce, 176.

[77] Jackson v. State, 30 S. E. 251, 103 Ga. 417.

[78] Jackson v. State, 30 S. E. 251, 103 Ga. 417.

[79] Hammond v. People, 64 N. E. 980, 199 Ill. 173.

[80] Conn v. People, 6 N. E. 463, 116 Ill. 458.

a reasonable doubt, that the defendant fired the revolver either with malice prepense, or with a total disregard of human life, as charged in the indictment, then the law is for the people, and it does not make any difference whether the said ——— was struck or not. In either event the jury must find the defendant guilty.[81]

§ 2899(6). Indiana

The jury are instructed that, to convict the defendant of the felony charged, the state must prove beyond a reasonable doubt that, in this county, within ——— years prior to filing the information, the defendant committed an assault and battery upon the person of ———, and that at the time of the assault and battery, he intended to kill said ———.[82]

§ 2899(7). Kansas

The court instructs the jury that, as applied to the facts in this case, the essential difference between section ——— and section ——— is that section ——— requires the assault be made on purpose and of malice aforethought, with intent to kill, while section ——— defines a lower grade of offense, in which the element of malice aforethought is not included. And in order to sustain a conviction under the latter section it is only incumbent upon the state to prove that the assault was made under such circumstances as would have constituted manslaughter if death had ensued.[83]

§ 2899(8). Missouri

You are instructed that if, upon consideration of all the evidence in the case, and in the light of the court's instructions, you find and believe from the evidence that at the city of ——— and state of ———, on or about the ——— day of ———, or at any time within ——— years next before the filing of the information herein, the defendant made an assault upon the prosecuting witness, ———, with a revolver pistol loaded with gunpowder and leaden balls, and did point said revolver pistol so loaded as aforesaid (if you find it was so loaded) at a vital part of the body of the said ———, and within shooting distance, and that said revolver pistol was a deadly weapon likely as used to produce death or great bodily harm, and if he did so willfully, on purpose, and with malice aforethought, with the intent to kill him, the said ———, you will find the defendant guilty of an assault with intent to kill with malice aforethought, as charged in the second count, and assess his punishment at imprisonment in the penitentiary for a term not less than ——— nor more than ——— years. The terms "willfully" and "on purpose" mean intentionally, and not by ac-

[81] Conn v. People, 6 N. E. 463, 116 Ill. 458.

[82] Beller v. State, 90 Ind. 448.

[83] State v. McCullough, 152 P. 766, 96 Kan. 453.

cident. The term "malice aforethought," as used in the information and in these instructions, means that one intentionally does what he knows to be a wrongful act, and that he has thought of it and determined to do it for any length of time beforehand, however short.[84]

You are instructed that, if you believe and find from the evidence that the defendant, at the county of ——— and state of ———, within ——— years before the filing of the information in this case, with a certain revolving pistol, loaded with powder and leaden balls, feloniously and willfully made an assault on the witness, ———, with the intention of then and there killing him, the said ———, with said revolving pistol, you will find the defendant guilty of assault with intent to kill, and assess his punishment at imprisonment in the penitentiary for a term of not less than ——— nor more than ——— years, or imprisonment in the county jail for a term of not less than ——— months, nor more than ——— year, or by both a fine of not less than $——— and imprisonment in the county jail not less than ——— months, or by a fine of not less than $———. "Willfully," as used in the foregoing instructions, means intentionally; that is, not accidentally. "Feloniously" means wrongfully, and against the admonition of the law.[85]

The court instructs the jury that, if they find from the evidence that ———, at any time within ——— years prior to the finding of the indictment in this cause, at the county of ——— and state of ———, feloniously, on purpose, and willfully, made an assault on one ——— with a pistol loaded with gunpowder and leaden balls, with the intent him, the said ———, then and there to kill, they will find the defendant guilty, and assess his punishment at imprisonment in the penitentiary not exceeding ——— years, or in the county jail not less than ——— months, or by both a fine of not less than $——— and imprisonment in the county jail not less than ——— months, or by a fine of not less than $———.[86]

§ 2899(9). Texas

You are instructed that if the defendant did, on or about ———, in ——— county, state of ———, willfully, intentionally, and without lawful justification or excuse, and in a state or condition of mind sufficiently cool to contemplate the nature and character of the act and its probable consequences, shoot his wife with a pistol, then said act of shooting was in law done on "malice"; and if, in addition to being done on "malice," if you so find it was, it was done with the purpose and intent to kill said

[84] State v. Wilson, 103 S. W. 110, 126 Mo. App. 302.

[85] State v. Temple, 92 S. W. 494, 194 Mo. 228.

[86] State v. Clayton, 13 S. W. 819, 100 Mo. 516, 18 Am. St. Rep. 565.

wife, the act was assault with intent to murder; and if you so find, beyond a reasonable doubt, that the shooting was done on "malice," and that it was done with the intent to kill said wife, you will find the defendant guilty of assault with intent to murder.[87]

You are instructed that if from the evidence you are satisfied beyond a reasonable doubt that the defendant, on or about the time charged in the indictment, in the county of ——— and state of ———, with a deadly weapon and with malice aforethought, did assault the said ——— with the intent then and there to kill and murder him, and you are further satisfied by the evidence and beyond a reasonable doubt that said assault was not made under the immediate influence of sudden passion produced by an adequate cause as the same is hereinafter explained to you, and not in defense of himself against an unlawful attack producing a reasonable expectation or fear of death or serious bodily injury, then you will find defendant guilty of assault with intent to murder. and so say by your verdict.[88]

The jury are instructed that, if you are satisfied beyond a reasonable doubt that defendant, with a deadly weapon or instrument reasonably calculated and likely to produce death or serious bodily injury from the manner in which it was used, and with malice aforethought, did assault the said ——— with the specific intent then and there to kill and murder him by the means charged in the indictment, then you will find defendant guilty of assault with intent to murder.[89]

You are instructed that, if from the evidence you are satisfied beyond a reasonable doubt that defendant, at any time within ——— years before the filing of the indictment, to wit, the ——— day of ———, in the county of ——— and state of ———, with a deadly weapon, or instrument reasonably calculated and likely to produce death or serious bodily injury from the manner in which it was used, and with malice aforethought, did assault the said ———, with intent then and there to kill and murder her, then you will find defendant guilty of an assault with intent to murder.[90]

You are instructed that an assault becomes and is an assault with intent to murder when it is committed with a deadly weapon and with intent to kill the person assaulted, done unlawfully and intentionally and with malice aforethought, and under such cir-

[87] Williams v. State, 135 S. W. 552, 61 Tex. Cr. R. 589.

[88] Barr v. State, 120 S. W. 422, 56 Tex. Cr. R. 372.

[89] Magruder v. State, 84 S. W. 537, 47 Tex. Cr. R. 465.

[90] Lozano v. State (Cr. App.) 81 S. W. 37.

cumstances that, had death resulted therefrom to the person assaulted, the killing would have been murder.[91]

You are instructed that, if you are satisfied from the evidence, beyond a reasonable doubt, that the defendant, without legal justification or excuse, did, in the county of ——— and state of ———, on or about the ——— day of ———, and prior to the ——— day of ——— (the date of the filing of the indictment), cut ——— with a knife, and that the knife was a deadly weapon, as above defined, and that defendant so cut said ———, not through sudden impulse, passion or resentment, fear or terror, but did so with the intent then and there to kill him, and with malice aforethought, as above explained, then you will find him guilty of an assault with intent to murder.[92]

You are instructed that if the defendant, with a deadly weapon or instrument calculated and likely to produce death or serious bodily injury from the manner in which it was used, and with malice aforethought, did assault ———, then he would be guilty of an assault with intent to murder.[93]

§ 2900. Same—What constitutes assault

§ 2900(1). Oklahoma

The jury are instructed that in its broad legal sense any unlawful attempt, coupled with the present ability to commit a violent injury upon the person of another, is an assault.[94]

§ 2900(2). Oregon

The jury are instructed that an assault is an intentional attempt to do violence to the person of another, coupled with present ability to carry that intention into effect.[95]

§ 2901. Same—Necessity that defendant might have been prosecuted for murder had death ensued

You are instructed that in order to convict the prisoner of the crime of which he is charged, it is not only necessary for the state to prove and for you to find that the prisoner committed the assault, and that he committed it with intent him, the said ———, to murder, but it must also be shown and you must also find that, if ——— had died from the injuries inflicted or attempted, the prisoner would have been guilty of the crime of murder. Should you find the prisoner guilty of the assault, you must thereafter try this case, and the court must instruct you upon the law, as though

[91] Alvarez v. State (Cr. App.) 58 S. W. 1013.

[92] Williams v. State, 41 S. W. 626, 38 Tex. Cr. R. 144.

[93] Hardy v. State, 37 S. W. 434, 36 Tex. Cr. R. 400.

[94] Tyner v. United States, 103 P. 1057, 2 Okl. Cr. 689.

[95] State v. Selby, 144 P. 657, 73 Or. 378.

death had actually resulted from the assault and as though the prisoner were charged with murder.[96]

You are instructed that manslaughter is a homicide distinguished from murder in that it is the unlawful killing of another without malice, as in a sudden affray, in the heat of blood or in a transport of passion, without time for deliberation, reflection or for the passions to cool. If you find the prisoner committed an assault upon ———, without malice, and if ——— had died from the injuries received or attempted, the prisoner would have been guilty, not of murder, but of manslaughter, you cannot find him guilty of assault with intent to murder, but you may find him guilty of assault only.[97]

The court instructs the jury that, before you can find the prisoner at the bar guilty of assault with intent to commit murder, you must also find that, had ——— died from the effects of the injuries received, the prisoner would have been guilty of the crime of murder. It is therefore necessary for us to define to you briefly the crime of murder. But we do not think it necessary to define the different degrees of murder under our statute; for whether the crime, if it had been completed by the death of the victim, had been murder of the first or second degree, would be immaterial, as either would meet the requirements of our statute, and would justify a verdict of guilty of assault with intent to commit murder. The crime of murder is the unlawful killing of a human creature in being with malice aforethought, either express or implied. If the killing is proved, it must be also proved that it was done with malice, either express or implied, before the person charged can be convicted of murder. But such malice may be implied from any unlawful act, such as in itself denotes a wicked heart fatally bent on mischief, or a reckless disregard of human life. The deliberate selection and use of a deadly weapon has been held to be evidence of malice; and where malice exists, together with the killing, the crime of murder is complete.[98]

The court instructs the jury that, if you believe that the crime of which the prisoner would have been guilty, if the prosecuting witness had died from the injuries received, would be manslaughter, you could not find him guilty of the intent to commit murder, for in manslaughter there is no malice.[99]

[96] State v. De Paolo (Del.) 84 A. 213, 3 Boyce, 176.

[97] State v. De Paolo (Del.) 84 A. 213, 3 Boyce, 176.

[98] State v. Lee (Del.) 74 A. 4, 1 Boyce, 18.

[99] State v. Lee (Del.) 74 A. 4, 1 Boyce. 18.

§ 2902. Same—Intent to kill and murder as essential element of offense

§ 2902(1). Colorado

You are instructed that the intent to murder cannot be implied as matter of law. It must be proved as matter of fact, and its existence the jury must determine from all the facts and circumstances in evidence. The offense of assault with intent to murder cannot exist unless, if death had resulted, the completed offense would have been murder; and, even if the act of shooting would have otherwise been murder if death resulted, still, if the defendant did not intend to kill he is not guilty of assault with intent to murder.[1]

§ 2902(2). Georgia

You are instructed that, if you believe from the evidence that the defendant shot ———, as charged in the bill of indictment, and that in doing so he was not acting in self-defense, nor under other circumstances justifying him in shooting, yet, if you should believe that at the time of the shooting it was not the intention on the part of the defendant to take the life of the prosecutor, ——— then you would not be authorized to return a verdict finding the defendant guilty of an assault with intent to commit murder; but, if you should believe that to be the truth of the case, then you would be authorized to return a verdict finding the defendant guilty of the offense of shooting at another.[2]

§ 2902(3). New Mexico

You are instructed that, if you believe that the defendant and the prosecuting witness got into a fight, and the defendant cut the witness without intent to do so, then you will find the defendant not guilty.[3]

§ 2902(4). Texas

The jury are instructed that there can be no offense of assault with intent to murder without the specific intent to take life. So, although you should believe that the defendant discharged a gun into H.'s house, and thereby wounded B. H., yet unless you further believe beyond a reasonable doubt that the defendant intended to kill B. H., you cannot convict the defendant of assault with intent to murder. But upon this point you are instructed that if the defendant voluntarily discharged his gun into H.'s house with intent to kill any person who might be in the way of the shot, and

[1] Keady v. People, 74 P. 892, 32 Colo. 57, 66 L. R. A. 353.

[2] Frazier v. State, 38 S. E. 349, 112 Ga. 868.

[3] Territory v. Baca, 71 P. 460, 11 N. M. 559.

that he thereby wounded B. H., such intent upon the part of the defendant would in law include the intent to kill B. H.[4]

§ 2902(5). Washington

The jury are instructed that, the defendant in this case being charged with cutting and wounding one ——— with intent to kill and murder the said ———, before the defendant can be convicted as charged in the information, it is necessary that you be satisfied by the evidence beyond a reasonable doubt, not only that the defendant did cut and wound said ———, but that in so doing he intended to kill and murder said ———. This intent is as essential an element of the crime as is the act itself, and must be found by the jury as a matter of fact before a conviction can be had of the crime charged in the information.[5]

You are instructed that, if you find from the evidence that the defendant cut and wounded said ———, and intended to cut and wound him, but are not satisfied that in so doing he intended to kill the said ———, you cannot find the defendant guilty as charged in the information. An intent to wound is not sufficient.[6]

The jury are instructed that, as the defendant is not charged with murdering said ———, but simply shooting and wounding him with intent to murder, there can be no question of implied intent in the case. The intent necessary to sustain a conviction must be an express and positive intent to murder.[8]

The jury are instructed that, if you find from the evidence that the defendant shot and wounded said ———, and intended to shoot and wound said ———, but are not satisfied that in so doing he intended to kill said ———, you cannot find the defendant guilty as charged in the information. An intent to wound is not sufficient.[9]

§ 2903. Same—Intent to kill unless certain demands are complied with

The court instructs you as to the intent to kill alleged in the indictment that though you must find that there was a specific intent to kill the prosecuting witness, ———, still, if you believe from the evidence beyond a reasonable doubt that the intention of the defendants was only in the alternative, that is, if the defendants, or any of them, acting for and with the others, then and there pointed a revolver at the said ——— with the intention of compelling him to take off his overalls and quit work, or to kill him

[4] Darity v. State, 43 S. W. 982, 38 Tex. Cr. R. 546.

[5] State v. Romano, 83 P. 1, 41 Wash. 241. See State v. Dolan, 50 P. 472, 17 Wash. 499.

[6] State v. Romano, 83 P. 1, 41 Wash. 241.

[8] State v. Dolan, 50 P. 472, 17 Wash. 499.

[9] State v. Dolan, 50 P. 472, 17 Wash. 499.

if he did not, and if that specific intent was formed in the minds of the defendants and the shooting of the said ——— with intent to kill was only prevented by the happening of the alternative, that is, the compliance of the said ——— with the demand that he take off his overalls and quit work, then the requirement of the law as to the specific intent is met.[10]

§ 2904. Same—Malice, premeditation and deliberation as essential elements of offense

§ 2904(1). Colorado

You are instructed that malice and deliberation are essential elements of the crime of assault with intent to murder; and that malice is not necessarily inferred from the use of a deadly weapon, or the mere fact of shooting or killing a person; and, while it is true that malice may be implied, it is not an inference or presumption of law, but a question of fact to be found by the jury from the proof of facts and circumstances, sufficient to warrant such implication; and the evidence of such facts and circumstances surrounding and attending the shooting should be of such a character as to remove all reasonable doubt in your minds on the question of defendant's malice before you can find him guilty.[11]

§ 2904(2). Delaware

You are instructed that in this case the party assaulted did not die, and you are therefore not trying the accused for murder but for an assault with intent to murder. In order to convict the accused of this charge, you must be satisfied, not only that he intended to kill the person assaulted but that he did it with malice in his heart. It is not easy to define just what the law means by malice. You know in a general way what is meant when an act is said to have been done maliciously. It denotes a condition of the mind and heart at the time of the commission of the act. It may be sufficient for the purposes of this case to say, that when an unlawful act is done cruelly, spitefully or revengefully it is done maliciously. If an act is committed by a person with a heart fatally bent on mischief and in utter disregard of human life it is committed with malice. If the killing is done with a deadly weapon, it is presumed to have been done with malice, in the absence of evidence to the contrary. You perceive from what we have said, that before you can convict the accused in manner and form as he stands indicted you must be satisfied that he committed the assault with the intent to kill and that he did it maliciously.[12]

[10] People v. Connors, 97 N. E. 643, 253 Ill. 266, 39 L. R. A. (N. S.) 143, Ann. Cas. 1913A, 196.

[11] Keady v. People, 74 P. 892, 32 Colo. 57, 66 L. R. A. 353.

[12] State v. Lichter, 102 A. 529, 7 Boyce, 119; State v. Rothwell, 92 A. 859, 5 Boyce, 312.

§ 2904(3). Florida

The jury are instructed that, if the defendant unlawfully attempted to shoot ——— with a gun loaded as charged, with intent to kill him, but without a premeditated design to do so, but such attempted shooting was imminently dangerous to ———, and evinced upon the part of the defendant a depraved mind, regardless of human life, he would be guilty of an assault with intent to commit murder.[13]

§ 2905. Acting under influence of passion aroused by adequate provocation

The court charges the jury that if they believe from the evidence that there was sufficient provocation to excite sudden passion, and defendant acted under such passion, then the presumption is that passion disturbed the sway of reason and made him regardless of his act, and the jury should not find the defendant guilty of assault with intent to murder.[14]

§ 2906. Necessity of showing ability to kill

The court instructs the jury that if it would not be possible to kill a person with a shotgun at the distance which separated the assailant from the persons assaulted, as sworn to in this case, and the assailant knew of the impossibility, there cannot be a conviction of an assault with intent to murder.[15]

§ 2907. Sudden affray

I charge you that if you believe from the evidence beyond a reasonable doubt that the assault in this case, if one was committed, was in a sudden rencounter or affray and caused by the defendant by the use of deadly weapons which were concealed before the commencement of the fight, ———, their adversary, having no deadly weapon drawn, then the defendants would be guilty of an assault with intent to murder.[16]

§ 2908. Shooting at one and wounding another

The jury are instructed that, if you believe from the evidence beyond a reasonable doubt that, in this county and before the finding of this indictment namely, ———, the defendant willfully, feloniously, and with malice aforethought shot and wounded S. with a pistol with the intention of killing him, or shot at E. with the intention of killing said E., and wounded said S., but not mortally, then you will find defendant guilty, and fix his punishment at con-

[13] Jordan v. State, 39 So. 155, 50 Fla. 94.

[14] Miller v. State, 40 So. 342, 146 Ala. 686.

[15] Smith v. State, 62 So. 575, 8 Ala. App. 187.

[16] Scroggins v. State, 25 So. 180, 120 Ala. 369.

finement in the penitentiary for not less than ———, nor more than ———, years.[17]

§ 2909. Accidental shooting

You are instructed that if you believe from the evidence, or have a reasonable doubt, that defendant, at the time of the alleged assault, drew his pistol, not for the purpose of making an assault upon ———, but for the purpose of protecting himself from any real danger, or apparent danger as viewed from his standpoint at the time, and whilst endeavoring to make ——— and her companions talk to him relative to getting his wife back to him, and whilst so engaged, if you further believe, or have a reasonable doubt, that ——— took hold of the barrel of the pistol held by defendant, and in the scuffle that then ensued, if any, the pistol was accidentally discharged, and ——— was thereby wounded, in such event you will find the defendant not guilty.[18]

§ 2910. Self-defense

§ 2910(1). Florida

The jury are instructed that if you should find from the evidence beyond a reasonable doubt that the defendant and ——— had an altercation or difficulty, in which both or either of them drew their knives, or in which ——— drew his knife, and that the defendant left the scene and went away some distance, procured his gun, and came back, and met the said ——— and shot him from a premeditated design to kill him, and that at the time of the shooting ——— was not near enough to defendant to harm him, and was not really or apparently making any effort or demonstration toward him indicating an intention to then and there injure him, he, the defendant, would be guilty of an assault with intent to commit murder in the first degree.*

§ 2910(2). Illinois

You are instructed by the court that if you find from all the evidence in this case that ——— and the defendant, on the day in question, went out upon the street in ——— to engage in a fist fight; and if you further find from all the evidence in this case that at the time said parties went out upon the street the defendant had no thought or intention of shooting said ———; and if you further find that defendant placed the revolver in his buggy, and beyond his reach, in order that he might engage in a fist fight unarmed; and if you further find that afterwards he saw a number of other persons advancing upon him in a threatening manner, and

[17] Tall v. Commonwealth, 110 S. W. 425, 33 Ky. Law Rep. 541.

[18] Groszoehmigen v. State, 121 S. W. 1113, 57 Tex. Cr. R. 241.

* Odom v. State, 40 So. 182, 51 Fla. 91.

under such circumstances as led the defendant to entertain a reasonable fear and an honest belief that his life was in danger, or that he was in danger of receiving great bodily harm; and if you further find that at that instant he for the first time formed the intent to use said revolver, and that he instantly seized it, and instantly used it—then, in such case, he would not be guilty of an assault with intent to murder, and in such case you should find the defendant not guilty.[19]

You are instructed by the court that if you find from all the evidence in this case that ——— and the defendant on the day in question, went out upon the streets in ——— to engage in a fist fight; and if you further find from all the evidence in the case that, at the time said parties went out upon the street, the defendant had no thought or intention of shooting the said ———; and if you further find from all the evidence that, just before the parties met upon the street, the defendant saw a number of other persons advancing upon him in a threatening manner, and under such circumstances as led the defendant to entertain a reasonable fear and an honest belief that his life was in danger, or that he was in danger of receiving great bodily harm—then, and in such case, the defendant had a legal right to defend himself, and in such case he had the right to use such force and such weapons as may have seemed to him necessary in his self-defense.*

The jury are instructed that, if you believe from the evidence in this case that there is a reasonable doubt as to whether defendant, at the time of the shooting, was under reasonable apprehension that the prosecuting witness intended to inflict upon him serious bodily injury, and that he fired the shots in self-defense, then the jury must acquit defendant.[20]

§ 2910(3). Indiana

The jury are instructed that in this case, if you believe from the evidence that, at the time of the alleged assault, ———, the person upon whom it is alleged that the assault was committed, was advancing towards the accused with a closed umbrella in his hand, in such a manner and under such circumstances that the accused honestly believed, and reasonably had a right to believe, that he was being violently assaulted with a dangerous and deadly weapon, and that he was in danger of receiving great bodily harm at the hands of his assailant, then his right of self-defense intervened, notwithstanding the fact that it afterwards developed that the apprehended danger was not real.[21]

[19] Davids v. People, 61 N. E. 537, 192 Ill. 176.

* Davids v. People, 61 N. E. 537, 192 Ill. 176.

[20] Lawlor v. People, 74 Ill. 228.

[21] Enlow v. State, 57 N. E. 539, 154 Ind. 664.

§ 2910(4). Missouri

The jury are instructed that the prosecuting witness, ———, had no right to assault the defendant with a club merely because the defendant was using threatening and insulting language towards him, nor unless the conduct of the defendant at the time, considered in connection with what he said, was such that the said ——— had good reason to believe, and did believe, that it was necessary for him to strike the defendant in order to protect himself from an assault by the defendant then about to be made upon him.[22]

The jury are instructed that, if they shall find from the evidence that the prosecuting witness, ———, made the first assault without the right to do so, as explained in these instructions, and that the defendant had good reason to believe, and did believe, that the said ——— was about to do him some great bodily harm, then the defendant had the right to meet such assault by the use of such force and means as were reasonable and necessary to protect himself from such assault; and, if the jury shall believe from the evidence that the defendant acted in self-defense, as herein explained, they will find him not guilty.[23]

The court instructs the jury that although they may find from the evidence that defendant sought or voluntarily entered into a quarrel with the prosecuting witness, ———, yet, unless they shall further find from the evidence that he made an assault upon him, then the said ——— had no legal right to assault the defendant; and if the jury shall find from the evidence that said ——— did, without legal right, so make an assault upon the defendant, and was about to do the defendant great bodily harm, then the defendant had a right to repel said assault by force, and to use whatever force was necessary to prevent said ——— from doing him great bodily harm, although the weapon used was a deadly weapon, and if the jury shall so believe they will find the defendant not guilty.[24]

The court instructs the jury that, before they can acquit the defendant upon the ground of self-defense, you must believe and find from the evidence that the defendant had reasonable cause to apprehend that ——— was about to inflict upon him some great bodily harm, and that such danger was imminent and impending; and, unless you so believe, you will find the defendant guilty, and assess his punishment as provided in these instructions.[25]

§ 2910(5). New Mexico

You are instructed that, if you believe the prosecuting witness, ———, knocked the defendant down with his fist or a quirt or a

[22] State v. Higgerson, 57 S. W. 1014, 157 Mo. 395.

[23] State v. Higgerson, 57 S. W. 1014, 157 Mo. 395.

[24] State v. Higgerson, 57 S. W. 1014, 157 Mo. 395.

[25] State v. Clayton, 13 S. W. 819, 100 Mo. 516, 18 Am. St. Rep. 565.

pistol, and then commenced to beat the defendant on the head or face with a pistol, or to cut him in the face with a knife, and the defendant had no other means of defending himself than to use his knife, and that he believed and had reason to believe that the prosecuting witness was about to kill him, or to do him some great bodily harm, and he used his knife to protect himself, then you will find him not guilty.[26]

§ 2910(6). Oklahoma

The jury are instructed that if they believe from the evidence in this case that the said P. assaulted the said defendant without fault or provocation on the part of the said defendant, and struck him with his fist, and that some one cried out to the defendant to watch out, and that the said defendant, as a reasonable man, then and there had reasonable cause to apprehend on the part of the said P. a design to kill him, the said defendant, or to do him some great bodily injury, and that there was reasonable cause for the said defendant to apprehend immediate danger of said design being accomplished, and that for the purpose of averting such apprehended danger to himself, and not in a spirit of revenge, he cut the said P. with a knife, in good faith believing it necessary for him to so cut in order to protect himself from such apprehended injury, then, in that event, the act of said defendant was not felonious, but was justifiable, and it would be your duty to acquit this defendant.[27]

§ 2910(7). Oregon

In this case the defendant seeks to justify his acts in the affray under consideration by the plea that he acted in necessary self-defense. I instruct you that a person has a right to protect his life or his person from great bodily harm, and that he has a right to meet force with force in order to repel an attack upon him, and to use such force as appears reasonably necessary to protect his life or his person from bodily harm, and he may even go to the extent in repelling an attack upon him of using a dangerous weapon, and to the extent of taking his assailant's life, if the same is necessary, or apparently necessary, to save his own life, or his person from great bodily harm. The danger to himself in fact need not be real, but only apparent, if the assailed at the time honestly believed and had reason to believe that his life was in danger, or that he was in danger of great bodily harm.[28]

§ 2910(8). Texas

You are charged that, if you believe that the defendant committed an assault as charged, if any, as a means of defense, believ-

[26] Territory v. Baca, 71 P. 460, 11 N. M. 559.

[27] Dooling v. State, 106 P. 982, 3 Okl. Cr. 491.

[28] State v. Selby, 144 P. 657, 73 Or. 378.

ing at the time he did so (if he did so) that he was in danger of being robbed or of losing his life or of serious bodily injury at the hands of said ———, ———, or ———, or either of them, or if you have a reasonable doubt thereof, then you will acquit the defendant, and say by your verdict not guilty.[29]

You are charged that it matters not whether such danger, if any, did in fact exist; but it is only necessary that the defendant reasonably believed that such danger did in fact exist, and, if acting upon such reasonable belief, the defendant would be justifiable in using all necessary force to protect himself against such danger—whether the danger was either real or apparent.[30]

You are charged that, in passing upon the defendant's case, the jury should view all of the facts from the defendant's standpoint. Each juror should place himself as nearly as may be in the position of the defendant at the time of the assault, if any, and determine from all of the facts and circumstances and surroundings as they appeared to defendant at the time of the assault, if any, whether an apprehension or a fear of death or serious bodily harm was reasonable; and, if you so find, you should acquit the defendant and say by your verdict not guilty.[31]

The court instructs the jury that a reasonable apprehension of death or great bodily harm will excuse a party in using all necessary force to protect his life or person, and it is not necessary that there should be actual danger, provided he acted upon a reasonable apprehension of danger as it appeared to him from his standpoint at the time; and in such case the party acting under such real or apparent danger is in no event bound to retreat in order to avoid the necessity of assaulting his assailant. If from the evidence you believe the defendant, ——— inflicted injury upon said W., but further believe that at the time of so doing W. had made an attack on him which caused him to have a reasonable expectation or fear of death or serious bodily injury, and that, acting under such reasonable expectation or fear, the defendant stabbed the said W., then you should acquit him; and if the said W. was armed at the time he was assaulted and injured, and was making such attack on the defendant, and if the weapon used by W. and the manner of its use was such as were reasonably calculated to produce death or serious bodily harm, then the law presumes the said W. intended to inflict serious bodily injury upon the defendant.[32]

You are instructed that if you believe from the evidence that the defendant did, with a knife, cut the said ———, and you further believe from the evidence that before he did so the said ——— did

[29] Kelley v. State, 190 S. W. 169, 80 Tex. Cr. R. 257.

[30] Kelley v. State, 190 S. W. 169, 80 Tex. Cr. R. 257.

[31] Kelley v. State, 190 S. W. 169, 80 Tex. Cr. R. 257.

[32] Hogue v. State, 146 S. W. 905, 65 Tex. Cr. R. 539.

assault him, and that from the manner of such assault the defendant believed that he was in danger of death or serious bodily injury at the hands of the said ———, then in that case he had the right to defend himself, and cut the said ———, and he would not be required to retreat in order to avoid the necessity, or apparent necessity, of cutting the said ———, and if you so find, you will return a verdict of not guilty.[33]

The jury are instructed that, if you believe from the evidence that defendant went to the home of prosecuting witness, ———, at the instance and request of the said ———, or if the mother of defendant told defendant that the said ——— wanted him (defendant) to come down and see her as soon as he returned from ———, or if you should find and believe from the evidence that defendant went to the home of said ——— to see his children, or for any other lawful purpose, without invitation, and the said ——— made an unlawful and violent assault upon defendant with a pistol, and it reasonably appeared to defendant that said ——— was about to take his life or inflict serious bodily injury upon him, and defendant shot and wounded said ——— with a pistol in order to save his own life, or to prevent serious bodily injury to himself from such unlawful assault so made upon him, then you will find defendant not guilty. And in this connection you are further instructed that, if defendant once commenced to shoot in order to save his life or to prevent serious bodily injury to himself, then he would have the right to continue to shoot as long as there was an appearance of danger to himself from such threatened assault; and in determining whether or not the defendant was in danger from such an assault, you are instructed that it is not essential to the right of self-defense that the danger should in fact exist. The danger may be only apparent, and not real. If it reasonably appears from the circumstances of the case that danger existed, the person threatened with such apparent danger has the right to defend himself against it, and to the same extent that he would have were the danger real. And in determining whether there was reason to believe that danger did exist, the appearances must be viewed from the standpoint of defendant, who acted upon them, and from no other standpoint. If it reasonably appeared to defendant that the danger in fact existed, he had the right to defend against it to the same extent and under the same rules as if the danger had been real.[35]

§ 2911. Same—Provocation by defendant

§ 2911(1). Alabama

I charge you, gentlemen of the jury, that if the defendants approached ——— and asked him why he had seduced their sister

[33] Perry v. State, 133 S. W. 685, 61 Tex. Cr. R. 2.

[35] Hall v. State, 66 S. W. 783, 43 Tex. Cr. R. 479.

and that ——— replied that he had not done so, and that the defendants then said to him, "You need not deny it, for you know you are guilty," the defendants are not without fault in bringing on the difficulty and cannot invoke the doctrine of self-defense.[36]

§ 2911(2). Indiana

The jury are instructed that, if you shall believe from the evidence that the accused was not wholly free from fault at and immediately prior to the time of the alleged commission of the assault and battery complained of in the affidavit and information in this cause, and that he had pressed his endeavors to have conversation with ——— in an unreasonable manner, or to an unreasonable extent, or even that in the beginning he was the aggressor, in an attempted interview, yet if you shall believe from the evidence that he in good faith withdrew from the attempt to secure such interview with ———, and his actions clearly manifested such intention to withdraw from such attempt, and that thereupon the prosecuting witness, ———, on his part advanced towards the accused with a loaded pistol in his hand, and by his conduct gave the accused grounds for reasonable apprehension that he was in danger of losing his life or suffering great bodily harm, then the court instructs you that the prosecuting witness, ———, by his conduct became the aggressor, and thenceforward the accused, in the exercise of the right of self-defense, as above defined, had the right to act upon the appearances then and there presented to him by the conduct of said prosecuting witness in forming his opinion as to whether he was in danger of losing his life or of receivng great bodily harm, and as to the means which were reasonably necessary to be used in the defense of his life or person.[37]

§ 2911(3). Kentucky

The court instructs the jury that, if you believe from all the evidence beyond a reasonable doubt that the accused began the difficulty in which H. was cut, and caused said H. to reasonably believe that he was then in immediate danger of loss of life or great bodily harm at the hands of defendant, then defendant lost his right of self-defense, and it was then his duty to desist from the contest or difficulty, and in good faith abandon the same, before his right of self-defense could be restored to him.[38]

§ 2912. Same—Duty to retreat

§ 2912(1). Alabama

The jury are instructed that, if the defendant was free from fault in bringing on the difficulty, then he was under no duty to retreat,

[36] Scroggins v. State, 25 So. 180, 120 Ala. 369.

[37] Eby v. State, 74 N. E. 890, 165 Ind. 112.

[38] Thompson v. Commonwealth, 18 S. W. 1022, 13 Ky. Law Rep. 916.

unless you believe he could have retreated without increasing his danger, or with reasonable safety.[39]

§ 2912(2). Indiana

The jury are instructed that, if you find from the evidence that, while the defendant was peaceably attending the last ——— election, he was violently, without fault on his part, assaulted by B. and others, he had the right, without retreating to repel force by force, and if, in the exercise of his right of self-defense, his principal assailant was injured, he was justifiable.[40]

§ 2912(3). Texas

The jury are instructed that, if you believe from the evidence that the defendant did, with a knife, cut the said ———, and you further believe from the evidence that before he did so the said ——— did assault him, and that from the manner of such assault the defendant believed that he was in danger of death or serious bodily injury at the hands of the said ———, then in that case he had the right to defend himself, and cut the said ———, and he would not be required to retreat in order to avoid the necessity, or apparent necessity, of cutting the said ———, and if you so find, you will return a verdict of not guilty.[41]

§ 2913. Renewal of combat by defendant after attack by prosecuting witness has ceased

The jury are instructed that, even if you believe from the evidence that ——— made the first attack upon the defendant, and assaulted the defendant with a knife, still, if you further believe from the evidence that the said ——— afterwards ceased to attack the defendant, and, after the defendant and ——— were separated, the defendant again attacked ——— at a time when the said ——— was not making any attack upon the defendant, then the defense of necessary self-defense is not established in law.[42]

§ 2914. Defending against assault made by prosecuting witness to prevent defendant from seeing his child

You are instructed that, if you find from the evidence that defendant was married to the sister of complaining witness, J. C., and that defendant had a child by said wife, then you are instructed that during the conjugal relations between defendant and his said wife, before a decree of divorce has been granted, and before a court of competent jurisdiction has passed upon the question of the custody of the children, the husband has as much legal right to the care, custody, and control of them as his wife. The wife and

[39] Deal v. State, 34 So. 23, 136 Ala. 52.

[40] Presser v. State, 77 Ind. 274.

[41] Perry v. State, 133 S. W. 685, 61 Tex. Cr. R. 2.

[42] People v. Mullen, 179 Ill. App. 202.

her relatives, or her relatives, have no legal right to prevent the husband from seeing the children. Their legal rights are coequal. Defendant had the right to peaceably enter the premises of the complaining witness, J. C., if you believe from the evidence that defendant's child was on said premises. He had the right in a peaceable manner to seek admission there for the purpose of carrying out the lawful purpose of seeing his child. If you believe that this was all that he did, and his brother-in-law J. C. assaulted him with a pistol, his right of self-defense would be perfect. And you are further instructed that defendant could not be deprived of his legal right to see his child, whether he had been invited by his wife to come to the place where the child was, or not, or whether he had been forbidden by his father-in-law to come to said place, or not.[43]

§ 2915. Insulting words as justification

You are instructed that it is well settled that opprobrious words, no matter how grievous or insulting, will not alone justify an assault with a deadly weapon used in a manner calculated to cause death.[44]

§ 2916. Fight by mutual consent

§ 2916(1). Indiana

The jury are instructed that, if the defendant, at the time and place charged, voluntarily and unlawfully entered into a mutual combat with B., armed with a dangerous and deadly weapon, and B. assaulted him with his fists, and upon the first assault offered him by said B. he struck B. with such weapon, without withdrawing, or attempting to withdraw, from the contest, the striking with such weapon would not be justified.[45]

§ 2916(2). Texas

You are instructed that if you believe from the testimony that the defendant and ——— agreed to leave the office of the said ——— and go out of doors and fight, and if you further believe that said fight was directly caused by, and was had in, the carrying out of an agreement to fight, then the defendant cannot resort to the law of self-defense as a defense, and you will find him guilty of some offense; the degree of which you will measure by other sections of this charge.[46]

§ 2917. Defending against intrusion into room or resisting arrest

In this connection, you are charged that, though you find and believe from the evidence that the defendant was guilty of a fel-

[43] Hjeronymus v. State, 79 S. W. 313, 46 Tex. Cr. R. 157.

[44] Mitchell v. State, 34 S. E. 576, 110 Ga. 272.

[45] Presser v. State, 77 Ind. 274.

[46] Brewer v. State, 153 S. W. 622, 68 Tex. Cr. R. 483.

ony, yet if he was not at the time about to escape, and there was time for the officers to procure a warrant for his arrest, then you are instructed that said arrest of defendant without a warrant (if they did so arrest him) was illegal, and that defendant had a right to resist same, using such force as was necessary, going even to the extent of killing said ——— and ——— or either of them, if such killing was necessary to prevent said illegal arrest; and if you find and believe under this charge that said arrest was illegal as herein defined, and that the injury inflicted upon the said ———, if any, was made while resisting arrest, or if you have a reasonable doubt thereof, then you will acquit the defendant and say by your verdict not guilty.[47]

You are charged that if you find and believe from the evidence, or have a reasonable doubt thereof, that the arrest of the defendant by said Officers ———, ———, and ——— was an illegal arrest, or if you further find and believe from the evidence that, viewed from the standpoint of the defendant in the light of all the surroundings and circumstances of the case, the defendant reasonably believed such arrest was an unlawful or an illegal arrest, or if you find that the defendant reasonably believed that said ———, ———, and ——— were about to make an unlawful intrusion into defendant's room, then, if you so believe or have a reasonable doubt thereof, you are instructed that the defendant had the right to use all necessary force in overcoming such, either real or apparent, illegal arrest or unlawful intrusion, if any, or such arrest as the defendant reasonably believed to be unlawful or illegal.[48]

You are hereby instructed at the request of the defendant that though you may find and believe from the evidence that the officers, ———, ———, and ———, had information from a credible person that the defendant herein had committed a felony, and though you believe said officers had a lawful right at said time to arrest the defendant, yet if you find and believe from the evidence that the power to arrest was, by them, or either of them, exercised in such a wanton and menacing manner as to threaten the defendant with loss of life or some serious bodily harm, then you are instructed said defendant had the right to defend himself from such danger or apparent danger as it reasonably appeared to him viewed from his standpoint. And a party so unlawfully attacked is not bound to retreat in order to avoid the necessity of killing his assailant. If you believe that the defendant committed the assault as a means of defense against the power to arrest exercised in a wanton and menacing manner, believing at the time he did so (if he did do so) that he was in danger of losing his life or of se-

[47] Kelley v. State, 190 S. W. 169, 80 Tex. Cr. R. 257.

[48] Kelley v. State, 190 S. W. 169, 80 Tex. Cr. R. 257.

rious bodily injury at the hands of the said ———, ———, and ———, or either of them, or if you have a reasonable doubt thereof, then you will acquit the defendant and say by your verdict not guilty.[49]

You are instructed that if you believe from the evidence, or have a reasonable doubt thereof, that the said ———, ———, or ———, or either or all of them, just previous to the time of the assault, if any, alleged in the indictment, attempted to force an entrance into the room occupied by the defendant; and if you further believe from the evidence, or have a reasonable doubt thereof, that at the time of attempting to force such entrance, if they did attempt to force an entrance, the said ———, ———, or ———, or either or all of them, had a pistol or pistols in their hands; and you further believe from the evidence, or have a reasonable doubt thereof, that the defendant saw said pistol or pistols, and that viewed from the defendant's standpoint and viewed in the light of all the surroundings, facts, and circumstances, the defendant reasonably believed that he was about to be unlawfully attacked and was about to receive death or serious bodily injury at the hands of the said ———, ———, or ———, or either or all of said men, or that the defendant reasonably believed that said ———, ———, or ———, or either or all of them, were attempting to enter said room for the purpose of burglary or the commission of a felony, or were attempting to force an unlawful intrusion into the room of defendant, or were attempting to make an unlawful or illegal arrest of the defendant, and that he (the defendant), acting under a reasonable apprehension of such danger, unlawful intrusion, or unlawful arrest, if any, at the time he did shoot said ———, if the defendant so shot him —then, if you so find, or have a reasonable doubt thereof, you are charged that such assault, if any, committed by the defendant upon the said ———, if he did so commit it, would be justifiable upon the grounds of his own necessary self-defense or in defense of his personal property or in defense of his domicile, and if you so believe, or have a reasonable doubt concerning such fact, you will acquit the defendant and say by your verdict not guilty.[50]

§ 2918. Resistance by defendant of arrest in ignorance of official capacity of person making arrest

You are charged that if you find and believe from the evidence, or have a reasonable doubt thereof, that at the time the officers, ———, ———, and ——— effected the arrest of the defendant at the rooming house on the corner of ——— and ——— streets in the city of ———, the defendant did not know and did not have

[49] Kelley v. State, 190 S. W. 169, 80 Tex. Cr. R. 257.

[50] Kelley v. State, 190 S. W. 169, 80 Tex. Cr. R. 257.

reasonable ground to believe that said ———, ———, and ——— were officers attempting to effect the arrest of the defendant at said time and place; and you further find and believe from the evidence, or have a reasonable doubt thereof, that the acts and conduct of said ———, ———, and ———, or their acts coupled with their words, at said time and place reasonably created in the mind of the defendant a belief that the said ———, ———, and ———, were burglars or robbers attempting to force an entrance to his room for the purpose of committing the offense of theft or any other felony, or that such acts or words, or acts coupled with the words of the said ———, ———, and ———, or either or all of them, if any, created in the mind of the defendant a reasonable belief that he was about to receive an unlawful attack from the said ———, ———, and ———, which placed the defendant in danger of death or serious bodily injury—then, if you so find, you are instructed that the defendant had the right to use all necessary force to repel such intrusion into his room by said ———, ———, and ———, or either or all of them, even going to the extent of taking the life of either or all of said men, and it matters not whether such danger be real or apparent, if it reasonably appeared to the defendant that such danger did in fact exist.[51]

§ 2919. Wounding one while defending against assault by another

The court instructs the jury if they believe from the evidence that at the time the defendant shot and wounded J. S., that defendant was in immediate danger of death or great bodily harm then about to be inflicted on him, or which reasonably appeared to the defendant about to be inflicted on him by ———, then the defendant had the right to use such force as reasonably appeared to him to be necessary to protect himself from death or great bodily harm at the hands of said ———, and if the jury believe from the evidence that at a time when defendant was in immediate danger of death or great bodily harm then about to be inflicted on him, or which reasonably appeared to the defendant about to be inflicted on him by ———, he (defendant) shot at said ——— and missed him and accidentally and unintentionally shot and wounded J. S., then the jury will find the defendant not guilty upon the grounds of self-defense and apparent necessity; but this instruction is subject to this modification: That if the jury believe from the evidence beyond a reasonable doubt that the defendant sought and began the difficulty in which said J. S. was shot and wounded by assaulting ——— with a deadly weapon when it did not reasonably appear to him to be necessary to protect himself from immediate danger of death or great bodily harm then about to be in-

[51] Kelley v. State, 190 S. W. 169, 80 Tex. Cr. R. 257.

flicted on him, or which reasonably appeared to defendant about to be inflicted on him by said ———, then in that event the jury cannot acquit the defendant upon the grounds of self-defense and apparent necessity.[52]

§ 2920. Shooting to alarm

See, also, ante, § 2838.

You are instructed that, if you find from the evidence that defendant did shoot off his pistol in the air at the time and place as charged, but that he did so for the purpose of causing the crowd to scatter, so as to enable him to get his wife out of the wagon driven by ———, or if you have a reasonable doubt thereof, you will find the defendant not guilty.[53]

§ 2921. Conviction of included offense

§ 2921(1). Kansas

You are instructed that, if the defendant assaulted, beat, and wounded ——— with a rock, as charged in the information, and thereby endangered his life, and without a design to effect the death of ———, then such facts would have constituted the offense of manslaughter in the fourth degree, had the death of the said ——— resulted therefrom.[54]

§ 2921(2). Missouri

The court instructs the jury that even though the defendant did unlawfully and feloniously assault the prosecuting witness, and cut and stab him with a knife with intent to kill him or do him some great bodily harm, they might find him guilty of an assault with intent to kill him without malice aforethought.[55]

§ 2922. Conviction of aggravated assault

The jury are instructed that, if you believe from the evidence, beyond a reasonable doubt, that the defendant did unlawfully commit an assault upon the said ———, but you have a reasonable doubt as to whether such assault was an assault with intent to murder, or an aggravated assault, then you must give the defendant the benefit of the doubt, and in such case, if you find him guilty, you cannot find him guilty of a higher grade than aggravated assault.[56]

The jury are instructed that, if you should believe from the evidence that the defendant intentionally fired his gun into H.'s house, and wounded B. H., in such manner as to constitute an unlawful

[52] Williams v. Commonwealth, 186 S. W. 881, 170 Ky. 848.

[53] Harris v. State (Tex. Cr. App.) 47 S. W. 643.

[54] State v. Ireland, 83 P. 1036, 72 Kan. 265.

[55] State v. Harris, 108 S. W. 28, 209 Mo. 423.

[56] Perry v. State, 133 S. W. 685, 61 Tex. Cr. R. 2.

assault, as hereinbefore defined and explained, and that said means as used by him was a deadly weapon, and if you do not believe beyond a reasonable doubt that he had the specific intent to kill, such as to constitute assault with intent to murder, as the matter has hereinbefore been explained, then you will find the defendant guilty of an aggravated assault, and assess his punishment.[57]

§ 2923. Conviction of common assault

§ 2923(1). Delaware

You are instructed that, if you are not satisfied from the evidence that the accused committed an assault upon the prosecuting witness, your verdict should be not guilty. If you believe he did commit the assault but are not satisfied that it was committed with an intent to murder, your verdict should be guilty of an assault only.[58]

§ 2923(2). Missouri

You are instructed that, if you find from the evidence that such assault was made by defendant, but that he had no intention to kill or do great bodily harm, then you will find him guilty of common assault, and assess his punishment at a fine not to exceed $———, or by imprisonment in the city jail not exceeding ——— months, or by both such fine and imprisonment.[59]

You are instructed that if, upon consideration of all the evidence in the case, and in the light of the court's instructions, you find and believe from the evidence that at the city of ——— and state of ———, on or about the ——— day of ———, or at any time within ——— years next, before the filing of the information herein, the defendant made an assault upon the prosecuting witness with a revolver pistol loaded with gunpowder and leaden balls, and did point said revolver pistol so loaded as aforesaid (if you find it was so loaded) at a vital part of the body of the said prosecuting witness, and within shooting distance, and that said revolver pistol was a deadly weapon likely as used to produce death or great bodily harm, and if you find from the evidence that, although such assault was made by defendant, he had no intention to kill or do great bodily harm, then you will find him guilty of common assault, and assess his punishment at a fine not to exceed $———, or by imprisonment in the city jail not exceeding ——— months, or by both such fine and imprisonment.[60]

§ 2923(3). Texas

The court instructs the jury that if you find from the evidence that ——— struck the defendant on the head, and that the force

[57] Darity v. State, 43 S. W. 982, 38 Tex. Cr. R. 546.

[58] State v. Rothwell, 92 A. 859, 5 Boyce, 312.

[59] State v. Wilson, 103 S. W. 110, 126 Mo. App. 302.

[60] State v. Wilson, 103 S. W. 110, 126 Mo. App. 302.

of the blow was such as to addle the mind of the defendant so that the defendant did not know what he was doing, and that, while in such condition of mind, the defendant cut the said ———, and that the defendant did not intend to cut the said ———, you cannot convict the defendant of either an assault with intent to murder nor of an aggravated assault; but, as to whether he is guilty of a simple assault or not, you will determine under other sections of this charge.[61]

The court instructs the jury that, if you believe from the evidence that the defendant and ——— agreed to fight, and that said fight occurred in the carrying out of said agreement to fight, and that the defendant intended to fight with his fists, and did strike the said ——— with his fists, but that afterwards the said ——— struck the defendant a blow which addled him, and that on account thereof the defendant's mind was so affected that he did not know what he was doing, and that he cut the said ——— without any purpose to do so, or without knowing that he was doing so, then the defendant would only be guilty of a simple assault.[62]

H. Justifiable or Excusable Homicide

1. *In General*

§ 2924. What constitutes

§ 2924(1). Oklahoma

You are instructed that in this case the defendant A., as his plea and for his defense, says that homicide was justifiable, and that in taking the life of the deceased he was acting in the defense of his brother. The defendant J., for his defense, claims that the act of A. was justified, and that he, J., took no part in the transaction, and did not engage in the difficulty in any way.[63]

You are instructed that homicide is justifiable when committed by any person in resisting any attempt to murder such person or to commit any felony upon him, or upon or in any dwelling house in which such person is; and it is also justifiable when committed in the lawful defense of such person, or wife, parent, child, master, mistress, or servant, brother or sister when there is reasonable grounds to apprehend a design to commit a felony, or to do some great personal injury and imminent danger of such design being accomplished.[64]

§ 2924(2). South Carolina

The court instructs the jury that justifiable homicide takes place when it is the duty of a man to take the life of another. When-

[61] Brewer v. State, 153 S. W. 622, 68 Tex. Cr. R. 483.

[62] Brewer v. State, 153 S. W. 622, 68 Tex. Cr. R. 483.

[63] McDaniel v. State, 127 P. 358, 8 Okl. Cr. 209.

[64] McDaniel v. State, 127 P. 358, 8 Okl. Cr. 209.

ever that happens, of course there is not a crime committed. Hence he goes away justified, because he has not only done no wrong, but he has actually done a duty, when he took the life of the party. When the sheriff, in obedience to the commands of a court of competent jurisdiction, executes the sentence of the court, and takes the life of a man condemned to death, the sheriff does no wrong, but he does his duty, and therefore is justified. And justifiable homicide occurs also when a man takes the life of another to prevent a known felony from being committed by him.[65]

You are instructed that excusable homicide occurs where the person doing the killing, though not justifiable, is excusable in the eyes of the law, in obedience to the instincts of our nature and the weakness and infirmities of human nature; as where a man engaged in a lawful business, without any negligence or fault in any way, happens accidentally, without any intention or fault, to kill a man; in that case he is excused. It is not justifiable, for it is not his duty to take life, but it is excusable homicide, and he goes acquitted of any intended homicide. Another case of excusable homicide is homicide in self-defense. It occurs when a man who has no other probable means of saving his life, or of defending his person from enormous bodily harm from one who combats against him, upon a sudden quarrel, kills the person assaulting him under necessity. Not only is a man entitled to the benefit of the law of self-defense when he is actually in danger of his life, but when the circumstances are such as to justify a man of ordinary reason and firmness in the belief that his life is in jeopardy, and you consider the circumstances to be such as to justify that belief, then he is equally entitled to the law of self-defense, because a man here is judged by his motives, and, if he honestly believes that he is obliged to take life in self-defense, and the circumstances are such as to justify that belief, then he is entitled to the law of self-defense. Of course, in excusable homicide, as in justifiable homicide, the verdict of the jury must be "not guilty" wherever they find him to be justified in the act. It is rested in the books upon the ground of necessity—self-defense is—that is to say, unless a man can show you that there was a necessity, or that the circumstances justified his belief that it was necessary to take life in order to save himself from death or serious bodily harm, he is not entitled to the plea of self-defense. It rests upon necessity. And it is said that when two parties are engaged in a sudden quarrel, and one is assaulted in such a manner as to endanger his life or person, if he can escape, he ought to escape. It is his duty, under the law, as used to

[65] State v. Bodie, 11 S. E. 624, 33 S. C. 117.

be said "to retreat to the wall," the meaning of which is to retreat unless there is more danger in retreating than in standing still.[66]

§ 2924(3). Virginia

The court instructs the jury that justifiable homicide is the killing of a human being in the necessary, or apparently necessary, defense of one's self or family from great bodily harm, apparently attempted to be committed by force or in defense of home, property, or person against one who apparently endeavors by violence or surprise to commit a felony on either.[67]

2. *Accidental Homicide or Homicide by Misadventure*

§ 2925. Nonliability for accidental killing

§ 2925(1). Alabama

The court charges the jury that if the shot that killed deceased was accidentally fired, then you cannot convict defendant.[68]

The court charges the jury that unless they believe from the evidence beyond all reasonable doubt that the defendant fired the shot intentionally that killed deceased, then you should find defendant not guilty.[69]

§ 2925(2). Pennsylvania

The jury are instructed that if you find, under the law and the evidence, that the shooting of the deceased in the leg would have been justifiable, and if you further find that, by a pure accident and without any carelessness on the part of defendant, the shot produced death by entering a vital part of deceased, then defendant's action was equally justifiable.[70]

§ 2925(3). Texas

You are instructed that if you believe from the evidence, beyond a reasonable doubt, that defendant, about the time alleged in the indictment, did shoot and thereby kill the deceased, and you further believe from the evidence that such shooting was accidental, and not intentional, upon the part of defendant, then and in that event the homicide is excusable; and, if you so believe from the evidence, or if you have a reasonable doubt thereof, then you will find defendant not guilty.[71]

[66] State v. Bodie, 11 S. E. 624, 33 S. C. 117.

[67] Green v. Commonwealth, 94 S. E. 940, 122 Va. 862.

[68] Bynum v. State, 62 So. 983, 8 Ala. App. 79.

[69] Bynum v. State, 62 So. 983, 8 Ala. App. 79.

[70] Commonwealth v. Long, 17 Pa. Super. Ct. 641.

[71] Scott v. State, 81 S. W. 294, 46 Tex. Cr. R. 536, 108 Am. St. Rep. 1032.

§ 2925(4). West Virginia

The court instructs the jury that, if they believe from the evidence that ——— was accidentally killed, they should find the defendant not guilty.[72]

§ 2926. What constitutes

§ 2926(1). Delaware

You are instructed that homicide by misadventure is the accidental killing of another when the slayer is doing a lawful act, unaccompanied by any criminally careless or reckless conduct.[73]

§ 2926(2). Kentucky

You are instructed that, if you believe from the evidence that the accused had reasonable grounds to believe and did believe there was no danger in handling the pistol as he did, and that it was done without any purpose of harm on his part, and if you further believe from the evidence, or have a reasonable doubt on the subject, that the killing was accidental, and without carelessness, you should acquit the defendant.[74]

§ 2926(3). Oklahoma

Gentlemen of the jury, you are instructed that the defendant in this case admits that the deceased met his death from a gunshot wound received at the time and place alleged, but says that the shooting was accidental. You are therefore instructed that, if you believe from the evidence that the shooting was accidental, or if the evidence in the case tending to show that the same was accidental is sufficient to create in your minds a reasonable doubt as to whether said shooting was intentional, then in such case the homicide was excusable, and in either case it will be your duty to acquit the defendant.[75]

You are further instructed in this case that the defendant, having pleaded he is not guilty, admits the killing, but claims he is excusable therefor because he says the shooting that caused the death of the deceased was unintentional, accidental, and a mere misadventure, and happened under such circumstances as to render him excusable therefor under the law. It therefore becomes necessary that you be instructed on this phase of the case, and that you be informed under what circumstances homicide is excusable under the law of ———, and also that you be instructed as to manslaughter in both the first and second degrees, both of which are criminal degrees of homicide, and are included in and may be considered under an information charging murder.[76]

[72] State v Legg, 53 S. E. 545, 59 W. Va. 315, 3 L. R. A. (N. S.) 1152.

[73] State v. Long, 108 A. 36, 7 Boyce, 397.

[74] Blanton v. Commonwealth, 112 S. W. 594, 33 Ky. Law Rep. 1022.

[75] Palmer v. State (Cr. App.) 187 P. 502.

[76] Kent v. State, 126 P. 1040, 8 Okl. Cr. 188.

You are instructed that homicide is excusable when committed by accident and misfortune in lawfully correcting a child or servant, or in doing any other lawful act by lawful means, with usual and ordinary caution, and without any unlawful intent.[77]

§ 2926(4). Pennsylvania

You are instructed that, if you believe the testimony of the defendant that the gun was discharged in a tussle or scuffle between himself and G. in some unaccountable way, and that the shot was accidental and without intention, on his part, and that the shot accidentally and without intention on his part struck the body of S., from the effects of which he afterwards died, then you should acquit the defendant; that is, your verdict should be that of not guilty.[78]

§ 2926(5). Texas

You are instructed in this case that the defendant must be tried from his standpoint and is to be judged as the facts and circumstances reasonably appeared to him; and if you believe and find from the evidence that on the night of ———, and at the time Mrs. W. was shot and killed, viewed from the defendant's standpoint and as he saw it, the strange man, Mrs. W., and his wife were guilty of improper relations with each other, the defendant would have the right while on his premises to stop the strange man running across his yard and make inquiry as to his presence there, and if at the time of the shooting, viewed from defendant's standpoint, it reasonably appeared to him that the deceased was the strange man that he had recently seen in his house, and upon seeing him he called to him to stop and drew his pistol, and in doing so was exercising ordinary care, and that the same was unintentionally and accidentally discharged, and Mrs. W. was shot, and if you should find that the defendant had no intention to shoot and kill said stranger, and that he did not know that she was present, but thought that she was the strange man, then you will acquit the defendant, or, if you have a reasonable doubt as to this fact, you will acquit him and return a verdict of not guilty.[79]

§ 2926(6). Washington

I instruct you that homicide is excusable when committed by accident or misfortune in doing any lawful act by lawful means with ordinary caution and without any unlawful intent. An accident is an event happening without the occurrence of the will of the person by whose agency it was caused. It is an event that takes place without one's foresight or expectation.[80]

[77] Kent v. State, 126 P. 1040, 8 Okl. Cr. 188.

[78] Commonwealth v. Knox, 105 A. 634, 262 Pa. 428.

[79] Jacobs v. State, 213 S. W. 628, 85 Tex. Cr. R. 505.

[80] State v. Sowders, 186 P. 260, 109 Wash. 10.

§ 2927. Firing gun without intending to do so

§ 2927(1). Texas

I further charge you that if you believe from the evidence, or have a reasonable doubt, that the defendant fired the pistol accidentally—that is, without intending to do so—and thereby killed said ———, and if you believe that he did not intend to kill said ———, and that defendant was not guilty of negligence and carelessness in firing said pistol, then you should find the defendant not guilty.[81]

§ 2927(2). West Virginia

The court instructs the jury that if they believe from the evidence that ——— instructed his wife, ———, the defendant, to hand him his gun, and, in accordance with such request, she undertook to get the gun down from the rack to hand him, and it was accidentally discharged and killed said ———, then the defendant is not guilty as charged in the indictment.[82]

§ 2928. Gun fired during struggle for its possession

§ 2928(1). Mississippi

The jury are instructed that if, after reviewing all the evidence in the case, the jury entertains a reasonable doubt as to whether or not, at the time the pistol shot was fired, the defendant and the deceased were scuffling for the possession of the pistol, and that it was fired accidentally during such scuffle, and without intent to take life, then the jury must acquit.[83]

§ 2928(2). Missouri

The jury are instructed that, if you find from the evidence that the deceased and defendant were riding the same horse along the road, the defendant having a pistol in his hand, and that the deceased seized hold of the pistol in the hands of defendant, and attempted to take the pistol from defendant by force, and in the scuffle which ensued the pistol was accidentally discharged, and produced the death of deceased by accident, without the fault or culpable negligence of defendant, and without defendant commencing or bringing on the difficulty with deceased, then the jury will find defendant not guilty.[84]

§ 2928(3). New Mexico

You are instructed that if you believe from the evidence that such killing was the result of accident or misfortune during the struggle between the defendant and the deceased, in which the deceased was seeking to disarm defendant, and said rifle was ac-

[81] Biggerstaff v. State, 129 S. W. 840. 59 Tex. Cr. R. 575.

[82] State v. Legg, 53 S. E. 545, 59 W. Va. 315, 3 L. R. A. (N. S.) 1152.

[83] Johnson v. State, 30 So. 39, 79 Miss. 42.

[84] State v. Wisdom, 84 Mo. 177.

cidentally discharged, or if such evidence creates in your mind a reasonable doubt as to whether the defendant unlawfully, deliberately, and of his premeditated malice killed the deceased, or if from any other reason you are not satisfied beyond a reasonable doubt of defendant's guilt, you should find the defendant not guilty; but if all the evidence in the case leaves in your minds, after careful consideration of the same, an abiding conviction of defendant's guilt, then you should so find him. Your verdict in this case will either be that the defendant is guilty of murder in the first degree, or that he is not guilty; you being instructed that you are confined to one of these two forms of verdict.[85]

§ 2929. Accidental killing while attempting to compel deceased to leave defendant's premises

I instruct you that if you find from the evidence that the defendant at the time of the difficulty was the lessee of the house wherein the difficulty occurred, and was conducting it as a rooming and lodging house, and that the deceased had shortly theretofore at the said house assaulted the defendant and attempted to rape her, and at the time of the difficulty he made an indecent proposal to her to have sexual intercourse with him, or attempted to have sexual intercourse with her against her will, or by his conduct led her, as a reasonable woman, to believe that he then and there intended to force her to have sexual intercourse with him against her will and consent, that she had a perfect legal right to command him to leave her home and to demand of him that he leave at once. The defendant would not be compelled to shelter within her home the deceased if he had attempted to commit a felony upon her, and by his conduct led her as a reasonable person to believe that he intended to do so at the first opportunity that presented itself. I further instruct you that under such circumstances the defendant would not only have the right to go to the room of the deceased and demand of him that he leave her house, but that if the conduct of the deceased led her to apprehend, and she did as a reasonable woman apprehend, that he would at such time commit a felonious assault upon her, she had a perfect right to arm herself with a pistol or other deadly weapon to protect her life and person against such assault, and to take it with her when she went to his room. And defendant would have the right under such circumstances to exhibit said weapon for the purpose of preventing such apprehended assault. And if you find that the defendant did, under such circumstances, go to the room of the deceased for the purpose of demanding that he leave her house, and that she took the pistol with her to protect herself and her person from such apprehended assault,

[85] Sandoval v. Territory, 45 P. 1125, 8 N. M. 573.

and while so doing the weapon was accidentally and unintentionally discharged, whereby the deceased was killed, you must acquit the defendant. And in determining whether or not the weapon was intentionally discharged by the defendant you must take into consideration all the circumstances surrounding the difficulty and the circumstances that led up to the difficulty if such have been proven, and the condition of the defendant's mind at the time, if the same was brought about by the wrongful acts or conduct of deceased as aforesaid.[86]

§ 2930. Firing gun to alarm trespasser or supposed trespasser

§ 2930(1). Delaware

You are instructed that, if you believe from the testimony that defendant fired the shots solely for the purpose of frightening supposed trespassers, with no intention to do harm or injury, and in firing the shots used the same degree of care which a prudent man would have used under like circumstances, your verdict should be not guilty.[87]

§ 2930(2). Texas

You are further charged that no act done by accident is an offense except where there has been a degree of carelessness or negligence, which the law regards as criminal, and homicide is excusable when the death of a human being happens by accident or misfortune, though caused by the acts of another who is in the prosecution of a lawful object by lawful means; and, as heretofore instructed, you are charged that the defendant at the time of the alleged killing had the legal right, with such care and caution as a man of ordinary prudence would exercise under the same or similar circumstances, to fire off his gun for the purpose of frightening the deceased or alarming him to cause him to leave his premises, if he was hunting thereon, or was on there without the defendant's permission, and if you believe from the evidence that on the date of the killing, if the defendant, not knowing the deceased was in the thicket on his premises, shot in that direction for the purpose of alarming the witness ——— to make him leave said premises, or if you believe that the defendant knew the deceased was in said thicket, but fired off his gun to alarm him and make him leave said premises, using at the time such care and caution as a man of ordinary prudence would use under like circumstances, then you will acquit him.[88]

[86] People v. Williamson, 92 P. 313, 6 Cal. App. 336.

[87] State v. Naylor, 90 A. 880, 5 Boyce, 99.

[88] Vick v. State, 159 S. W. 50, 71 Tex. Cr. R. 50.

§ 2931. Accidentally killing one person while defending against another

See, also, ante, § 2919.

§ 2931(1). Kentucky

The court instructs the jury that, if they believe from the evidence that at the time the defendant shot and killed A., if he did shoot and kill him, the defendant was in immediate danger of death or great bodily harm then about to be inflicted on him, or which reasonably appeared to defendant about to be inflicted on him by S., then the defendant had the right to use such force as reasonably appeared to him to be necessary to protect himself from death or great bodily harm at the hands of said S., and if the jury believe from the evidence that, at a time when defendant was in immediate danger of death or great bodily harm then about to be inflicted on him, or which reasonably appeared to defendant about to be inflicted on him by S., he (defendant) shot at said S. and missed him, and accidentally and unintentionally shot and killed A., then the jury will find the defendant not guilty, upon the grounds of self-defense and apparent necessity; but this instruction is subject to this modification: That if the jury believe from the evidence beyond a reasonable doubt that the defendant began the difficulty in which said A. was killed by assaulting S. with a deadly weapon, when it did not reasonably appear to him to be necessary to protect himself from immediate danger of death or great bodily harm then about to be inflicted on him, or which reasonably appeared to defendant about to be inflicted on him, by said S., then and in that event the jury cannot acquit the defendant upon the grounds of self-defense and apparent necessity.[89]

§ 2931(2). Texas

You are instructed that when a person is acting in defense of himself, or in defense of another, under the rules herein given you, and while so acting, accidentally kills a person, not engaged in the difficulty, such defendant is guilty of no offense.[90]

You are instructed that if you find that, on the occasion under investigation, either B. or the defendant did kill the said O. by shooting him with a gun, but that when the said O. was so shot D. had shot at or apparently shot at either B. or the defendant, before any shot was fired by the defendant or B. (if either of them did fire a shot), you will acquit the defendant; or if you have a reasonable doubt whether the death of the said O. was caused in an effort of either B. or the defendant to defend himself or the other from an unlawful attack made, or apparently about to be made by D. with

[89] Turner v. Commonwealth, 89 S. W. 482, 28 Ky. Law Rep. 487.

[90] Hunter v. State, 129 S. W. 125, 59 Tex. Cr. R. 439.

a gun upon either B. or the defendant, you will acquit the defendant.[91]

You are instructed that, if you believe from the evidence that defendant went to the home of prosecuting witness, ———, at the instance and request of his wife, or if you should find or believe from the evidence that defendant went to the home of said ——— to see his (defendant's) child, or for any other lawful purpose, with or without invitation from any one, and the said ——— made an unlawful and violent assault upon defendant with a pistol, and it reasonably appeared to defendant that said ——— was about to take his life or inflict serious bodily injury upon him, and defendant shot at said ——— with a pistol in order to save his own life, or to prevent serious bodily injury to himself from such unlawful assault so made upon him, then you will find defendant not guilty, regardless of whether or not the shot or shots fired by defendant, if you believe he fired a shot or shots, struck or wounded ———. And in this connection you are further instructed that, if defendant once commenced to shoot in order to save his life, or to prevent serious bodily injury to himself, then he would have the right to continue to shoot as long as there was an appearance of danger to himself from such threatened assault; and, in determining whether or not the defendant was in danger from such an assault, you are instructed that it is not essential to the right of self-defense that the danger should in fact exist. The danger may be only apparent, and not real. If it reasonably appears from the circumstances of the case that danger existed, the person threatened with such apparent danger has the right to defend himself against it, and to the same extent that he would have, were the danger real. And in determining whether there was reason to believe that danger did exist, the appearances must be viewed from the standpoint of defendant, who acted upon them, and from no other standpoint. If it reasonably appeared to defendant that the danger in fact existed, he had the right to defend against it to the same extent and under the same rules as if the danger had been real.*

§ 2932. Killing with instrument not calculated to produce death

You are instructed that, where a homicide occurs under the influence of sudden passion, and by the use of means not in their nature calculated to produce death, the person killing is not deemed guilty of the homicide, unless it appears that there was an intention to kill, but the party from whose act the death resulted may be prosecuted for and convicted of any grade of assault and battery.[92]

[91] Hunter v. State, 129 S. W. 125, 59 Tex. Cr. R. 439.

* Hjeronymus v. State, 79 S. W. 313, 46 Tex. Cr. R. 157.

[92] Perrin v. State, 78 S. W. 930, 45 Tex. Cr. R. 560.

3. *Killing in Exercise of Authority or Duty*

§ 2933. Killing by officer in execution of legal process

§ 2933(1). Alabama

I charge you that the defendant was under no legal duty to yield to the solicitations or requests of the ladies in or about the home of ——— not to enter such home, if you believe from the evidence that at the time he had in his possession the warrant of arrest in evidence in this case, and was entering the home for the purpose of executing the warrant; but his duty required him to disregard such solicitations and requests, if any were made, and go forward and duly execute the warrant.[93]

§ 2933(2). Oklahoma

You are instructed that after a search warrant has been executed and the property and things therein described have been seized thereunder, its office has been performed and a lawful search cannot again be made thereunder.[94]

§ 2934. Killing by officer in attempt to arrest deceased

§ 2934(1). Alabama

I charge you that resistance to a legal arrest may consist in acts or demonstrations on the part of the party sought to be arrested, which import defiance and indicate an immediate purpose to use violence in resisting, and after such acts or demonstrations the officer may instantly employ such degree or force as is necessary to reduce the party to submission and accomplish the arrest, even to the taking of the party's life, if so necessary.[95]

§ 2934(2). Kentucky

You are instructed that it was the duty of the defendant F. to arrest ——— under the misdemeanor warrant, and that it was the duty of ——— to peaceably submit to arrest; and if you believe that defendant F. had in good faith summoned M., J., and N. to aid him in arresting ——— under the warrant, and that the defendants F. and M., while in good faith attempting to arrest ———, were met with resistance from him to such an extent as to put either of the defendants or J. or N. in danger of their lives or great bodily harm, or that the defendants believed, and had reasonable grounds to believe, that either of the defendants, or J., or N., were in danger of losing his life or suffering great bodily harm, then the defendants, or either of them, had the right to use such force as was necessary, or as reasonably appeared to them to be necessary, to over-

[93] Holland v. State, 50 So. 215, 162 Ala. 5.

[94] Duncan v. State, 144 P. 629, 11 Okl. Cr. 217.

[95] Holland v. State, 50 So. 215, 162 Ala. 5.

come such resistance, even to the taking of the life of said ———, and you should find the defendants not guilty.[96]

The jury are instructed that the defendant had reasonable grounds to believe that the deceased had committed a felony, and he had the right to arrest him therefor. He had no right to shoot deceased, unless in self-defense; but, if the deceased attacked him, he had the right to stand his ground and use such force as was necessary to arrest him. And if you shall believe from the evidence that at the time the defendant shot said ———, if he did so, he believed and had reasonable grounds to believe that he was then and there in danger of death or the infliction of some great bodily harm at the hands of said ———, and that it was necessary, or was believed by the defendant, in the exercise of a reasonable judgment, to be necessary, to shoot the deceased in order to avert that danger, real or to the defendant apparent, then you will acquit the defendant upon the ground of self-defense or apparent necessity.[97]

The court further instructs the jury that it is a public offense for any person while riding on a passenger train, to, in the hearing or presence of the passengers, and to their annoyance, use or utter obscene or profane language, or behave in a boisterous or riotous manner, and it is the duty of the conductor in charge of a train upon which any such offense is committed either to put the person so offending off the train, or to give notice of such offense to some peace officer at the first stopping place where any such peace officer may be, and it is the duty of such peace officer when so notified by such conductor to arrest such offender, and carry him to the most convenient magistrate of the county in which such arrest is made; and in making such arrest such peace officer has the right to use such force as is necessary therefor, even to the taking of the life of the offender, but not the right to use unnecessary violence, nor to shoot the offender, unless such offender resist such arrest, and such arrest cannot be otherwise made.[98]

You are instructed that a city marshal is a peace officer of the county in which the city is located of which he is marshal, and if the jury should believe from the evidence that B. was the conductor in charge of the train upon which the deceased was riding at the time that he was killed, and further believe from the evidence that said B. as such conductor, in ——— county, state of ———, while such conductor was in charge of said train and on said run, and before said killing was done, complained to and notified the defendant, as marshal of the city of ———, in said county, that the de-

[96] Newsom v. Commonwealth, 188 S. W. 387, 171 Ky. 333.

[97] Tolliver v. Commonwealth, 170 S. W. 515, 161 Ky. 81.

[98] Commonwealth v. Marcum, 122 S. W. 215, 135 Ky. 1, 24 L. R. A. (N. S.) 1194.

ceased had on his (B.'s) train, on said run, committed a public offense as defined in said instructon No. ———, and that, as such marshal, defendant in the discharge of his official duties in good faith attempted to arrest the deceased, and while so engaged the deceased, with the intent to prevent and with force resisted such arrest and assaulted the defendant, and there appeared to defendant, exercising a reasonable judgment at the time and under the circumstances, no other safe way to save his life or to protect himself from great bodily harm or to make such arrest than to shoot and kill the deceased, then in such event the jury will acquit the defendant upon the grounds of self-defense or apparent necessity.[99]

The jury are instructed that it was the duty of the peace officer to arrest the offender upon the verbal request or demand of the conductor, and that in making the arrest the peace officer was not required to examine into the guilt or innocence of the offender whom the conductor asked to have arrested, and it was the duty of the decedent to submit to a lawful arrest at the hands of the peace officer, whether or not he had done anything which justified the arrest.[1]

§ 2934(3). New Mexico

The court instructs the jury that, if the jury believe the defendant was a deputy sheriff, and attempted to arrest C. for an assault which he had reason to believe, and did believe, C. had just made on the witness ———, and that the deceased refused to submit to such arrest, and assaulted the defendant with a pistol, and that such assault was imminently perilous to the life of the defendant, or placed him in imminent peril of great bodily harm from the deceased, and that the defendant, in order to save his own life or save himself from great bodily harm, shot and killed the deceased, then you are instructed that such killing was justifiable and excusable, and you will in that event acquit the defendant. In this connection you are instructed that the defendant had the right to act on reasonable appearances of danger, and that the jury should judge of the appearance from his standpoint.[2]

§ 2934(4). Oklahoma

You are instructed, gentlemen of the jury, that if you find from the evidence that at the time and place stated in the indictment the defendant was a peace officer in the city of ———, in said county and state, and was at the time deputized to act as such in said city,

[99] Commonwealth v. Marcum, 122 S. W. 215, 135 Ky. 1, 24 L. R. A. (N. S.) 1194.

[1] Commonwealth v. Marcum, 122 S. W. 215, 135 Ky. 1, 24 L. R. A. (N. S.) 1194.

[2] Territory v. Kimmick, 106 P. 381, 15 N. M. 178.

then as such officer he had a right to command the peace and to arrest without warrant any person in the act of committing a breach of the peace in his presence; and, if you further find from the evidence that the deceased was in the act of committing a breach of the peace, and the defendant was in the act of arresting him or commanding the peace, and as such officer used any language indicative of such purpose, and that the deceased thereupon made a violent demonstration towards the defendant of such character as to raise in the mind of a reasonably prudent man and officer a belief that his own life was then in jeopardy by reason of the acts of the deceased, then such person or officer would thereupon be justified in using all the force necessary to overcome such threatened danger, even to the extent of taking life if such were to him apparently necessary, and it would be justifiable.[3]

§ 2934(5). South Carolina

You are instructed that something has been said about an officer. The law permits a peace officer in the actual discharge of his duties to carry a weapon concealed about his person. He is not, when in the active discharge of his duties, violating the law by carrying a concealed weapon. Now, there is another suggestion made that I ought to give you my views about, as to what the privileges of an officer of the law are. If an officer of the law has a warrant to serve and is required to make an arrest, and proceeds to make the arrest or serve the warrant in a proper way, that act would not make him the aggressor in any difficulty that immediately follows. That is my understanding of the law as to peace officers. If you are a peace officer and have a warrant to serve or an arrest to make—on me, for instance—when you undertake to make that arrest or serve that warrant, you would not be the aggressor in any difficulty that might ensue. You would be doing what you have to do in serving the warrant or making the arrest; if doing it properly, you would not be the aggressor.[4]

§ 2935. Same—Duty of officer to give notice of purpose to arrest

You are instructed that it was the duty of the defendant in attempting to arrest the deceased to inform him of his intention to arrest him and of the offense charged against him, and if the jury believe from the evidence beyond a reasonable doubt that the defendant failed to perform said duties, or either of them, and they further believe from the evidence beyond a reasonable doubt that the deceased did not know the defendant's purpose and the offense charged against him, then the deceased had the right under the law to use such force as was necessary or reasonably appeared to him

[3] Douglas v. Territory, 98 P. 1023, 1 Okl. Cr. 583.

[4] State v. Hardin, 103 S. E. 557, 114 S. C. 280.

to be necessary to protect him from danger or death or great bodily harm then about to be inflicted on him by the defendant.[5]

§ 2936. Same—Duty of officer not to use unnecessary force

The jury are instructed that in making such arrest, such peace officer has the right to use such force as is reasonably necessary therefor, if the arrest be forcibly resisted, even to the taking of the life of the offender, but he has not the right to use unnecessary force or violence, nor to shoot or otherwise injure the offender, unless such offender forcibly resists the arrest and the arrest cannot be otherwise made, or it appears to the officer in the exercise of a reasonable judgment, that it cannot be otherwise made.[6]

§ 2937. Killing by defendant while assisting in execution of legal process

The court instructs the jury that, even though you may believe an ill and unfriendly feeling existed between the defendant and ———, and even though you believe that the defendant knew that, if he went to the premises of ———, it would likely cause ——— to become angry and resist by force any demand made upon him for the delivery of the books, yet you are instructed that defendant, as a director of school district No. ———, had a right to go to the premises of ———, either alone or in connection with P., and, if P. called upon defendant to aid him in executing the papers which were then in his possession, it was defendant's duty to go to the aid or assistance of P., and he was authorized to meet force with force and to kill ——— if reasonably necessary or apparently necessary to protect his own life or the life of P.[7]

The court instructs the jury that under the evidence in this case the defendant was one of the legally elected and qualified school directors of school district No. ———, and as such was entitled to demand that ——— deliver to him as such director the books and papers belonging to said district, and the mere fact that he instituted a suit in replevin to obtain the possession of said papers and accompanied P. to ———'s place on the day before and on the day of the tragedy did not make him a wrongdoer or impair his right to defend himself.[8]

[5] Commonwealth v. Marcum, 122 S. W. 215, 135 Ky. 1, 24 L. R. A. (N. S.) 1194.

[6] Commonwealth v. Marcum, 122 S. W. 215, 135 Ky. 1, 24 L. R. A. (N. S.) 1194.

[7] Gibbons v. Territory, 115 P. 129, 5 Okl. Cr. 212.

[8] Gibbons v. Territory, 115 P. 129, 5 Okl. Cr. 212.

§ 2938. Asssault made by deceased while resisting arrest for breach of the peace

The court further instructs the jury that the defendant was a deputy sheriff of ——— county at the time he shot and killed ———, and as such had the right, and it was his duty, to preserve the public peace and to prevent any and all breaches of the public peace committed or about to be committed in his presence, and to arrest the offenders, if need be, in order to preserve the peace. If you believe from the evidence that the deceased, ———, was publicly drunk, and guilty of such boisterous conduct as was calculated to disturb the public peace, in defendant's presence, then it was the duty of defendant to use such means as might be necessary to prevent a continuation of such conduct. He had the right, and it was his duty, to go to the said ——— and use such force as was reasonably necessary to prevent the continuation of said conduct; and if said ——— refused to obey, and so conducted himself in the presence of defendant that defendant had reason to believe, and did believe, that said ——— was then and there about to kill him, or do him some great bodily harm, and defendant believed, and had reasonable grounds to believe, from the conduct of said ——— that to avoid such danger, either real or to him apparent, it was necessary to shoot said ———, you will find the defendant not guilty on the ground of self-defense and apparent necessity.[9]

§ 2939. Killing of escaping prisoner by officer

You are instructed that, if you find that the defendant had arrested D., and that the deceased appeared, and undertook by violence upon the defendant to effect the release of D. from such arrest, then it was defendant's duty to also arrest the said deceased, and it was said deceased's duty to submit to such arrest; and if the said deceased, by violence upon or against the defendant, resisted such arrest, and attempted to escape therefrom, the defendant had the right to use all the force and violence that to him, in good faith as an ordinarily reasonable man under all the surrounding circumstances and conditions seemed to him necessary to prevent the escape.[10]

§ 2940. Killing by officer of person attempting to rescue prisoner

§ 2940(1). Kentucky

The court instructs the jury that, if you believe from the evidence that M. was drunk and disorderly in the presence of defend-

[9] Keeton v. Commonwealth, 108 S. W. 315, 32 Ky. Law Rep. 1164.

[10] State v. Smith, 103 N. W. 944, 127 Iowa, 534, 70 L. R. A. 246, 109 Am. St. Rep. 402, 4 Ann. Cas. 758. In this case deceased had been arrested for attempting to aid another prisoner to escape, which, under the statute, was a felony.

ant, the latter, as deputy marshal of the town of ———, had the right to arrest him without a warrant; and if you further believe from the evidence that, after defendant had placed M. under arrest, the deceased attempted by force or violence to effect M.'s release from defendant's custody as an officer, the defendant had the right to use such force as was necessary, or reasonably appeared to him to be necessary, but no more, to overcome such force or violence on the part of the deceased in his efforts, if any, to effect the release of M.; and if, under these circumstances, he shot and killed the deceased, the killing was justifiable, and you will acquit the defendant if you believe from the evidence that the defendant could not, or it reasonably appeared to him that he could not, otherwise overcome such force or violence, if any, on the part of the deceased.[11]

§ 2940(2). North Carolina

The jury are instructed that, if you shall believe from the evidence that said D. was under lawful arrest and in the custody of the defendant, and that the deceased attempted to rescue the said D. from such custody, then the defendant, in resisting such attempt, would be protected in the use of such force as a jury would ordinarily consider excessive, if the defendant was acting in good faith and was free from malice.[12]

§ 2941. Killing by private citizen while attempting to arrest deceased

You are instructed that, if you find from the evidence in this case that said ——— was at the time in any manner disturbing the peace and quiet of the defendant, or his family, within the town of ———, then he was guilty of a violation of the provisions of said ordinance, and if said offense was committed or being committed in the presence of the defendant, then the defendant had the right under the law to arrest or cause the arrest of the said ———, and to turn him over to a peace officer of said town of ———. You are instructed, however, that in making such arrest, if he did make such arrest, or attempt to make such arrest, it was the duty of the defendant to in some manner give said ——— to understand that he was so placed under arrest, and that said ——— should submit to such arrest, and that it was the intention of the defendant to turn said ——— over to a peace officer of the town of ———. In making such arrest the defendant had no right to use any other means or any greater force than was reasonably necessary to accomplish that purpose, and in his efforts to make such arrest or to turn said ——— over to a peace officer of the

[11] Smith v. Commonwealth, 195 S. W. 811, 176 Ky. 466.

[12] State v. Rollins, 18 S. E. 394, 113 N. C. 722.

town of ———, in accomplishing that end alone, he had no right to make use of a deadly weapon in a deadly manner to accomplish such purpose; and so the defendant cannot justify the taking of the life of said ——— merely on the grounds that he, as a private citizen, had the right to arrest said ———, and was in the act of taking said ——— to a peace officer of the town of ——— for the purpose of turning him over to such peace officer, and this feature of the case is submitted to you only for the purpose of your determination of the fact as to whether, under all of the circumstances disclosed by the proof, the defendant was at the time justified in being armed with a deadly weapon, and in using same in a deadly manner. And so in the determination of this case you will bear in mind that, so far as the mere making of an arrest by the defendant as a private citizen of said ———, and in attempting to deliver him to a peace officer of said town of ——— is concerned, however, said ——— may have resisted such an arrest, if it went no further than mere resistance to such arrest or attempt to flee from said defendant to avoid an arrest, the defendant would not be justified in using a deadly weapon in a deadly manner; nor would he be justified in so using such deadly weapon in a deadly manner unless in doing so he was acting in necessary self-defense, as his right in relation thereto is more fully explained to you in subsequent instructions.[13]

4. *Killing in Self-Defense*

Self-defense as defense to civil action for intentional killing, see ante, § 2098.

§ 2942. General rule

§ 2942(1). United States

The jury are instructed that, before a person can avail himself of the defense that he used a weapon in defense of his own life, the jury must be satisfied from the testimony that the defense was necessary, that he did all he could consistently with his own safety to avoid the killing, and that it was necessary to protect his own life, or to protect himself from such serious bodily harm as would give him a reasonable apprehension that his life was in immediate danger. If he used the weapon, having no other means of resistance, and if he retreated as far as he could with safety to himself, the homicide would be excusable.[14]

§ 2942(2). Alabama

The jury are instructed that defendant had no right to take the life of ——— unless a necessity to take his life existed at the time he did take it (if you believe from the evidence beyond a rea-

[13] State v. Towne, 160 N. W. 10, 180 Iowa, 339.

[14] United States v. Lewis (C. C. Tex.) 111 Fed. 630.

sonable doubt that he fired the fatal shot), or unless there was apparent necessity to take the life of ———. The law requires that there must have been real danger; that he must have been in danger of suffering serious bodily harm or death, or the appearances of danger must have been such as to have created or produced in the mind of a reasonable man the honest belief that there was danger to his life, or that he was about to suffer death, or serious bodily harm.[15]

The court charges the jury that, to make out a case of justifiable self-defense, the evidence must show that the difficulty was not provoked or encouraged by defendant, that he was or appeared to be so menaced at the time as to create reasonable apprehension of danger to his life or of grievous bodily harm, and that there was no other reasonable hope of escape from such present impending peril.[16]

I charge you, that before a jury can acquit the defendant on the ground of self-defense, three essential elements must occur: (1) The defendant must be reasonably without fault in bringing on the difficulty, and must not be disregardful of the consequences in this respect of any wrongful words or act; (2) there must have existed at the time, either really or so apparently as to lead a reasonable mind to the belief that it actually existed, a present, impending, imperious necessity to shoot in order to save his own life, or to save himself from great bodily harm; and (3) there must have been no other reasonable mode of escape, by retreating, or by avoiding the combat with safety.[17]

You are instructed that, if the defendant shot under a bona fide belief that his life was in danger, and had had, under all the circumstances, reasonable cause to believe he was in imminent danger at the moment the shot was fired, it would be immaterial whether there was such actual danger or not.[18]

You are instructed that the essential elements of self-defense are: First. That the defendant was free from fault; that he must not say or do anything for the purpose of provoking the difficulty, nor be unmindful of the consequences in this respect of any wrongful word or act. Second. There must be a present impending peril to life, or danger of great bodily harm, either real or so apparent as to create a bona fide belief of an existing necessity. Third. There must be no convenient or reasonable mode of escape by retreat, or by declining the combat with safety.[19]

[15] Caldwell v. State, 84 So. 272, 203 Ala. 412.

[16] Watson v. State, 46 So. 232, 155 Ala. 9.

[17] Green v. State, 39 So. 362, 143 Ala. 2.

[18] Kennedy v. State, 37 So. 90, 140 Ala. 1.

[19] Sherrill v. State, 35 So. 129, 138 Ala. 3.

§ 2942(3). Arizona

You are instructed that, if you believe from the evidence that the defendant had reasonable ground to apprehend a design on the part of deceased to commit a felony, or to do some great bodily injury, and that there was imminent danger of such design being accomplished, and that for that purpose, in good faith, of defending himself from such design or such injury, the defendant shot and killed the deceased, then you are instructed that such killing under such circumstances was justifiable.[20]

§ 2942(4). Arkansas

The court instructs the jury that one has the right to fight in his necessary self-defense, and to oppose force with force, and to pursue such means as are actually, or to him apparently, necessary to resist or repel any actual or threatened assault.[21]

You are told that the defendant had the right to defend himself against an assault made upon him by the deceased, and to use such force as reasonably appeared to him at the time to be necessary to repel such assault, and if he struck the deceased, without fault or carelessness on his part, honestly believing at the time that deceased was about to cut him with a knife, and that it was necessary for him to strike deceased to prevent deceased from cutting him, you may acquit the defendant, although you may believe deceased was knocked from the wagon and run over as a result of such blow.[22]

§ 2942(5). California

The jury are instructed that if they believe that defendant killed ———, having reasonable grounds to believe that if he did not do so ——— would then and there do him some great bodily harm, then his act was not either murder or manslaughter, but justifiable self-defense.[23]

§ 2942(6). Delaware

You are instructed that if one is attacked, and from the character of such attack he had reasonable cause to believe, and did believe, that he was in imminent danger of death or great bodily harm, and he had no other reasonable means of avoiding or preventing death or great bodily harm, then the killing of the deceased would be a justifiable act of self-defense.[24]

You are instructed that in ascertaining whether the accused was in any, and in what, danger of injury at the hands of the deceased when he struck the mortal blow, and, if in such danger, whether

[20] Morgan v. Territory, 64 P. 421, 7 Ariz. 224.

[21] Lee v. State, 172 S. W. 1025, 116 Ark. 588.

[22] Gilmore v. State, 122 S. W. 493, 92 Ark. 205.

[23] People v. Grimes, 64 P. 101, 132 Cal. 30.

[24] State v. Cephus, 67 A. 150, 6 Pennewill, 160.

he took the proper precautions to avoid such danger, the jury should consider the facts and circumstances of the case as disclosed by the witnesses.[25]

You are instructed that if the deceased first attacked the accused, even though the attack was of such a character as to create in the mind of the accused a reasonable belief that he was in danger of death or great bodily harm, it was his duty to retreat, if he could safely do so, or to use such other reasonable means as were within his power to avoid killing his assailant. No one may take the life of another, even in self-defense, unless there is no other available means of escape from death or great bodily harm.[26]

§ 2942(7). Idaho

You are instructed that the right of self-defense is expressly recognized by our statute, and the conditions under which it may be asserted are clearly defined. These are that the party was not himself the first aggressor, or, if the aggressor, that he had in good faith withdrawn from the contest before he struck the blow or fired the fatal shot; second, that the striking or shooting was necessary to prevent the infliction upon himself of a great bodily injury by the party stricken or shot.[27]

§ 2942(8). Illinois

The court instructs the jury that justifiable homicide is the killing of a human being in necessary self-defense, or under circumstances sufficient to excite the fears of a reasonable person, and induce him as a reasonable person to believe that in order to save his own life or prevent him from receiving great bodily harm it was necessary to take the life of the person killed.[28]

The jury are instructed that, if you believe from the evidence that the defendant, in defense of himself, inflicted upon the deceased the wounds or stabs which caused his death, while the deceased was manifestly intending and endeavoring, in a violent manner to enter the habitation of the witness, Mrs. ———, for the purpose of assaulting or offering personal violence to the defendant, being therein, the killing was justifiable, and the jury must acquit the defendant.[29]

The jury are instructed that, if you believe from the evidence that the defendant inflicted the wounds upon the deceased which caused his death, and that he inflicted said wounds in self-defense, believing that his life was in danger, or that he was in danger of receiving great bodily harm from the deceased, and that such dan-

[25] State v. Cephus, 67 A. 150, 6 Pennewill, 160.

[26] State v. Cephus, 67 A. 150, 6 Pennewill, 160.

[27] State v. Lyons, 64 P. 236, 7 Idaho, 530.

[28] Kota v. People, 27 N. E. 53, 136 Ill. 655.

[29] Reins v. People, 30 Ill. 256.

ger was so urgent and pressing that, to save his own life or to prevent such harm, it was absolutely necessary for him to inflict the said wounds, and that the circumstances were sufficient to excite the fears of a reasonable person, you must acquit the defendant, unless you also find that defendant sought to renew the fight. and did not really and in good faith endeavor to decline any further struggle before the mortal blow was given.[30]

The jury are instructed that, if you believe from the evidence that deceased first assaulted the defendant without any reasonable or justifiable cause, and that at the door of ———'s shanty the defendant tried and endeavored in good faith to escape from deceased, and to prevent his entry there, and did not seek to renew the fight, and that defendant was in fear of his life or of great bodily harm from deceased, and that, from all the surrounding circumstances, he had reasonable grounds for such fear, you must acquit the defendant.[31]

§ 2942(9). Iowa

The jury are instructed that a defense offered in this case is that of self-defense. A man acting in necessary defense may use and adopt such means as he may deem necessary acting as a reasonably prudent person would act under the circumstances, and even to the extent of doing great bodily injury, or to killing his assailant. If you find from all the evidence in this case that the injury done and committed upon the person of ——— which caused his death, if you find it did cause his death, was done in necessary self-defense, then the law does not impute any crime, and in such case the defendant will be entitled to an acquittal.[32]

In determining whether or not the shot was fired without legal excuse or justification, you are instructed that the defendant admits the killing of ———, and his claim is that in what he did he was acting in self-defense. You are instructed, in relation to this claim of the defendant, that where one is assaulted by another person in such a manner as to induce the person assaulted to reasonably believe that he is at the time in actual danger of losing his life, or of suffering great bodily harm, he is justified in defending himself, although the danger be not real, but only apparent, and he may use such force and means to defend himself as may in good faith appear necessary to him as an ordinarily prudent and courageous man, under all the circumstances at the time surrounding him. And he is not bound to draw nice calculations from appearances. All that is required of him is that he shall act from reasonable and honest convictions as to his danger, although mis-

[30] Reins v. People, 30 Ill. 256.
[31] Reins v. People, 30 Ill. 256.
[32] State v. Thomas, 132 N. W. 51, 151 Iowa, 572.

taken as to the extent of said danger. But before one is justified in taking life in self-defense, it must be, or it must reasonably appear to be, the only means of saving one's own life, or of preventing great bodily injury. If it is evident to the assaulted that the danger which appears to be imminent can be avoided in any other way, as by retreating from the conflict, the taking of the life of the assailant is not excusable. And if you shall find from the evidence in this case that just before the defendant killed ———, he had been unlawfully assaulted by the said ———, and that from the character of said assault and the weapon used he had reason, as an ordinarily prudent and courageous man, to believe, and did in good faith and honestly believe, that he was in danger of being killed, or suffering great bodily injury, and that the parties were so situated that he could not have retreated, or that he could not reasonably have expected to have preserved his life or protect himself from injury by retreating, then and in that case he was justified in using such force and such means to protect his life and person as may in good faith then have appeared necessary to him as an ordinarily prudent and courageous man, under all the circumstances then surrounding him, even to the taking of life. And if you shall find that he did not use greater force, or more hazardous means to protect his life and person than really appeared to him necessary as an ordinary prudent and courageous man under the circumstances in which he was then placed, including the nature and manner of the assault, then and in that case the killing was not unlawful, and you should return a verdict of not guilty. But if you find that he did use greater force, or more hazardous means than appeared necessary to protect himself from great bodily harm, as an ordinarily prudent and courageous man under the circumstances in which he was then placed, including the nature and manner of the assault, you cannot acquit him on the ground of self-defense. A "great bodily injury," as used in these instructions, means a more serious bodily injury than results from an ordinary battery.[33]

The jury are instructed that, if the said ——— first assaulted the defendant with a dangerous or deadly weapon, and such assault was made in such a fierce manner as to create in the mind of the defendant, acting as a reasonably prudent man would act under the circumstances, a belief, and he did believe, that said ——— intended to take his life, or inflict upon him some great bodily injury, and in such belief he fired the shot in resistance of such assault, from the effect of which the said ——— died, he was justified in so doing, and you should acquit the defendant.[34]

[33] State v. Dyer, 124 N. W. 629, 147 Iowa, 217, 29 L. R. A. (N. S.) 459.

[34] State v. Donnelly, 27 N. W. 369, 69 Iowa, 705, 58 Am. Rep. 234.

§ 2942(10). Kansas

You are instructed that the killing of deceased would be justifiable if done by the defendant in resisting any attempt to murder him or do him great personal injury, where there was reasonable cause to apprehend a design to so murder or injure the defendant, and immediate danger of such design being accomplished.[35]

§ 2942(11). Kentucky

The court instructs the jury that, although you may believe from the evidence beyond a reasonable doubt that the defendant shot with a pistol, loaded with powder, leaden balls, or other hard and explosive substances, the deceased, from which shooting the said deceased did then and there presently die, yet if you further believe from the evidence that, at the time he did so shoot and kill said deceased, he, the defendant, believed and had reasonable grounds to believe that he was then and there in imminent danger of death or the infliction of some great bodily harm at the hands of the said deceased, and that it was necessary, or was believed by the defendant, in the exercise of a reasonable judgment, to be necessary, to shoot and wound or kill the said deceased to avert that danger, real or to the defendant reasonably apparent, then you ought to acquit him on the ground of self-defense or apparent necessity therefor.[36]

The court instructs the jury that, if you believe from the evidence that at the time the defendant shot and killed ———, if he did so do, he believed and had reasonable grounds to believe that he was then and there in immediate danger of death or the infliction of some great bodily harm at the hands of ———, and that it was necessary or was believed by the defendant in the exercise of a reasonable judgment to be necessary to so shoot and wound the deceased in order to avert that danger, real or to the defendant apparent, then you ought to acquit the defendant upon the ground of self-defense or apparent necessity therefor.[37]

The court instructs the jury that, if you believe from the evidence that at the time the defendant struck and killed the deceased with a club, if he did so, he (the defendant) then believed, and had reasonable grounds for believing, that he was then and there in danger of death, or great bodily harm, at the hands of the deceased, and had no other safe, or to him apparently safe means of avoiding the danger, real or to him apparent, except to strike the deceased with the club, and in so doing used no more force than was necessary, or, in the exercise of a reasonable judgment, appeared to him.

[35] State v. Appleton, 78 P. 445, 70 Kan. 217.

[36] Reynolds v. Commonwealth, 209 S. W. 346, 183 Ky. 375.

[37] Taylor v. Commonwealth, 188 S. W. 1087, 172 Ky. 136.

at the time to be necessary to protect himself from the danger at the hands of the deceased, real or to him apparent, the law is for the defendant, and the jury should find him not guilty.[38]

You are instructed that, if you believe from the evidence that at the time he shot and killed ———, if he did so, the defendant believed and had reasonable grounds for believing that he was in immediate danger of death or great bodily injury at the hands of said ———, and that defendant used such force, and no more, as was reasonably necessary, or as seemed to him at the time, in the exercise of a reasonable discretion, to be necessary to avert such danger, he is excusable on the ground of self-defense, and you should find him not guilty.[39]

You are instructed that, although you may believe from the evidence to the exclusion of a reasonable doubt that the defendant shot ——— with a pistol, from which shooting said ——— presently died, yet, if you further believe from the evidence that when he did so he believed, and had reasonable grounds to believe, that he was then in danger of death, or some other great bodily harm about to be inflicted upon him by said ———, then he had the right to use such means as in reason appeared to him to be necessary to avert the impending danger, real, or to him, apparent, even to the extent of so shooting and killing said ———, and in this event you will return a verdict of not guilty.[40]

§ 2942(12). Missouri

As a defense to this prosecution the defendant alleges that the act, with which he is charged, was done in self-defense. Upon this feature of the case you are instructed that if at the time defendant stabbed the deceased he (the defendant) had reasonable cause to apprehend a design on the part of the deceased to take his life or do him some great personal injury, and that there was reasonable cause for him to apprehend immediate danger of such design being accomplished, and that to avert such apprehended danger the defendant stabbed the deceased, and that at the time he did so he had reasonable cause to believe, and did believe, that it was necessary for him to do so in order to protect himself from such apprehended danger, then such stabbing was justifiable; and, if such are the facts in this case, you should acquit on the ground of self-defense.[41]

The court instructs the jury that if at the time the defendant shot the deceased he had good reason to believe, and did believe, that the deceased was about to immediately inflict upon him some

[38] Heck v. Commonwealth, 174 S. W. 19, 163 Ky. 518.

[39] Weathers v. Commonwealth, 172 S. W. 107, 162 Ky. 146.

[40] Gordon v Commonwealth, 124 S. W. 806, 136 Ky. 508.

[41] State v. Hostetter (Sup.) 222 S. W. 750.

great personal injury, and he shot him for the purpose of averting such apprehended injury, then you must acquit him on the ground of self-defense. In such case it is not necessary that the danger should have been real and about to fall. All that is necessary is that the defendant believed, and had good reason to believe, that such danger existed. On the other hand, it is not enough that the defendant believed in the existing of such danger, but he also must have reasonable cause for so believing, before he can be acquitted upon the ground of self-defense. And if you believe from the evidence that the defendant sought, brought on, or voluntarily entered into the difficulty in which the deceased was shot for the purpose of wreaking his malice and killing the deceased, then you cannot acquit him on the ground of self-defense.[42]

§ 2942(13). Nebraska

The jury are instructed that the defense of necessary self-defense is interposed in this case. This defense is legal and proper in a criminal case. This defense is interposed by law, and you are required to consider it in view of the testimony in this case. And it will be your duty to consider it fairly and honestly upon its merits. And the rule of law on the subject of necessary self-defense is this: Where a man in the lawful pursuit of his business is attacked, and where from the nature of the attack he honestly believes that there is a design to take his life or to do him great bodily injury, then the killing of his assailant under such circumstances would be excusable or justifiable, although it should afterwards appear that no great bodily injury was intended, and no real danger of losing his life, or receiving great bodily injury existed. And the jury are instructed that if you find from the evidence that at the time the defendant is alleged to have killed the deceased the circumstances surrounding the defendant were such as in sound reason would justify or induce in the defendant's mind an honest belief that he was in danger of receiving from the deceased great bodily harm, or that the defendant was about to lose his life, and that the defendant in doing what he then did was acting from instinct of self-preservation, then he is not guilty.[43]

§ 2942(14). Ohio

The jury are instructed that, if the appearances were such as would have alarmed a man of ordinary firmness, and would have impressed him that there was imminent danger to his life or of great bodily harm from the acts of deceased, and if the defendant honestly believed such to be the case, it is not material whether the danger was real or not. The condition of the assailant must be

[42] State v. Hudspeth, 60 S. W. 136, 159 Mo. 178.

[43] Maynard v. State, 116 N. W. 53, 81 Neb. 301.

such as to render it necessary on the part of the killer to do the act in self-defense, and the attack must have been such as in the belief of the defendant, rendered the taking of the life of deceased in his defense necessary. The slayer cannot urge in justification a necessity produced by his own fault.[44]

§ 2942(15). Oklahoma

The court instructs the jury that homicide is not without authority of law, but is justifiable, where committed by any person in resisting an attempt to murder him or to commit a felony upon him, or when committed in the lawful defense of such person when there is a reasonable ground to apprehend a design of the person killed to do some great personal injury to the person doing the killing, and there is imminent danger of such design being accomplished.[45]

The court instructs the jury that, if you believe from the evidence, or have a reasonable doubt thereof, that at the time of the fatal difficulty the deceased, without any act upon the part of the defendant showing a purpose to do bodily harm to the deceased, did then and there by some act upon his part then done, make it reasonably to appear to the defendant, viewed from the standpoint of the defendant, that it was then and there the purpose of the deceased to assault him or to do him some personal injury, then in that event the defendant had a right to shoot the deceased in his self-defense, if it was then and there necessary, or apparently necessary, for him to do so in his own proper self-defense; and, if he did so shoot the deceased under these circumstances, then you are instructed that you should find him not guilty, and, unless you find beyond a reasonable doubt that the defendant unlawfully killed the deceased, you must return a verdict of not guilty.[46]

You are instructed that the law gives to every person the right to fight in his self-defense to protect himself from the unlawful attacks of his adversary, and, if necessary to save his life or prevent great bodily injury, he may take the life of his assailant, and, where a person is unlawfully attacked, he is not required to retreat, but has the right to stand his ground and to use whatever force is necessary to repel the attack, even to the extent of taking life, and is not required to desist or cease from use of force until his adversary has entirely abandoned the conflict or has been disabled, and he has the same right to act in the defense of his brother as in his own defense.[47]

The jury are instructed that where one is in a place he has a right to be, and is not the aggressor, and does not by his own wrongful

[44] Carr v. State, 21 Ohio Cir. Ct. R. 43, 11 O. C. D. 353.

[45] Brantley v. State, 175 P. 51, 15 Okl. Cr. 6.

[46] Brantley v. State, 175 P. 51, 15 Okl. Cr. 6.

[47] McDaniel v. State, 127 P. 358. 8 Okl. Cr. 209.

conduct bring on the conflict which endangers his safety, and he is violently assaulted by another, or is, from the conduct and hostile actions of his antagonist, induced to believe that he is in imminent danger of losing his life or of receiving some great personal injury, he may lawfully resort to such force or violence as to him under all the circumstances seems reasonably necessary to protect himself from death or receiving some great bodily harm, even to the taking of the life of his assailant, if he in good faith from reasonable appearances believes such action necessary for his own safety; but one who by his own wrongful conduct brings on a fight, or who commences the combat, is not allowed this privilege of self-defense.[48]

You are instructed that by the language "lawful defense of the person" is meant what we sometimes term "self-defense." The right of self-defense is founded upon the natural right of a man to protect himself against the unlawful assault upon him by another. This defense having been made in this case, the jury should weigh each fact and circumstance that is offered as justifiable grounds in connection with all the other testimony in the case. Mere apprehension that a person designs to kill another or to commit some great bodily harm upon him is not sufficient to justify such other in first making an attack and committing the act complained of in the indictment herein; and to perform such act, when the excuse therefor is mere apprehension, would not be sufficient to justify the act as one having been committed in the lawful defense of the person. In a case where a person attacks another, or attempts to execute a design upon the life of such other, and is in an apparent situation to do so, thereby creating a reasonable belief that such design is about to be accomplished, then the person so threatened may resist and use all necessary force to prevent the accomplishment of such design, even to the extent of taking life, and it is justifiable. Actual or positive danger is not indispensable to justify self-defense. The law considers that men, when threatened with danger, are obliged to judge from appearances and to determine therefrom the exact state of things surrounding them, and in such case, if a person acts from an honest conviction, induced by reasonable evidence, he will not be held criminally for a mistake as to the extent of actual danger. If the jury believe from the evidence that at the time the defendant is alleged to have shot the deceased the circumstances surrounding him were such as in sound reason would justify or induce in his mind an honest belief that he was in danger of receiving from the deceased some great bodily harm, and that the defendant in doing what he did was acting

[48] Vance v. Territory, 105 P. 307, 3 Okl. Cr. 208.

solely from the instincts of self-preservation, then he is not guilty, and you should so find.[49]

§ 2942(16). Oregon

The court instructs the jury that the law gives to every man the right of self-defense. This means that, if a man is assaulted, he may defend his life or his person from great bodily harm. He may repel force by force and he may resort to such force as under the circumstances surrounding him may be reasonably necessary to repel the attack upon him, even to the taking of the life of his adversary. If, then, you should find in the consideration of this case the defendant honestly believed that he was being feloniously assaulted, and did honestly believe that he was then and there in danger of death or great bodily harm, he would be justified in defending himself even to the extent of taking the life of his adversary.[50]

§ 2942(17). South Carolina

You are instructed that there are four essential, prerequisite elements entering into the plea of self-defense. The law requires defendant to satisfy you by the preponderance of the evidence on all these four elements. If he satisfies you on three of them, and fails on any one of them, his plea of self-defense falls to the ground. He must be without fault in bringing on the difficulty. No man can bring on a difficulty and successfully plead necessity for taking human life. Has the defendant shown you by the greater weight of the evidence he was without fault in bringing on this immediate difficulty, and was he without fault in bringing on this immediate difficulty? If so, he has not yet established his plea of self-defense. He must go a step further. He must show you that at the time he struck the fatal blow he was in danger of receiving serious bodily harm or death, and it was necessary to take the life of his assailant at the time he struck the fatal blow—it was necessary, or it appeared to be necessary, to strike the fatal blow in order to avert serious injury to himself or to avoid losing his own life. If he has shown you that, he must yet go a step further and show that the circumstances at the time—the circumstances were such as would warrant a man of ordinary prudence, firmness, and courage to strike the fatal blow in order to save himself from serious bodily harm, or losing his own life. The test is not whether an unusually timid or an unusually brave man would have been so warranted—were the circumstances such as would warrant a man of ordinary firmness, prudence, and courage in coming to the same conclusion at the time the fatal blow was struck, in concluding at the time the fatal blow was struck that it was necessary, or appeared to be nec-

[49] Robinson v. Territory, 85 P. 451, 16 Okl. 241.

[50] State v. Butler, 186 P. 55, 96 Or. 219.

essary, to strike the fatal blow in order to prevent serious injury or death to the one assailed. If defendant has satisfied you of that, he must go a step further and show you that he had no other probable means of escape, except to take the life of his assailant.[51]

You are instructed that self-defense is a complete defense to any charge in an indictment for murder or manslaughter. I charge you that self-defense is based upon necessity; and the person who sets up the plea of self-defense must satisfy the jury by the preponderance of the evidence that it was necessary or apparently necessary to take the life of an assailant in order to keep himself or herself from being killed or being seriously injured. If she shows that, then she must go further and show that she was without fault in bringing on the difficulty. If she shows that, then she must show that any person of ordinary prudence and courage would have been warranted in coming to the conclusion that the danger did exist and that it was necessary to shoot and strike in order to keep herself from being seriously injured or losing her own life. She must go further, if she has satisfied you of that by the preponderance of the evidence, and show that there was no other reasonably safe means of escape, unless you find from the evidence that she was on her own premises and in her own house.[52]

§ 2942(18). South Dakota

You are instructed that, if you find from the evidence that at the time the defendant shot the deceased the deceased was armed with an ax, and was striking or attempting to strike the defendant with it, and the defendant at the time had reasonable grounds to believe and did believe that the deceased was trying to kill him, or inflict great bodily injury upon him, and that the danger of being killed or receiving great bodily harm was imminent, then the shooting of the deceased by the defendant was justifiable, and you should find the defendant was not guilty.[53]

§ 2942(19). Texas

Upon the law of "self-defense," you are instructed, gentlemen, that homicide is permitted by law when inflicted for the purpose of preventing the offense of murder or the infliction of serious bodily injury, when the killing takes place under the following circumstances: First. It must reasonably appear by the acts or by the words, coupled with the acts of the person killed, that it was the purpose and intent of such person to commit such murder or to inflict such injury. Second. The killing must take place when

[51] State v. Hardin, 103 S. E. 557, 114 S. C. 280.

[52] State v. Hollis, 95 S. E. 74, 108 S. E. 442.

[53] State v. Stumbaugh, 132 N. W. 666, 28 S. D. 50.

the person killed was in the act of committing such murder or of inflicting such injury or after some act done by him showing evidently an intent to commit such murder or to inflict such injuries.[54]

§ 2942(20). West Virginia

You are further instructed that if you believe from all the evidence as well by the state as by the defendant that the deceased, upon a public highway of this county assaulted and beat the defendant after he, the defendant, had declined to fight and when the defendant was apparently grossly intoxicated, and that such said assault was of such a character as to cause the defendant to fear and believe that death or great bodily injury was about to be inflicted upon him by the deceased, and if you further believe that the defendant had reason to believe and did believe himself in great danger of death or serious bodily injury, and that he acted without malice or previously formed design, and only acted because he was as he then believed in imminent danger of life and bodily injury, and killed the deceased by reason thereof, then he, the defendant, is not guilty of any offense, and you should so find by your verdict, notwithstanding the fact that the killing was done with a deadly weapon.[55]

§ 2943. Right to kill in self-defense as based upon the law of necessity

§ 2943(1). Illinois

You are further instructed that, although you may believe from the evidence that the deceased was armed with a revolver at the time of the killing, and that he made the first attack upon the defendant, yet if you further believe from the evidence beyond a reasonable doubt that at the time the mortal shot was fired by defendant, it was not necessary, or apparently necessary, in order to save his own life, or to prevent his receiving great bodily harm, then the killing would not be justifiable under the plea of self-defense interposed in this case.[56]

§ 2943(2). Missouri

The court instructs the jury that the law of self-defense is emphatically the law of necessity, to which the party may have recourse under certain circumstances to prevent any reasonably apprehended great injury which he may have reasonable grounds to believe is about to fall upon him. If you believe that defendant had reasonable cause to apprehend a design on part of deceased to

[54] Carey v. State, 167 S. W. 366, 74 Tex. Cr. R. 112.

[55] State v. Donahue, 90 S. E. 834, 79 W. Va. 260.

[56] Henry v. People, 65 N. E. 120, 198 Ill. 162.

commit a felony upon defendant or to do him some great personal injury, and that there was reasonable cause to apprehend immediate danger of such design being carried out, and he cut deceased and killed him to prevent the accomplishment of such apprehended design, then the killing is justifiable, upon the ground of self-defense, and you should acquit him.[57]

§ 2943(3). South Carolina

You are instructed that the whole thing of self-defense after all is summarized and embraced in one word, necessity. The law of self-defense is founded in necessity, and if it be not necessary to take human life, if it appear not to be necessary to take human life at the time it was taken, the law of self-defense falls to the ground. There must be some real or some apparent necessity for taking human life, the party must be actually in imminent danger or he must believe he was in imminent danger, before he can strike. So far as the law of self-defense is concerned, it does not make one shadow of difference whether the danger was real or not, if the party actually, honestly believed at the time he was in danger of receiving serious bodily harm, or suffering death at the hands of the party slain.[58]

§ 2943(4). Texas

You are instructed that all self-defense rests upon necessity. Where there is no necessity to kill, it cannot be self-defense; but a reasonable apprehension of death or great bodily harm will excuse a party using all necessary force to protect his life or person, and it is not necessary that there should be actual danger, provided he acted upon a reasonable apprehension of danger as it appeared to him from his standpoint at the time; and in such case the party acting under such real or apparent danger is in no event bound to retreat in order to avoid the necessity of killing his assailant.[59]

§ 2944. Provocation of difficulty or aggression by defendant as affecting right to set up self-defense

§ 2944(1). Alabama

You are instructed that, if the jury believe beyond all reasonable doubt, from the evidence, that the difficulty was caused and commenced by reason of an opprobrious epithet by the defendant, then he would not be entitled to set up self-defense.[60]

The court charges the jury that if the defendant willingly fought with ———, and when beginning to fight he was armed with a

[57] State v. Maupin, 93 S. W. 379, 196 Mo. 164.

[58] State v. Miller, 53 S. E. 426, 73 S. C. 277, 114 Am. St. Rep. 82.

[59] Williford v. State, 42 S. W. 972, 38 Tex. Cr. R. 393.

[60] Sills v. State, 57 So. 89, 2 Ala. App. 73.

weapon calculated to take life when used in a deadly way, and then intended to use such weapon in that way in the fight if it became necessary, and in the fight he intentionally used such weapon in such a way as would be calculated to kill ———, and thus did kill him, then the defendant is not entitled to the benefit of the law of self-defense, and is guilty of at least murder in the second degree, if this was in ——— county before the finding of the indictment.[61]

You are instructed that, if the jury believe from the evidence beyond a reasonable doubt that the defendant, by his acts or words on the occasion of his fatal difficulty, intended to provoke the deceased to make a demonstration against him, intending then to kill him, it would be murder, and you should so find your verdict.[62]

The court charges the jury that, to make the plea of self-defense available, the defendant must be free from fault in bringing on the difficulty. If the defendant was the aggressor, he cannot invoke the doctrine of self-defense, even though the deceased, at or before the time he was shot made a hostile motion as though he was going to shoot the defendant; and whether the necessity to take the life of the deceased was real or only apparent, if brought about by the design, contrivance, or fault of the defendant, he cannot be excused on the plea of self-defense.[63]

The court charges the jury that, even though they should find from the evidence that, at the time defendant cut ———, defendant was in imminent danger of his life, or of suffering great bodily harm, or that the circumstances attending the assault were such as to impress the mind of a reasonable man that the defendant was in actual danger, yet if they also believe from the evidence beyond a reasonable doubt that the defendant entered into the difficulty willingly, and that he was not without fault in bringing on the difficulty, then his plea of self-defense must fail.[64]

The court charges the jury, that to make the plea of self-defense available, the defendant must be without fault. If he was himself the aggressor, he cannot invoke the doctrine of self-defense, even if the deceased struck him, and whether the necessity to take the life of the deceased was real or only apparent, if brought about by design, connivance or fault of the defendant, he cannot be excused on the plea of self-defense.[65]

The court charges the jury that, to make a plea of self-defense available, the defendant must be without fault. If he was himself the first aggressor, he cannot invoke the doctrine of self-defense.

[61] Wingate v. State, 55 So. 953, 1 Ala. App. 40.

[62] Robinson v. State, 45 So. 916, 155 Ala. 67.

[63] Bluett v. State, 44 So. 84, 151 Ala. 41.

[64] Wright v. State, 42 So. 745, 148 Ala. 596.

[65] Green v. State, 39 So. 362, 143 Ala. 2.

even if the deceased was approaching him in a hostile manner; and whether the necessity to take life was real or only apparent, if brought about by the design, contrivance, or fault of defendant, he cannot be excused on the plea of self-defense.[66]

The court charges the jury that if they believe beyond a reasonable doubt, from the evidence, that the defendant and the deceased had had some trouble a few days before the homicide, and that when defendant, on the day of the homicide, came to where the deceased was standing at the "new home base" he stepped up in front of the deceased, and in an angry manner said to him, "You said you wanted to see me; now you can see me," and the jury should further find from the evidence beyond a reasonable doubt that the deceased left the place and went to the pitcher's stand, some ——— or ——— feet away, and the defendant followed the deceased to that place, and they there became involved in a difficulty, and the defendant killed deceased, then he cannot set up self-defense in this case.[67]

The jury are instructed that the law does not institute any comparison for the purpose of ascertaining the relative fault of the accused and the person assaulted; but it says that the accused who answers a charge of crime by the plea of self-defense must, in order to be acquitted on that ground, be entirely free from fault in bringing on the difficulty.[68]

§ 2944(2). Arkansas

You are instructed that if you believe from the evidence in the case, beyond a reasonable doubt, that the defendant provoked or voluntarily entered into or that he sought out the deceased for the purpose of settling a difficulty, and, when he did so, brought on a difficulty and killed his assailant, he cannot shield himself on the plea that he was defending himself, he cannot take advantage of a necessity produced by his own unlawful or wrongful act after having provoked or excited or sought the attack, if you find from the evidence, beyond a reasonable doubt, that he did so; he cannot be excused or justified in killing his assailant for the purpose of saving his own life or preventing great bodily injury, unless he had in good faith withdrawn from the combat as far as he could, and did all in his power to avoid the danger and avert the necessity of the killing.[69]

You are instructed that, if you believe from the evidence in this

[66] King v. State, 69 So. 345, 13 Ala. App. 91; Watson v. State, 46 So. 232, 155 Ala. 9; Jarvis v. State, 34 So. 1025, 138 Ala. 17.

[67] Ragsdale v. State, 32 So. 674, 134 Ala. 24.

[68] Ellis v. State, 25 So. 1, 120 Ala. 333.

[69] McKinney v. State, 215 S. W. 723, 140 Ark. 529.

case that the defendant, armed with a deadly weapon, sought the deceased with a felonious intent to kill him, or sought or brought on, or voluntarily entered into, the difficulty with deceased with the felonious intent to take his life, then the defendant cannot invoke the law of self-defense, no matter how imminent the peril in which he found himself placed.[70]

You are instructed that the law of self-defense does not imply the right of attack. If you believe from the evidence in this case, beyond a reasonable doubt, that the defendant sought the deceased with felonious intent to kill him, or sought, brought on, or voluntarily entered into a difficulty with the deceased with the felonious intent to kill him, then the defendant cannot invoke the law of self-defense, no matter how imminent the peril in which he found himself placed, unless you should further find that the defendant actually and in good faith endeavored to abandon and withdraw from the conflict before the fatal blow was given.[71]

The jury are instructed that, if you believe from the evidence in this case beyond a reasonable doubt that the defendant provoked, brought on, or voluntarily entered into the difficulty, or that he sought out the deceased, for the purpose of bringing on a difficulty, and when he did so killed his assailant, he cannot shield himself on the plea of self-defense. He cannot take advantage of a necessity produced by his own unlawful or wrongful acts.[72]

The court instructs the jury that, if you find from the evidence in the case beyond a reasonable doubt that the defendant took a position on the gallery accessible to a gun, and had reasonable grounds for believing that if he was there he would be attacked by the deceased, and that by his acts and demonstrations he caused or provoked an attack to be made upon him, with intent then and there to kill the deceased, and that he was so attacked and that he killed the deceased, then, having voluntarily entered into the contest, he cannot claim the benefit of the plea of self-defense, and you should find him guilty of murder in the first degree.[73]

§ 2944(3). Florida

The court instructs the jury that a person relying upon self-defense to justify a homicide must himself be reasonably free from fault in the inception of the difficulty in which the homicide may be committed, and it must be necessary, either actual or apparent, to resort to the means used in the particular instance to protect his life or person from imminent danger either real or apparent. A person cannot by his own wrongful act or conduct provoke or

[70] Hines v. State, 215 S. W. 735, 140 Ark. 13.

[71] Slaytor v. State, 215 S. W. 886, 141 Ark. 11.

[72] Lee v. State, 172 S. W. 1025, 116 Ark. 588.

[73] Caughron v. State, 139 S. W. 815, 99 Ark. 462.

bring about a difficulty with his adversary and having wrongfully provoked or brought about a difficulty act under a necessity arising or appearing during such altercation and kill his adversary and justify such homicide under a plea of self-defense.[74]

The court instructs the jury that, before one not reasonably free from fault in the inception of the difficulty in which the homicide may have been committed can justify the homicide, he must have honestly and in good faith declined combat and retired from the difficulty or so attempted to retire as to fairly make it appear that he had changed his mind and was no longer the aggressor, while a person reasonably free from fault is under no obligation in law to retreat, but may act upon the necessities of the occasion as they arise.[75]

§ 2944(4). Georgia

You are instructed that, if the defendant assaulted the deceased, the latter had a right to use such force as was necessary to prevent such assault, and if the defendant shot and killed the deceased when the deceased was using such force only, or making such resistance only, as was necessary to defend himself from the assault made on him by the defendant, the defendant would not be justifiable in killing the deceased for defending himself from the felonious assault made upon him by the defendant.[76]

§ 2944(5). Illinois

The jury are further instructed that if they believe from the evidence beyond a reasonable doubt that the defendant brought on the difficulty between the deceased and himself, at the time of the killing, and that the defendant was the first assailant, he cannot avail himself of the right of self-defense, in order to shield himself from the consequences of the killing of deceased, if such is the proof, however imminent the danger in which he may have found himself in the progress of the affray which he so brought on himself, unless you further believe that the defendant in good faith endeavored to decline any further struggle before the mortal shot was fired.[77]

The jury are instructed that, if you believe from the evidence beyond a reasonable doubt that the defendant sought and brought on a difficulty with ——— at the time of the killing, he cannot afterwards avail himself of the right of self-defense in order to shield himself from the consequences of killing the said ———, if such is the proof, however imminent the danger in which he may

[74] Barton v. State, 73 So. 230, 72 Fla. 408.

[75] Barton v. State, 73 So. 230, 72 Fla. 408.

[76] Tolbirt v. State, 53 S. E. 327. 124 Ga. 767.

[77] Henry v. People, 65 N. E. 120, 198 Ill. 162.

have found himself in the progress of the affray which he so brought on himself.[78]

§ 2944(6). Kentucky

The court instructs the jury that if you believe from the evidence that, at the time defendant struck ——— with a baseball bat (if he did so), the defendant believed and had reasonable grounds to believe he was then and there in danger of loss of life or of receiving great bodily injury at the hands of said ———, and that it was necessary, or believed by the defendant in the exercise of a reasonable judgment to be necessary, to strike said ——— with a baseball bat in order to avert that danger, real or to the defendant apparent, then you should find defendant not guilty, on the ground of self-defense and apparent necessity. On the other hand, if you believe from the evidence to the exclusion of a reasonable doubt that the defendant, when he did not believe, or did not have reasonable grounds to believe, that his life or person were in danger at the hands of said ———, did first willfully and voluntarily assault said ——— with a baseball bat, and in so doing make the harm or danger to himself, if any there was, necessary or apparently necessary or excusable on the part of ——— in his own necessary self-defense, you should not in that event excuse the defendant on the ground of self-defense.[79]

You are instructed that, if the jury believe from the evidence beyond a reasonable doubt that the defendant, armed with a deadly weapon, sought out the deceased for the purpose of engaging in a difficulty with him, and willfully brought on the difficulty with the deceased for the purpose and with the formed design to kill him, or to inflict on him serious injury, and willingly engaged in same up to the time he fired the fatal shot (if they believe he did so), then and in that event the defendant cannot justify on the ground of self-defense and apparent necessity, unless the jury believe that the defendant had abandoned in good faith his intention to bring on the difficulty for said purpose, if they believe he had such intention, and withdrew in good faith from the conflict before he shot the deceased, if he did shoot him.[80]

The jury are instructed that, if the jury believe from the evidence that the defendant, at the time he shot and killed the deceased (if they believe from the evidence beyond a reasonable doubt he did shoot and kill the deceased), believed and had reasonable grounds to believe that he was then and there in danger of death or some other great bodily harm at the hands of deceased, and that

[78] Gainey v. People, 97 Ill. 270, 37 Am. Rep. 109.

[79] Deacon v. Commonwealth, 172 S. W. 121, 162 Ky. 188.

[80] Truax v. Commonwealth, 149 S. W. 1033, 149 Ky. 699.

it was necessary, or seemed to the defendant in the exercise of a reasonable judgment to be necessary, to shoot the deceased in order to avert that danger, real or to the defendant apparent, then and in that event the jury will find the defendant not guilty on the ground of self-defense and apparent necessity. On the other hand, if the jury shall believe from the evidence beyond a reasonable doubt that the defendant, when he was in no danger or apparent danger of death or great bodily harm at the hands of ———, began the difficulty between himself and ———, wherein the latter lost his life, by first assaulting said ——— with a gun, and so made the danger to himself, if there was any, excusable on the part of said ——— in his necessary or apparently necessary self-defense, then and in that event the defendant cannot be acquitted on the ground of self-defense.[81]

You are instructed that, although you may believe from the evidence, beyond a reasonable doubt, that in this county and before the date of the finding of the indictment the defendant shot ——— with a pistol, and thereby killed him, and you further believe from the evidence that when he did he believed, and had reasonable grounds to believe, that he was then in real or apparent impending danger of death, or some other great bodily harm, about to be inflicted upon him at the hands of said ———, yet, if you further believe from the evidence, to the exclusion of a reasonable doubt, that when the defendant did not believe, and have reasonable grounds to believe, that he was in real or apparent danger of death, or other great bodily harm at the hands of said ———, defendant willfully and feloniously brought on the difficulty by making demonstration to shoot said ——— with a pistol with the intention of killing him and thereby made the danger to himself on the part of ——— excusable or justifiable in the protection of himself, or that the defendant and said ——— voluntarily entered into the actual combat with the intention upon the part of each to kill the other, or do the other some great bodily harm, then you cannot acquit the defendant on the ground of self-defense or apparent necessity.[82]

You are further instructed that if you believe from the evidence, beyond a reasonable doubt, that defendant was a party to a conspiracy formed for the purpose of taking the life of ———, and that in pursuance of such conspiracy, and while it existed, defendant and any one or more of the other conspirators went to the place where they knew or believed ——— would be, for the purpose of killing him, and did then and there willfully kill him in execution of such conspiracy, or that defendant, or any one or more of the

[81] Cash v. Commonwealth, 127 S. W. 492.

[82] Gordon v. Commonwealth, 124 S. W. 806, 136 Ky. 508.

conspirators, first commenced the difficulty by shooting or making a demonstration to shoot ———, you should not acquit defendant on the ground of self-defense or apparent necessity, but should find him guilty of willful murder under instruction No. ———.[83]

§ 2944(7). Louisiana

You are instructed that, where any pretext, design, contrivance, fraud, or excuse is resorted to, to bring on a difficulty or to provoke the occasion of one, the person using it will be regarded as the aggressor therein, and any act of a person by which he puts himself in the way of being assaulted, in order that when hard pressed he may have a pretext for taking the life of his assailant, amounts to the bringing on of a difficulty.[84]

§ 2944(8). Missouri

You are further instructed that if you believe from the evidence that the defendant provoked the difficulty or began the quarrel, with the purpose of taking advantage of the deceased, and of taking his life, or doing him some great bodily harm, then there is no self-defense in the case, however imminent the peril of the defendant may have become during the difficulty in consequence of an attack made upon him by the deceased; and if under such circumstances the jury believe that defendant shot and killed the deceased, then the defendant is guilty of murder in the first degree, and the jury should so find.[85]

The court instructs the jury that if the defendant voluntarily brought on the difficulty with deceased, or voluntarily entered into a difficulty with deceased, with the intention of killing or inflicting upon him some great bodily injury if he should resist, then the danger in which he found himself during such difficulty, no matter how great it might be, would not extenuate or mitigate the offense or reduce its grade at all, and there can be no self-defense in the case.[86]

The jury are instructed that the law of self-defense does not imply the right of attack, nor will it permit of acts done in retaliation or for revenge. Therefore, if you shall believe and find from the evidence that the defendant sought, brought on, or voluntarily entered into a difficulty with the deceased, for the purpose of wreaking vengeance upon him, or if you shall find and believe that he wounded the deceased at a time when he had, because of the acts of the deceased, no reasonable apprehension of immediate and impending injury to himself, and did so from a spirit of retaliation and revenge, for the purpose of punishing the deceased for past injuries

[83] Gambrell v. Commonwealth, 113 S. W. 476, 130 Ky. 513.

[84] State v. Varnado, 52 So. 1006, 126 La. 732.

[85] State v. Heath, 141 S. W. 26, 237 Mo. 255.

[86] State v. Bailey, 88 S. W. 733, 190 Mo. 257.

done him, the defendant, then the defendant cannot avail himself of the law of self-defense, and you should not acquit on that ground; and the court further instructs you that in case you find that the defendant sought, brought on, or voluntarily entered into a difficulty with the deceased, it does not matter, in the application of the law of self-defense, how great the danger or imminent the peril to which the defendant may have believed himself to have been exposed during such difficulty.[87]

§ 2944(9). New Mexico

The court instructs the jury that the law of self-defense does not imply the right to attack, nor will it permit acts done in retaliation or for revenge, and if you believe from the evidence, beyond a reasonable doubt, that the defendant sought, brought on, or voluntarily entered into a difficulty with the deceased for the purpose of engaging him in a conflict with deadly weapons, then the defendant cannot avail himself of the law of self-defense and you should not acquit him on that ground, and it is for you to determine from all the evidence whether the claim of the defendant that he killed deceased in self-defense is made in good faith or is a mere pretense.[88]

§ 2944(10). Oklahoma

You are instructed, gentlemen of the jury, that while the law permits a person to defend himself or his wife against real or apparent danger, such right is defensive and not offensive; and therefore you are instructed that a person under the law cannot arm himself and invite and provoke a difficulty, and thereupon assault and slay his adversary, and invoke the right of self-defense. And you are instructed, gentlemen of the jury, if you believe from the evidence in this case beyond a reasonable doubt, that this defendant armed himself with a rifle and sought the deceased, either acting alone or in conjunction with his wife, for the purpose of provoking or engaging in a difficulty with the deceased, and in furtherance of any such design between husband and wife, either husband or wife invoked and provoked a difficulty with the deceased, and thereupon the defendant shot and killed the deceased, then the defendant cannot invoke the right of self-defense.[89]

You are instructed that the state of mind of the defendants at the time they started towards the station with the gun is the principal question in this case. If they started back with the hope or expectation that there would be trouble, and intending willingly to enter into the trouble, and to take the life of the deceased if oppor-

[87] State v. Vansant, 80 Mo. 67.

[88] State v. Pruett, 172 P. 1044, 24 N. M. 68.

[89] Bashara v. State, 164 P. 324, 13 Okl. Cr. 304.

tunity offered, and voluntarily entered into the difficulty, then they, or the one of them, having that intention, and so entering into the conflict, are guilty of murder; but if they had no such hope as they started back, but, on the contrary, hoped and desired that there would be no trouble, and with the expectation of using the weapon with which A. was armed only as a last resort, and did not intend to voluntarily enter into the difficulty, and did not enter into it voluntarily, then the homicide was justifiable, and it would be your duty to acquit them.[90]

You are instructed that the law of self-defense is given to the citizen for his protection, and it cannot be pleaded as a defense by one who himself is the aggressor, or who enters voluntarily into a difficulty armed with a deadly weapon, no matter in how much danger he may be placed in the course of the difficulty, nor how imminent his peril may become.[91]

You are instructed that, if you believe from the evidence beyond a reasonable doubt that, after the first meeting with the deceased in front of the hotel, the defendant armed himself with a shotgun, and that the defendants, in pursuance of a common design to engage in a deadly conflict with the deceased, returned to the place where the deceased was, and then and there voluntarily entered into the difficulty in which the deceased lost his life, they are both guilty of murder, and it will be your duty to convict them of that charge, no matter in how much danger or peril they may have been at the time of the homicide.[92]

You are instructed that, if you should believe from the evidence beyond a reasonable doubt that the defendant armed himself with a deadly weapon, and voluntarily went to the scene of the homicide and placed himself at the scene of the homicide for the purpose of meeting the deceased, and with the intent and purpose to produce the occasion of a meeting with the deceased, with the purpose and intent to then and there kill the deceased, and with the premeditated design to effect the death of the deceased, and that he did then and there under such circumstances without any act at the time on the part of the deceased manifesting a purpose to take his life or do him great personal injury shoot and kill the deceased as alleged in the indictment, then it is your duty to find the defendant guilty of murder and so say by your verdict. And, in this connection, you are told that, should you believe that before the fatal shot was fired the deceased by some act then done manifested a purpose to attack the defendant, yet if you believe beyond a reasonable doubt that

[90] McDaniel v. State, 127 P. 358, 8 Okl. Cr. 209.

[91] McDaniel v. State, 127 P. 358, 8 Okl. Cr. 209.

[92] McDaniel v. State, 127 P. 358, 8 Okl. Cr. 209.

the defendant provoked the deceased into doing such an act, and as a result thereof he then and there shot and killed the deceased, in pursuance of a premeditated design to effect his death, then you are told that such killing is murder.[93]

In this connection you are instructed that no man by his own lawless act can create a necessity for acting in self-defense, and thereupon assault and injure or kill the person with whom he seeks the difficulty, and then interpose as a defense the plea of self-defense. The plea of necessity is a shield only for those who are without fault in occasioning it and acting under it.[94]

The court further instructs the jury that the law of self-defense does not mean or imply the right of attack, nor will it permit of acts done in retaliation or for revenge. And in this case, if you believe from the evidence that the defendant sought out or brought on the difficulty at the time the fatal shot was fired, and for the purpose of wreaking vengeance upon the deceased, on account of the acts of the deceased in reference to the sale of the farm in controversy, and that at the time the defendant shot the deceased there was no reasonable apprehension of immediate and pending injury to the defendant, and that the defendant shot the deceased from a spirit of retaliation or revenge, and for the purpose of punishing the deceased for past injuries, then you are charged that the defendant cannot avail himself of the law of self-defense, and that the shooting and killing of the deceased affords no justification or excuse.[95]

§ 2944(11). South Carolina

The jury are instructed that a man cannot set up the plea of self-defense if he himself has brought about the trouble. As I explained to you, a man can only set up the plea of self-defense when he at the time was without fault, or did not bring about the trouble or difficulty.[96]

§ 2944(12). Tennessee

You are instructed that a defendant cannot be denied the right to rely on the plea of self-defense merely because he was in any sense, justly or unjustly, the "aggressor," or "in fault," or "provoked the difficulty" in which another was slain. In order to deny him the right to rely upon the plea of self-defense, it must appear that he was the "aggressor," or "in fault," or "provoked the difficulty" in such way and with such intent as the law contemplates in the use of these terms. It is not every "aggression" which produces a difficulty that is an unlawful one within the meaning of this phrase;

[93] Turner v. State, 111 P. 988, 4 Okl. Cr. 164.

[94] Robinson v. Territory, 85 P. 451, 16 Okl. 241.

[95] Wells v. Territory, 78 P. 124, 14 Okl. 436.

[96] State v. Whittle, 37 S. E. 923, 59 S. C. 297.

nor is it every fault which a man might commit that precludes him from defending himself when violently assaulted or menaced; nor is it every "provocation of a difficulty" which robs him of the right of self-defense. His right depends upon the character and intent of his act. Language used, however, opprobrious, is not sufficient to deny him the right. If defendant's act is an assault, or the menace of one by an overt act, or the provocation of a difficulty with the intent to inflict death or great bodily harm in the event it is resisted, made of malice to bring about that result, and enable the provoking party to wreak his vengeance upon the assailant, that is an "aggression," or "fault," or "provoking a difficulty," within the legal sense and meaning of the term, and if the combat is provoked, or the occasion to kill is produced on this account, with this intent, and for this purpose, defendant cannot rely upon the plea of self-defense; otherwise, he can.[97]

§ 2944(13). Texas

I further charge you that, if you believe from the evidence, beyond a reasonable doubt, that the defendant sought the meeting with deceased for the purpose of slaying deceased, and, having found him, did some act, or used some language, or did both, with intent to produce the occasion and bring on the difficulty, and that the same, under the circumstances, was or were reasonably calculated to provoke a difficulty, and on such account the deceased attacked him, and he then killed deceased in pursuance of his original design, then the defendant cannot justify on the ground of self-defense, but such killing would be murder of one of the degrees; but if defendant had no such purpose in seeking the fatal meeting, or, having it, did no act reasonably calculated to provoke the difficulty, and was attacked by the deceased, then his right of self-defense would not be forfeited, and he could stand his ground and defend himself by the use of such means of defense as the facts and circumstances indicated to be necessary to protect himself from danger, or what reasonably appeared to him at the time to be danger.[98]

You are further instructed, gentlemen, as a part of the law of this case, that if you believe from the evidence in this case, beyond a reasonable doubt, that the defendant formed the design to kill the deceased, and that he armed himself with a pistol, and sought a meeting with deceased for the purpose and with the intention of taking the life of the deceased, and that when he met the deceased he did acts and made statements which, under the circumstances existing between the two men, were reasonably calculated to and did provoke the deceased to attack him, the defendant, and that in de-

[97] Cooper v. State, 138 S. W. 826, 123 Tenn. 37.

[98] Kinney v. State, 144 S. W. 257, 65 Tex. Cr. R. 251.

fense of himself against such attack the defendant shot and killed the deceased, you will find him guilty of murder in the second degree, or of manslaughter, according to the facts and circumstances of the case.[1]

You are further instructed, as a part of the law of self-defense, that if a person, by his own wrongful act, brings about the necessity of taking the life of another to prevent himself being killed, he cannot claim that such killing was in his own necessary self-defense, but the killing in such case will be imputed to malice, by reason of the wrongful act which brought it about, or malice from which it was done. The law is that he who brings on an affray in which he intends to wreak his malice cannot avail himself of the shield of self-defense, though his own life be imperiled in the affray, and that the slayer, if he provoked the contest or produced the occasion with the intention of killing deceased or of doing him some serious bodily harm, is guilty of murder, although he may have done the act of killing suddenly, without deliberation, to save his own life. In such case the law allows no justification, and no reduction of the grade of the homicide below that of murder. If you believe, therefore, beyond a reasonable doubt, that defendant by his own wrongful act brought about the necessity of killing deceased, intentionally and with a view thereto, or if defendant provoked the difficulty with the intention of taking the life of deceased, intentionally and with a view thereto, and that under such circumstances he shot and killed deceased, then the homicide would be murder in the first or second degree, according as the facts and circumstances may justify the jury in finding, even though he may have done the act of killing suddenly and to save his own life. But if defendant provoked the difficulty that resulted in the death of deceased, or by his own wrongful act produced the necessity for taking the life of deceased, but with no intention to kill deceased or to inflict upon him some serious bodily harm, and suddenly, under the immediate influence of sudden passion arising from an adequate cause, as explained to you in paragraph ——— of this charge, he shot and killed deceased, then you will find defendant guilty of manslaughter.[2]

You are instructed that the law is that he who brings on an affray in which he intends to wreak his malice cannot avail himself of the shield of self-defense, though his own life be imperiled in the affray, and the slayer, if he provoked the contest, or produced the occasion, with the apparent intention of killing the deceased or of doing him some serious bodily harm, is guilty of murder, although

[1] Gaines v. State, 127 S. W. 181, 58 Tex. Cr. R. 631. This instruction clearly and logically carries with it the implication that the acts done by defendant must have been intended to provoke the difficulty.

[2] Matthews v. State, 58 S. W. 86, 42 Tex. Cr. R. 31.

he may have done the act of killing suddenly, and without deliberation, to save his own life. In such case the law allows no justification and no reduction of the grade of the homicide below that of murder.[3]

You are instructed that if you believe, therefore, beyond a reasonable doubt, that defendant, by his own wrongful act, brought about the necessity of killing deceased, or provoked the difficulty with the apparent intention of taking the life of the deceased, intentionally, and with a view thereto, and that under such circumstances he shot and killed deceased, then defendant's plea of self-defense will not avail him, and the homicide would be murder in the first or second degree, according as the facts and circumstances may justify the jury in finding.[4]

§ 2944(14). Virginia

You are instructed that even the necessity relied upon to justify killing must not arise out of prisoner's own misconduct.[5]

§ 2944(15). Washington

You are instructed that an accused person who is an aggressor in an affray, or by acts or words provokes or brings on an affray, cannot invoke the doctrine of self-defense or be justified in shooting to prevent injury, unless before such shooting such aggressor in good faith sought and endeavored to withdraw from and abandon the conflict.[6]

§ 2945. Same—Seeking out deceased in his own home

You are instructed that, if the deceased had reason to believe that she or any one at her home would probably be attacked, then as a matter of law she had a perfect right to arm herself and prepare, not only for her own defense, but that of her home and all persons being therein at the time; and, if the defendant advanced upon the deceased's home for the purpose of attacking the deceased or any person in her home, the deceased would not be required to retreat, but would have a right to stand her ground and repel force with force, and if necessary to prevent herself or any person in her home from receiving great bodily injury at the hands of the defendant, and if you find from the evidence in this case, beyond a reasonable doubt, that the defendant was entering the home of the deceased, over her protest, and killed her, as is charged in the indictment, then you will find the defendant guilty.[7]

[3] Gonzales v. State, 16 S. W. 978, 30 Tex. App. 203.

[4] Gonzales v. State, 16 S. W. 978, 30 Tex. App. 203.

[5] Hodges v. Commonwealth, 15 S. E. 513, 89 Va. 265.

[6] State v. McConaghy, 146 P. 396, 84 Wash. 168.

[7] Jackson v. State, 202 S. W. 683, 133 Ark. 321.

§ 2946. Provoking of difficulty by defendant without intent to do serious bodily injury

You are instructed that, if the defendant provoked the difficulty without any intention to kill or inflict serious bodily injury, and suddenly and without deliberation did the act of killing, under the immediate influence of sudden passion arising from adequate cause, as hereinafter explained to you, while the homicide would not be justifiable, it would be "manslaughter," within the meaning of that term as now hereafter defined.[8]

§ 2947. Withdrawal by defendant after aggression

§ 2947(1). Arkansas

You are instructed that, if you believe from the evidence in this case beyond a reasonable doubt that the defendants brought on the difficulty, before they or either of them would be justifiable in striking a fatal blow, they must show that they in good faith endeavored to decline any further contest before striking the mortal blow.[9]

§ 2947(2). Georgia

The jury are instructed that if the jury believe that the evidence establishes, beyond a reasonable doubt, that the defendant shot and killed the deceased, and that the reason for that killing on the part of the defendant was because the deceased was seeking to commit a serious personal injury upon the defendant with a pistol, and that the deceased was the assailant, or if the jury believe that the defendant was the assailant, and that the defendant had really and in good faith endeavored to decline any further struggle before the fatal shot was fired, and that the circumstances were sufficient to excite the fears of the defendant, as a reasonable man, that his life was in danger, or that some great bodily harm would come to him, from the assault of the deceased, and under the influence of those fears, and not in a spirit of revenge, he shot and killed the deceased, that would be a killing in self-defense, and the defendant would be justifiable, and it would be the duty of the jury to acquit the defendant.[10]

§ 2947(3). Kentucky

The jury are instructed that, if you believe from the evidence, beyond a reasonable doubt, that the defendant first began the difficulty by shooting ——— or making a demonstration to shoot him, then you ought not to excuse the defendant on the ground of self-defense or apparent necessity therefor, or the defense of another or apparent necessity therefor, as defined in instruction No. ———,

[8] Gonzales v. State, 16 S. W. 978, 30 Tex. App. 203.

[9] Howard v. State, 183 S. W. 743, 122 Ark. 422.

[10] Roark v. State, 32 S. E. 125, 105 Ga. 736.

unless you believe from the evidence that he, or he and those acting with him, if any, abandoned such assault and difficulty in good faith, and then the deceased, seeing or knowing of such abandonment, continued to assault the defendant or either of the defendants, or to so menace them or any of them, as that it was necessary, or was believed by the defendant in the exercise of a reasonable judgment to be necessary to shoot the deceased, or to aid, encourage, advise, or command one of the other defendants to so shoot and kill the deceased in order to avert that danger, real or to the defendant apparent, in which event you ought to acquit the defendant on the ground of self-defense and apparent necessity therefor.[11]

§ 2947(4). Louisiana

The jury are instructed that, if a person commits an assault upon another, or provokes a difficulty, and thereby brings on a conflict, he cannot justify the killing of a person thus assaulted or provoked, unless he satisfies the jury that he withdrew from the conflict brought on by himself. His withdrawal from the conflict must be in good faith, and in such an unequivocal manner as to show his adversary that he desires to withdraw. If then the party provoked or assaulted follows him, or attempts to kill him, or to do him great bodily harm, he acquires the same right of self-defense as if he had not been the original aggressor.[12]

§ 2947(5). Mississippi

The jury are instructed that, even though the jury should believe from the evidence beyond a reasonable doubt that the defendant was the aggressor in the difficulty between himself and J. L., and even though the jury should further believe from the evidence beyond a reasonable doubt that the deceased M. L., began beating the defendant with a deadly weapon to prevent the defendant from committing a felony upon J. L., still the said M. L., had no right to continue beating defendant after said defendant had ceased such attack upon said J. L., and if the jury believe from the evidence that M. L. did so continue to beat the defendant with a deadly weapon, then the defendant had a right to defend himself against such continued attack, even to the point of taking the life of said M. L., if actually or apparently necessary to save himself from great bodily harm, or, if the jury are in doubt as to this, they should acquit.[13]

[11] Gambrell v. Commonwealth, 113 S. W. 476, 130 Ky. 513.

[12] State v. Simon, 59 So. 975, 131 La. 520.

[13] Boykin v. State, 38 So. 725, 86 Miss. 481.

§ 2947(6). Tennessee

You are instructed that in the present case, if the difficulty in which it is insisted that the deceased was killed was brought about by the fault, design, or contrivance of the defendant, then the defendant cannot excuse himself as for a killing in self-defense, unless he in good faith used all the means in his power to escape, and abandon the difficulty, before resorting to the alleged fatal shot.[14]

§ 2948. Assault by deceased preceded by mutual insults

The jury are instructed that, if deceased first used verbal insult towards the defendant, without any provocation whatever on the part of defendant, and defendant retorted by using the same character of insult to deceased, and if then he was assaulted by deceased, defendant had the right to defend himself against such aggression upon the part of deceased, if such you find occurred, provided defendant did not fight willingly, and provided, further, that there was no reasonable means of escape, without increasing his real or apparent danger, and if you further find that under the circumstances existing at the time defendant shot he honestly believed that he was in imminent danger to life or limb, and the conditions at the time were such as would have impressed upon the minds of a reasonable person that there was such imminent danger, though there was no such danger in fact, but that it was only apparent, then defendant would have been justified in shooting deceased.[15]

§ 2949. Duty not to choose path which is likely to lead to an anticipated combat

You are instructed that a man who expects to be attacked should first employ the means to avoid the necessity of self-defense, and until he has done this his right of self-defense does not exist. The law says that if one expects to be assaulted and has two paths, one leading to the attack and the other leading from it, he must avail himself of the one leading from it if while so doing he can reasonably avoid the necessity of resorting to it. And, if he does not, he puts himself in a position that he cannot plead self-defense. If two courses are open to him, and by reasonably taking that course by which he would avoid the necessity of the attack, or conflict, or killing, and he voluntarily takes the other course, and puts himself in a position where it then becomes necessary for him to defend himself, he cannot be said to be without fault in bringing on the difficulty, and his plea of self-defense under those circumstances would not hold. It is under that proposition of law that a conflict of blood must be avoided if a party can reasonably do so, and thereby avoid the fight. If you come to the conclusion that the de-

[14] Turner v. State, 15 S. W. 838, 89 Tenn. 547.

[15] Hubbard v. State, 64 So. 633, 10 Ala. App. 47.

fendant drove upon the highway and accepted or sought a threatened attack upon him, and that pursuing the tenor of his way he could have reasonably avoided it, and voluntarily put himself in the way of the attack, he could not under those circumstances plead self-defense. And that is where we get the expression in the law of "self-defense," that before it is available one must show that he had no other probable means of escape. The old law was that he had to flee to the wall. Our law is that he must show that he had no other means of escape.[16]

§ 2950. Killing in an attempt to secure an apology from deceased for insulting wife of defendant

The court instructs the jury that if they believe that defendant went to the place of the fatal encounter for the purpose of peaceably stopping the disturbance there, and for the purpose of peaceably demanding an apology of ——— for the grievous and abusive words spoken of his wife, and that he did not go there for the purpose of killing ———, or of having a difficulty with him in the event he should refuse to give the required apology, and that defendant did go there and peaceably endeavor to stop the disturbance, and did peaceably demand an apology of ———, and that ——— refused to give the apology, but advanced upon defendant with a pistol, and that defendant killed ——— under the belief that it was necessary to save his life, or himself from some bodily injury, then the jury must find him not guilty.[17]

§ 2951. Arming by defendant to protect himself against another than deceased

You are instructed that, if the purpose of defendant in arming himself, if such be the fact, was to protect himself against another, with no purpose to attack the deceased or to provoke a difficulty with him for the purpose of killing him, then defendant would be justified, if the deceased did attack him in such a manner as to produce in his mind a reasonable apprehension of his life or serious bodily injury, as before defined and instructed.[18]

§ 2952. Killing in mutual combat

§ 2952(1). Alabama

I charge you, gentlemen of the jury, that if you are satisfied from all the evidence in this case beyond a reasonable doubt that defendant entered into the fight willingly in which ——— lost his life, then defendant cannot invoke the doctrine of self-defense, and you must find him guilty.[19]

[16] State v. Babb, 70 S. E. 309, 88 S. C. 395.

[17] Watson v. Commonwealth, 13 S. E. 22, 87 Va. 608.

[18] Tardy v. State, 78 S. W. 1076, 46 Tex. Cr. R. 214.

[19] Turner v. State, 65 So. 719, 11 Ala. App. 1.

The jury are instructed that, if you believe from the evidence in this case beyond a reasonable doubt that the defendant entered into the fight willingly that resulted in the death of ———, then the defendant cannot invoke the doctrine of self-defense.[20]

§ 2952(2). Arkansas

The jury are instructed that no one, in resisting an assault made upon him in the course of a sudden brawl or quarrel, or upon a sudden encounter or in a combat on a sudden quarrel, or from anger suddenly aroused at the time it is made or in a mutual combat, is justified or excused in taking the life of his assailant, unless he is so endangered by such assault as to make it necessary to kill his assailant to save his own life, or to prevent a great bodily injury, and he employed all the means in his power, consistent with his safety, to avoid the danger and avert the necessity of killing. He cannot provoke the attack, bring on the combat, and then slay his assailant, and claim exemption from the consequences of killing his adversary, on the ground of self-defense. He cannot invite or voluntarily bring upon himself an attack with a view of resisting it, and, when he has done so, slay his assailant, and then shield himself on the assumption that he was defending himself. He cannot take advantage of a necessity produced by his own wrongful or unlawful act. After having provoked or brought on the combat, he cannot be excused or justified in killing his adversary for the purpose of saving his own life, or preventing a great bodily injury, until he has in good faith withdrawn from the combat, as far as he can, and done all in his power to avoid the danger and avert the necessity of killing. If he has done so, and the other party pursues him, and the taking of life becomes necessary to save his life or to prevent his receiving great bodily injury, he is excusable.[21]

§ 2952(3). Georgia

You are instructed that, if you believe the parties went together and met under circumstances showing mutual intent to fight, to have a mutual combat, and that they were armed and looking to that end, and that they had prepared weapons for that purpose, and met together, and one of them was quicker than the other, and by this means fired before the other could fire or did fire, that would still be a crime, and the jury would be authorized to find the killing murder.[22]

You are instructed that, if the jury believe that the evidence es-

[20] Terry v. State (App.) 86 So. 127, 17 Ala. App. 527; McEwen v. State, 44 So. 619, 152 Ala. 38.

[21] Hankins v. State, 145 S. W. 524, 103 Ark. 28.

[22] Dorsey v. State, 35 S. E. 651, 110 Ga. 331. The above is proper, when accompanied by an instruction on voluntary manslaughter in connection with mutual combat.

tablishes beyond a reasonable doubt that the defendant and the deceased bore malice to each other, and that there had been mutual threats to kill against the other, known to each of them, and that each, with the knowledge of the other, had deliberately procured pistols for the purpose of fighting with them, and had thereupon deliberately fought with their pistols, and under those circumstances the defendant, being quicker than the deceased, fired and killed the deceased, the jury would be authorized to find the defendant guilty of the crime of murder.[23]

§ 2952(4). Kentucky

The jury are instructed that, if they believe from the evidence, beyond a reasonable doubt, that the defendant, or ———, ———, ———, or ———, or any of them, when they met ——— and his party, commenced the difficulty with them by first shooting at them, or any of them, or making the first demonstration to shoot at any of them, or that defendant, or ———, ———, ———, and ——— met the parties named, and both parties were armed and determined on a conflict, and did engage in such conflict by mutual consent, then in either event the defendant cannot rely on the right of self-defense, or that he acted in defense of his associates named.[24]

§ 2952(5). Texas

You are instructed that, if the defendant at the yard gate of the deceased, agreed with the deceased to engage in a fight with deceased, and if at the time he intended to have only a fist fight with deceased, and did not intend to fight the deceased with a weapon, and did not intend to use a knife on deceased, and if, pursuant to such intention, he went with deceased some distance from the yard gate and house of the deceased, and if at the place they stopped the deceased struck or attacked the defendant with the large stick exhibited in evidence before you, or with any other stick, and produced in his mind such a degree of anger, rage, resentment, or terror as to render it incapable of cool reflection, and that under such circumstances defendant killed the deceased by cutting and stabbing him with a knife, he would not be guilty of a higher grade of offense than manslaughter.[25]

You are also further instructed, as a part of the law of this case, to be read and considered by you in connection with the charge hereinbefore given, as follows: If you believe from the evidence beyond a reasonable doubt that the defendant went to the scene of the homicide for the purpose of engaging in a mutual combat with the deceased, and that he there waited for deceased to ap-

[23] Roark v. State, 32 S. E. 125, 105 Ga. 736.

[24] Watkins v. Commonwealth, 97 S. W. 740, 123 Ky. 817.

[25] Anthony v. State, 136 S. W. 1097, 62 Tex. Cr. R. 138.

pear for the purpose of engaging in said combat, and that thereafter deceased did appear, and he and defendant engaged in said combat, and during the progress of the conflict so brought on and occasioned that defendant shot and killed deceased, then you are charged that defendant cannot claim that the killing was in his self-defense, but he will be guilty of murder in the second degree or manslaughter, according as the facts and circumstances in evidence, applied to the law herein given you, may justify the jury in finding. Upon the other hand, if defendant did not go to the scene of the homicide for the purpose of engaging in a difficulty, but for the purpose of settling a dispute between himself and deceased in a peaceable and friendly manner, and if the deceased became the aggressor, and made an assault upon defendant in such a manner as caused defendant to have a reasonable expectation or fear of death or serious bodily injury, and, acting under such reasonable expectation or fear, he shot and killed deceased, then his right of self-defense would be complete, and, the killing thus occurring, it will be your duty to acquit. If, however, the attack on defendant, if any, was not such as reasonably produced in his mind an expectation or fear that his life was in danger, or that his person was in danger of serious bodily injury, then he would have a qualified right of self-defense,—that is, he would be authorized to use all the force necessary to repel, the assault being made on him; and if he shot and killed deceased, and in so doing he used no more force than was necessary, then he would not be guilty, and you will acquit. But, upon the other hand, if in firing the fatal shot, if you find that he did, he used more force than was necessary, as it reasonably appeared to him at the time, to repel said assault by the deceased, then he will be criminally responsible, and will be guilty of murder in the second degree or manslaughter, according as the facts and circumstances, as applied to the charge, may justify you in finding.[26]

§ 2952(6). West Virginia

The court instructs the jury that where there is a quarrel between two persons, and both are in fault, and a combat as a result of that quarrel takes place, and death ensues, in order to reduce the offense to killing in self-defense two things must appear from the evidence and circumstances of the case: First, that before the mortal blow was given the prisoner declined further combat, and retreated as far as he could with safety; and, secondly, that he necessarily killed the deceased in order to save his own life or protect himself from great bodily harm.[27]

[26] Gardner v. State (Cr. App.) 59 S. W. 1114.

[27] State v. Dickey, 37 S. E. 695, 48 W. Va. 325.

§ 2953. Killing in sudden brawl or quarrel

§ 2953(1). Arkansas

The jury are instructed that no one, in resisting an assault made upon him in the course of a sudden brawl or quarrel, or upon a sudden encounter, or in a combat on a sudden quarrel, or from anger suddenly aroused at the time it is made, is justified in taking the life of the assailant, unless he is so endangered by such assault as to make it necessary to kill the assailant to save his own life, or to prevent a great bodily injury, and he employed all the means in his power consistent with his safety, to avoid the danger and avert the necessity of killing. The danger must apparently be immiment, irremediable, and actual, and he must exhaust all the means within his power, consistent with his safety, to protect himself, and the killing must be necessary to avoid the danger. If, however, the assault is so fierce as to make it, apparently, as dangerous for him to retreat as to stand, it is not his duty to retreat, but he may stand his ground, and if necessary to save his own life, or to prevent a great bodily injury, slay his assailant.[28]

§ 2953(2). California

The jury are instructed that a person may while engaged in a sudden quarrel be justified in killing another in self-defense, as, for instance, one party may assail another under such circumstances as to make it necessary for the other to kill in self-defense, or such person being the aggressor, he may so conduct himself as to justify the other as a reasonable man in believing that it is necessary to so do in order to save himself from death or great bodily injury. In either event, the mere fact that the parties are engaged in a sudden quarrel, which may be a mere altercation of words, cannot deprive one of the right to defend himself against a real or apparent assailant. But mere words, whether used in a sudden quarrel, or otherwise, never justify or excuse one in taking life. There must be some overt act or demonstration of force reasonably sufficient to cause the one doing the killing to believe, as a reasonable person that his own life is in danger, or that he is in imminent peril of some great bodily injury.[29]

§ 2953(3). Kentucky

The court further instructs the jury that if they believe from the evidence, to the exclusion of a reasonable doubt, that the defendant killed one ——— by shooting him to death with a pistol loaded with powder and ball, or other hard substance, but they further believe from the evidence that at the time of said shooting and killing the defendant was engaged in a sudden affray with said

[28] Cantrell v. State, 174 S. W. 521, 117 Ark. 233.

[29] People v. Shimonaka, 116 P. 327, 16 Cal. App. 117.

———, and was being attacked by said ———, and the defendant believed he was then in danger of suffering great bodily harm or death at the hands of said ———, and he believed he had no safe means of avoiding said attack, or to him apparently safe means of avoiding same, and the defendant shot said ——— in his necessary self-defense, or what appeared to him, under the circumstances, to be his necessary self-defense, considering all the circumstances and surroundings at the time of said shooting, they should find him not guilty, on the ground that said killing was done in self-defense.[30]

§ 2954. Killing in mutual combat pursuant to previously formed design

You are instructed that, if a party enters into a contest dangerously armed and fights under an undue advantage, even though mutual blows pass, if he slays his adversary pursuant to a previously formed design, either special or general, to use such weapon in case of an emergency in which his life would not be endangered, or he would not be in danger of suffering great bodily harm, it is not manslaughter, but it is murder.[31]

§ 2955. Killing in quarrel provoked by defendant for such purpose

§ 2955(1). Georgia

The jury are instructed that if, as contended by the state, the defendant was the aggressor and provoked the difficulty, and provoked the deceased to resent his attack and insult, for the purpose of getting an excuse to slay the deceased, and under those circumstances took the life of the deceased in a spirit of revenge and with malice, the killing would be murder.[32]

§ 2955(2). Illinois

You are instructed that if you believe, from the evidence, beyond a reasonable doubt, that the defendant, without provocation, sought and provoked a quarrel with ——— for the purpose of killing him, and in the quarrel did kill him, with the malicious intention of taking the life of ———, you will find him guilty of murder.[33]

The jury are instructed that the defendant cannot avail himself of the plea of necessary self-defense, if the necessity of that defense was brought on by the deliberate and lawless act of defendant, or by his bantering ——— to a fight, for the purpose of taking his life or committing a bodily harm upon him, and in which he killed ——— by the use of a deadly weapon.[34]

[30] Connor v. Commonwealth, 81 S. W. 259, 118 Ky. 497.

[31] Jarvis v. State, 34 So. 1025, 138 Ala. 17.

[32] Chancey v. State, 80 S. E. 287, 141 Ga. 54.

[33] Kyle v. People, 74 N. E. 146, 215 Ill. 250.

[34] Adams v. People, 47 Ill. 376.

The jury are instructed that, if defendant sought a difficulty with the deceased for the purpose of killing him, and in the fight did kill him in pursuance of his malicious intention to take the life of the deceased you will find him guilty of murder.[35]

§ 2956. Provoking combat with design to use deadly weapon in emergency

See, also, ante, § 2954.

The court charges the jury, if a party dangerously armed provokes a hostile demonstration with an undue advantage, he is guilty of murder, if he slays his adversary pursuant to a previously formed design to use his weapon in an emergency. Previous preparation for a rencounter evinces deliberation and premeditation, and, unexplained, is evidence of express malice.[36]

§ 2957. Abandonment of mutual combat by defendant

§ 2957(1). Illinois

The jury are instructed that if the jury believe, from the evidence, that the defendant did not seek to renew the fight, but in good faith sought to decline it, and that he was pursued and assaulted by the deceased in such a way as to induce in said defendant a reasonable and well-grounded belief that he was actually in danger of losing his life, or suffering great bodily harm from said deceased, and that, acting under such reasonable apprehension, and for the purpose of protecting himself, he inflicted wounds upon the said deceased which resulted in his death, then the jury must acquit the defendant.[37]

§ 2957(2). Texas

You are instructed that if the defendant, at the yard gate of the deceased, agreed to engage voluntarily in a combat with deceased, either with the knife exhibited in evidence or without it, and with his fists, and if the defendant and the deceased left the yard gate and house of the deceased for the purpose and with the intention of engaging in a combat with each other, but after they had gone some distance from the yard gate and house of the deceased they stopped, and the defendant abandoned the combat and the agreement to have a combat, and started to turn and leave the deceased, and the deceased then struck or attacked the defendant with the stick exhibited in evidence before you, or with any other stick, and in defense of himself against such attack by the deceased the defendant killed the deceased by cutting and stabbing him with the knife exhibited in evidence, or if you have a reasonable doubt as to whether or not the

[35] Adams v. People, 47 Ill. 376.
[36] Watson v. State, 46 So. 232, 155 Ala. 9.
[37] Reins v. People, 30 Ill. 256.

killing occurred under such circumstanees, the defendant would be justified in such killing.[38]

§ 2958. Homicide occurring in attempt by defendant to eject trespasser from his land

You are instructed that in this case there are some circumstances of a peculiar character, arising from the claim of proprietorship of land and the right to use a road. Upon this subject, after considering it with some care, I have adopted the law as laid down, with some very slight modification, in the requests to charge by the defendant. These requests are based upon the supposition on the part of defendant that there was a trespass committed by the deceased, and that the object of the prisoner at the bar was to remove the trespasser; and these principles of law mostly apply only in case you find that defendant was engaged in an effort to remove a trespasser from his land. They are all based upon that supposition,—that his object was to remove a trespasser. Now, if you find that, instead of that, defendant's purpose there was something else; that he took that pistol, and you find in that act that he was actuated by any ill feeling towards the deceased; that that was his purpose, with which he went there, expecting to have a deadly combat with him—then these propositions of law do not apply.[39]

You are instructed that the law justifies a man in using force in the defense of his person, habitation, or property, against one who manifestly intends and endeavors by violence to commit a known felony on either. He is not obliged to retreat, but may pursue his adversary till he finds himself out of danger; and if, in a conflict between them, he happens to kill his adversary, such killing is excusable. The right of self-defense of this kind is founded on the law of nature.[40]

I charge you, in accordance with the first request of the defendant, "that the deceased had no right to travel the road on the defendant's land without his consent, or unless the deceased or the public had acquired such right by prescription, and that nothing short of twenty years' continuous use can give a person or the public a prescriptive right over another man's land." In connection with that fact, I desire to say that, whereas to give a man the right of way requires a grant or fee to right of way to a man over the land of another, yet, if there was a parol permission to use the road—a parol license or permission to use the road—given by defendant to the deceased, why defendant could not treat him as a trespasser until he revoked that permission.[41]

[38] Anthony v. State, 136 S. W. 1097, 62 Tex. Cr. R. 138.

[39] State v. Bodie, 11 S. E. 624, 33 S. C. 117.

[40] State v. Bodie, 11 S. E. 624, 33 S. C. 117.

[41] State v. Bodie, 11 S. E. 624, 33 S. C. 117.

The court instructs the jury that, if the jury believe that the deceased went upon the defendant's land against his notice and consent, and that deceased had no legal right on said premises, then it was the duty of the deceased to leave said land when ordered so to do by the defendant, and, if he refused, the defendant had a legal right to use such force as was necessary to eject the deceased; and if in doing so the deceased resisted, and assaulted the defendant in such a manner as would cause a reasonable person of ordinary firmness to believe that it was necessary to kill deceased in order to save his own life or his person from serious bodily harm, then defendant had a right to repel such assault, even to the extent of taking the life of the deceased.[42]

You are instructed that a person in the rightful possession of lands may lawfully approach any person wrongfully upon the same, and may order the person trespassing to leave or quit the land; and, in the event of a refusal to do so, may use such force as may be necessary to eject such trespasser, and if such person is resisted by force in the attempt to eject such trespasser, he may legally defend himself, and repel force by force, using only such force as the fierceness of the attack may render necessary to defend himself.[43]

§ 2959. Right of one sought to be arrested to resist use of excessive force by officer

You are instructed that, although you may believe from the evidence beyond a reasonable doubt that the defendant had in his possession spirituous, vinous, or malt liquors for the purpose of sale in ——— county, in the presence of K., on the day before the killing, that the said K. arrested the defendant for the offense of having in his possession spirituous, vinous, or malt liquors for the purpose of sale in ——— county, that the defendant escaped custody, and that the said K. had summoned the deceased to assist him in the rearrest of the defendant, and that the said K. and the deceased were endeavoring to rearrest the defendant for that offense, yet if you further believe from the evidence that while said K. and the deceased were endeavoring to rearrest the defendant, the defendant did not resist the arrest by force or violence, and that the deceased, or the said K. began an attack on the defendant with guns or pistols, from which defendant believed and had reasonable grounds to believe, in the exercise of a reasonable judgment, that he was in immediate danger of death or some great bodily harm at the hands of said K. and the deceased, or either one of them, and that to surrender to them would not avail him safe means of averting the danger, real or apparent, and that his only safe means, in the exer-

[42] State v. Bodie, 11 S. E. 624, 33 S. C. 117.

[43] State v. Bodie, 11 S. E. 624, 33 S. C. 117.

cise of a reasonable judgment, to avert such danger was to shoot and kill the said deceased, and that the defendant did shoot and kill said deceased for that purpose, then you will acquit the defendant on the ground of self-defense or apparent necessity therefor.[44]

§ 2960. Killing in resisting excessive use of force to prevent defendant from committing a felony

The jury are instructed that, if an officer or other person who attempts to prevent another from committing a felony uses more force than is reasonably necessary, he becomes a wrongdoer, and the person so sought to be prevented may resist said excess of force by force, even to the killing, of the person so seeking to prevent the felony, if necessary, to preserve his own life from such excessive use of force, or to save himself from great bodily harm.[45]

§ 2961. Nature of assault by deceased and imminence of danger

§ 2961(1). United States

The jury are instructed, with respect to the law of self-defense, that it does not mean that defendant was assaulted in a slight way, or that you can kill a man for a slight attack. The law of self-defense is a law of proportions as well as a law of necessity, and it is only danger that is deadly in its character, or that may produce great bodily harm, against which you can exercise a deadly attack. If a man is attacked by another in such a way as to denote a purpose to take away his life, or to do him some great bodily harm from which death or permanent injury may follow, in such a case he may lawfully kill the assailant. When? Provided he use all the means in his power otherwise to save his own life or prevent the intended harm, such as retreating as far as he can, or disabling him without killing him, if it be in his power. The act coming from the assailant must be a deadly act, or an act that would produce great violence to the person, under this proposition. It means an act that is hurled against him, and that he has not created it, or created the necessity for it by his own wrongful, deadly, or dangerous conduct —conduct threatening life. It must be an act where he cannot avoid the consequences. If he can, he must avoid them, if he can reasonably do so with due regard to his own safety.[46]

The jury are instructed, with reference to the matter of self-defense by reason of the presence of a real danger, that it cannot be a past danger, or a danger of a future injury, but a present danger, and a danger of great injury to the person injured, that would maim him, or that would be permanent in its character, or that might produce death.[47]

[44] Dale v. Commonwealth, 217 S. W. 363, 186 Ky. 510.

[45] Bissot v. State, 53 Ind. 408.

[46] Allen v. U. S., 17 S. Ct. 154, 164 U. S. 492, 41 L. Ed. 528.

[47] Acers v. United States, 17 S. Ct. 91, 164 U. S. 388, 41 L. Ed. 481.

§ 2961(2). Alabama

The court instructs the jury that, if the defendant shot under a bona fide belief that his life was in danger, and had under the circumstances reasonable cause to believe that he was in imminent danger at the moment the shot was fired, it would be immaterial whether there was such actual danger or not.[48]

You are instructed that the essential elements of self-defense are, first, that the defendant must be free from fault himself, he must not say or do anything for the purpose of provoking a difficulty, nor be disregardful of the consequences in this respect of any wrongful word or act; second, there must be a present, impending peril to life, or danger of great bodily harm, either real or so apparent as to create the bona fide belief of an existing necessity; third, there must be no convenient or reasonable mode of escape by retreat or by declining the combat.[49]

You are instructed that, when one is menaced with an assault, the following inquiries present themselves: First. Is he free from fault in bringing on the difficulty? Second. Is there reasonable ground and room for escape from injury? Third. Is the threatened assault of such nature as, if perpetrated, it is likely to produce death or the gravest bodily harm?[50]

§ 2961(3). Arkansas

You are instructed that in ordinary cases of one person killing another in self-defense, it must appear to the defendant that the danger was so urgent and pressing that in order to save his own life, or to prevent his receiving great bodily injury, or to prevent the commission of the felony feared by him, the killing of the other was necessary; and it must also appear that the person killed was the assailant, or that the slayer had really and in good faith endeavored to decline any further contest before the mortal blow or injury was given.[51]

I charge you that the right of self-defense begins in necessity and ends in necessity, and before the defendant can justify himself in taking the life of deceased (if you find he did take the life of deceased), defendant must have employed all the reasonable means in his power consistent with his safety to have avoided the danger, real or apparent, to himself to avert the necessity of taking the life of the deceased. I charge you that the danger, real or apparent, to the defendant, must have been so urgent and pressing as to cause the defendant to honestly believe that the killing of ——— was necessary in order to save his own life or prevent him from

[48] Gaston v. State, 49 So. 876, 161 Ala. 37.

[49] Robinson v. State, 45 So. 916, 155 Ala. 67.

[50] Sherrill v. State, 35 So. 129, 138 Ala. 3.

[51] Johnson v. State, 179 S. W. 361, 120 Ark. 193.

receiving great bodily harm at the hands of the deceased, and defendant must have acted under the influence of these fears and not in a spirit of revenge.[52]

You are instructed that, before the plea of self-defense made herein by the defendant shall be available, it must have appeared to the defendant, not only that the danger to him at the hands of the deceased was imminent, but it must also appear that it was so pressing and urgent that to save himself from death, or great bodily harm, the killing of the deceased was necessary.[53]

§ 2961(4). Idaho

The court instructs the jury as a matter of law that a person need not be in actual, imminent peril of his life or of great bodily harm before he may assault his assailant; it is sufficient if in good faith he has a good and reasonable belief from the facts as they appear to him at the time that he is in such imminent peril.[54]

§ 2961(5). Illinois

The court instructs the jury that although you may believe, from the evidence, that the deceased had a club and a spade with him at the time and immediately before he was killed, that fact, alone, would not justify the defendants, or either of them, in taking the life of deceased; but it must appear that at the time of the killing the defendants, or either of them, were in actual or apparent danger of receiving great bodily harm or losing his or their lives, and that the danger was so urgent and pressing that such killing of deceased was necessary, or apparently so, in order to save his or their own lives or prevent him or them from receiving great bodily harm.[55]

The court instructs the jury that, if a person kill another in self-defense, it must appear that the danger was apparently so urgent and pressing that, in order to save his own life or to prevent his receiving great bodily harm, the killing of the other was absolutely necessary; and it must appear, also, that the person killed was the assailant, or that the slayer had really and in good faith endeavored to decline any further struggle before the mortal blow was given.[56]

The jury are instructed that, before the defendant can avail himself of the right of self-defense, it must appear that at the time of the killing the danger was so urgent and pressing that, in order to save his own life, or to prevent his receiving great bodily harm, the killing of the deceased was absolutely necessary, or apparently necessary; and it must also appear that the deceased was the first

[52] Whitener v. State, 178 S. W. 394, 120 Ark. 30.

[53] Plumley v. State, 171 S. W. 925, 116 Ark. 17.

[54] State v. Fondren, 135 P. 265, 24 Idaho, 663.

[55] People v. Grosenheider, 107 N. E. 607, 266 Ill. 324.

[56] People v. Hubert, 96 N. E. 294, 251 Ill. 514.

assailant, or that the defendant had in good faith endeavored to decline any further struggle before the mortal shot was fired.[57]

The court further instructs the jury (in the words of the statute) that "if a person kill another in self-defense, it must appear that the danger was so urgent and pressing that, in order to save his own life, or to prevent his receiving great bodily harm, the killing of the other was absolutely necessary." [58]

§ 2961(6). Iowa

The jury are instructed that, before a person can be excused from using a dangerous and deadly weapon in a dangerous manner that might, or does, result in great bodily injury to or the death of an assailant, it must appear to the defendant that the danger was so urgent and pressing that in order to save his own life, or to prevent his receiving great bodily harm, the use of such dangerous and deadly weapon in a dangerous and deadly manner was absolutely necessary, and it must appear that the person upon whom such weapon was used was the assailant, and that the defendant was really and in good faith endeavoring to decline any further struggle before the blow in question was given. If the defendant was assaulted by the said ———, he had the right to repel the attack, using sufficient force for that purpose; but, if the defendant was not reduced to such apparent extremity or danger as reasonably appeared to him to render it absolutely necessary to use a dangerous and deadly weapon to save his own life, or to prevent his sustaining great bodily harm, then you cannot find that the acts of the defendant in so using such dangerous and deadly weapon in a dangerous manner, if he did so use it, were committed in self-defense.[59]

§ 2961(7). Kentucky

The court instructs the jury that if you believe from the evidence that at the time the defendant shot at and wounded ———, so that he died thereby, if he did so do, he believed, and had reasonable grounds to believe, that he was then and there in danger of death or the infliction of some great bodily harm at the hands of said ———; and that it was necessary, or was believed by the defendant in the exercise of reasonable judgment to be necessary, to so shoot and wound the deceased in order to avert that danger, real or to the defendant apparent, then you ought to acquit defendant upon the ground of self-defense or apparent necessity therefor.[60]

You are instructed that, however abusive may be the language

[57] Henry v. People, 65 N. E. 120, 198 Ill. 162.

[58] Greschia v. People, 58 Ill. 295.

[59] State v. Thomas, 132 N. W. 51, 151 Iowa, 572.

[60] Winburn v. Commonwealth, 203 S. W. 1073, 181 Ky. 183.

of one of the combatants, it will not justify an assault or battery upon the other, but an assault and battery may be opposed by same, and, further, that before either can take the life of the other, or do him other great bodily harm and be justified by the law, the one so doing must believe, and have reasonable grounds to believe, that at such time he himself is in real or apparent danger of death, or some other great bodily harm, impending at the hands of the other.[61]

You are instructed that, if you believe from the evidence that at the time the defendant shot and killed ———, if he did so, he believed, and had reasonable grounds to believe, that he was then and there in immediate danger of death, or the infliction of some great bodily harm at the hands of the said ———, and that it was necessary, or was believed by the defendant in the exercise of a reasonable judgment to be necessary, to shoot at and kill the said ———, in order to avert that danger, then you will acquit the defendant, upon the grounds of self-defense and apparent necessity.[62]

§ 2961(8). Mississippi

The court instructs the jury that if they believe from the evidence that ——— assaulted the defendant with a deadly weapon, to wit, a stick, the defendant had the right, under the law of the land, to repel such an assault by the use of a deadly weapon; and if, in repelling such assault, the defendant wounded the deceased by cutting him with a knife, from which deceased died, then such killing was justifiable, and the jury should find the defendant not guilty.[63]

The court instructs the jury that they are not called upon to determine in this case which of the parties was the aggressor in the fight between J. L. and the defendant. But the jury is to determine whether or not, at the time the defendant cut deceased, the said deceased was in the act of committing an assault upon the defendant with a deadly weapon; and if the jury believe that, at the time defendant cut deceased, the deceased was in the act of so assaulting the defendant, then such cutting was justifiable, and the jury should find the defendant not guilty, or, if the jury entertain a reasonable doubt as to whether the cutting was justifiable or not, they should resolve such doubt in favor of the defendant, and acquit him.[64]

The court instructs the jury that if they believe from the evidence that J. L. began the assault upon the defendant with his fist, and if they further believe from the evidence that, while J. L.

[61] Gordon v. Commonwealth, 124 S. W. 806, 136 Ky. 508.

[62] Burns v. Commonwealth, 124 S. W. 409, 136 Ky. 468.

[63] Boykin v. State, 38 So. 725, 86 Miss. 481.

[64] Boykin v. State, 38 So. 725, 86 Miss. 481.

was thus assaulting defendant, the deceased began beating defendant with a deadly weapon, then defendant had a right to defend himself against such attacks, even to the point of taking the life of either or both of the said ———, if actually or apparently necessary to save his own life or limb; and, if the jury entertain a reasonable doubt as to this, they should resolve said doubt in favor of the defendant, and acquit him.[65]

The court instructs the jury, further, for the defendant, that if they believe from the evidence in this case that B., on the simple request of defendant for an explanation of the trouble he (B.) had had with defendant's little brother, became angered, and assaulted defendant with a stick capable in his (B.'s) hand of inflicting great bodily harm upon defendant, and that the manner of such assault caused defendant reasonably to believe that such injury was then about to be, or in progress of being, inflicted on him, and to prevent it he reasonably believed it was necessary to shoot him, then he had a right to draw his pistol in his own defense, and shoot B., even if it killed him; and, if the killing occurred under such circumstances, then the jury should acquit defendant.[66]

The court instructs the jury for the defendant that if they believe from the evidence in the case that ———, while seated in his buggy, and when defendant stated to him that he did not know him, said, in an angry and rude tone to defendant, "You are a damned liar," or a "God damned liar," and immediately threw his hand behind him in a threatening and menacing manner, as though he intended to draw a weapon, and that his acts and conduct were such as to engender in the mind of defendant a reasonable belief that ——— was armed and intended to draw a pistol and shoot defendant, and that under such circumstances defendant shot ———, then defendant should be acquitted.[67]

§ 2961(9). Missouri

The court instructs the jury that, to justify a killing on the ground of self-defense, it must appear that the party killing was apprehensive, in consequence of the acts and conduct of the party killed, that some great bodily injury to himself was impending, and about to fall on him, and that such killing was necessary to prevent such injury, either apparent or actual. Therefore, if you believe from the evidence that, in consequence of the acts and conduct of ———, either alone or acting with another at the time the fatal shot was fired, the defendant had reasonable cause to believe,

[65] Boykin v. State, 38 So. 725, 86 Miss. 481.

[66] King v. State, 23 So. 766.

[67] Fore v. State, 23 So. 710, 75 Miss. 727.

and did believe, that ——— was about to kill him or do him some great bodily harm, and that defendant shot to prevent such design being consummated, then your verdict should be for defendant. But you must say from the evidence, under all the facts and circumstances before you, whether the defendant did have reasonable cause for such apprehension. If he did not have reasonable cause for such apprehension, even though he believed he had, you cannot acquit him on the ground of self-defense. It is not, however, necessary that the danger should have been actual or real, or that the danger should have been about to fall upon him. All that is necessary is that the defendant should have had reasonable cause to believe that state of facts, and did so believe, and shot and killed ——— to prevent the consummation of such design on the part of ———.[68]

§ 2961(10). Oklahoma

The court instructs the jury that a person need not be in actual imminent peril of his life being taken, or of great personal injury being done him, and if the jury believe that the defendant had reasonable grounds to believe and did believe, from the facts as they reasonably appeared to him at the time, that the danger was so urgent and pressing, or apparently so urgent and pressing, that the defendant could not avoid the necessity of killing in safety to himself to protect himself from death or great personal injury, then if under such circumstances the killing took place it was justifiable.[69]

§ 2961(11). Oregon

You are instructed that the law regards human life as the most sacred of all interests committed to its protection, and there can be no setting up of self-defense unless the necessity of taking human life is actual, present, urgent—unless, in a word, the taking of his adversary's life is the only reasonable resort of the party to save his own life or his person from deadly harm or severe calamity felonious in its character, or from all of the circumstances he had reasonable ground to believe his life or person was in such grave danger.[70]

§ 2961(12). Tennessee

I charge you that if you find from the evidence that the defendant was sitting peaceably and quietly, and did nothing to bring on the difficulty in this case, and if you find that C. approached the place where the defendant was thus sitting, and menaced him in such language and tones and by such acts as caused the defendant

[68] State v. Hollingsworth, 56 S. W. 1087, 156 Mo. 178.

[69] Brantley v. State, 175 P. 51, 15 Okl. Cr. 6.

[70] State v. Butler, 186 P. 55, 96 Or. 219.

to be apprehensive for his life, or apprehensive of great bodily harm, and if you find that the deceased undertook to intervene and disarm the defendant when the defendant was faultless, and thus committed an assault upon the defendant which the defendant apprehended put his life in jeopardy, either from C. or from the deceased, then the defendant, if he, as I instructed you, was apprehensive for his life or great bodily harm, would have the right to act upon such apparent danger, and, if he acted in good faith, he could slay his adversaries in order to save himself from death or great bodily harm.[71]

§ 2961(13). Texas

You are instructed that a reasonable apprehension of death or great bodily harm will excuse a party in using all necessary force to protect his life or person, and it is not necessary that there should be actual danger, provided he acted upon a reasonable apprehension of danger as it appeared to him from his standpoint at the time, and in such case the party acting under such real or apparent danger is in no event bound to retreat in order to avoid the necessity of killing his assailant. Now, if from the evidence you believe the defendant killed the said ———, but further believe that at the time of so doing the deceased had made an attack on the defendant, which from the manner and character of it and the relative strength of the parties, caused the defendant to have a reasonable expectation or fear of death or serious bodily injury, and that, acting under such reasonable expectation or fear, the defendant killed the deceased, then you should acquit the defendant.[72]

You are instructed that if, from the evidence, you believe that the defendant shot and killed the said ———, but further believe that at the time of so doing the deceased was drawing a pistol, or making a demonstration as if to draw a pistol, which caused the defendant to have a reasonable expectation or fear of death, or serious bodily injury at the hands of deceased, and that, acting upon such reasonable expectation or fear, the defendant shot and killed the deceased, then you should acquit him.[73]

You are instructed that if you believe that the deceased, at the time the said defendant killed him made some demonstration which was calculated to produce and did produce in the mind of the defendant the reasonable fear that the deceased was in the act of shooting and killing or doing the defendant great bodily injury, and even though you believe that by said demonstration, if any, the deceased, did not in fact intend to shoot or kill, and did not in

[71] Johnson v. State, 143 S. W. 1134, 125 Tenn. 420, Ann. Cas. 1913C, 261.

[72] Zimmerman v. State, 215 S. W. 101, 85 Tex. Cr. R. 630.

[73] Jackson v. State, 180 S. W. 260, 78 Tex. Cr. R. 100.

fact intend to inflict some bodily injury upon the defendant, then you will acquit the defendant and say by your verdict, "Not guilty." [74]

The court instructs the jury that a reasonable apprehension of death or serious bodily injury will excuse a person in the use of all necessary force to protect his life or person, and it is not necessary that there should be actual danger, provided he acts upon a reasonable apprehension of danger as it appeared to him, from his standpoint at the time, and in such cases the party acting under such real or apparent danger is in no event bound to retreat in order to avoid the necessity of killing his assailant. If from the evidence you believe that at the time the defendant killed the deceased the said ——— was making, or was about to make, an attack upon the defendant with a pistol, and that the manner and character of such attack, and the relative strength of the parties and the defendant's knowledge of the character and disposition of the deceased, caused him to have a reasonable expectation or fear of death or serious bodily injury, and that, acting under such reasonable expectation or fear, the defendant cut and killed the deceased, or if, after hearing all of the evidence, you have a reasonable doubt as to whether the defendant acted in self-defense as the same is herein explained to you, then you will acquit him and say by your verdict, "Not guilty." [75]

You are instructed that homicide is permitted by law and is justifiable when inflicted for the purpose of preventing the offense of murder, maiming, disfiguring, or other serious bodily injury, when the killing takes place under the following circumstances: (1) It must reasonably appear by the acts, or by words coupled with the acts, of the person killed, that it was the purpose and intent of such person to commit one of the offenses above named; (2) the killing must take place while the person killed was in the act of committing the offense, or after some act done by him showing evidently an intent to commit such offense. So, upon this issue, you are charged that the defendant would be justifiable in killing deceased, if it is shown to have been done to prevent the deceased from murdering, maiming, or disfiguring him, or if it is shown that at the very time of the killing, or immediately preceding such killing, the deceased had made, or was in the act of making, some hostile demonstration towards defendant, such as produced in his mind a reasonable fear or expectation of death or of some serious bodily injury; but in that case, to justify the killing, it must reasonably appear from the acts, or words coupled with the acts, of the deceased, that he intended to murder, maim, disfigure, or in-

[74] Manly v. State, 176 S. W. 724, 76 Tex. Cr. R. 606.

[75] Roberts v. State, 168 S. W. 100, 74 Tex. Cr. R. 150.

flict some serious bodily injury upon defendant, and the killing must have taken place while deceased was in the act of committing such offense, or after some act done by him showing evidently an intention to commit such offense. Therefore, if you believe from the evidence that defendant at the time of the homicide believed that his life was in danger, such fear being produced by hostile acts on the part of deceased, and that at the time he fired the fatal shot (if he did so) it reasonably appeared to defendant, from all the circumstances of the case, viewed from defendant's standpoint alone, that deceased was about to shoot him with a pistol, then defendant would be justifiable in killing deceased; and, if you so believe, you will acquit defendant, though it may appear as a fact that defendant was in no danger at the time of the homicide.[76]

§ 2961(14). Washington

The jury are instructed that a person assailed has no right to take the life of his assailant, even if he believes his own life in danger, when the assault is without a weapon of any kind, and when there is no reasonable ground for the belief, by the person attacked, that his person is in imminent danger of death or great bodily harm, but that an ordinary battery is all that is intended, and all that he has reasonable ground to fear from the acts of his assailant; while a person is not bound to retreat from a place where he has a right to remain, and may lawfully repel a threatened assault, and to that end may use force enough to repel the assailant, yet he has no right to repel a threatened assault with naked hands by the use of a deadly weapon, in a deadly manner, unless he honestly believes, and has reasonable grounds to believe, that he is in imminent danger of death or great bodily harm.[77]

§ 2962. Same—Assault with hand or fist

See, also, ante, § 2961(14).

Gentlemen of the jury, I charge you that an assault with the hand or fist never justifies or excuses a homicide under ordinary circumstances, and it is for you to decide whether the facts in this case are within the ordinary reason or not.[78]

§ 2963. Right to kill to avoid great bodily harm

The court instructs the jury that the law gives a person the same right to use such force as may be reasonably necessary, under the circumstances by which he is surrounded, to protect himself from great bodily harm as it does to prevent his life being

[76] Matthews v. State, 58 S. W. 86, 42 Tex. Cr. R. 31.

[77] State v. Churchill, 100 P. 309, 52 Wash. 210.

[78] George v. State, 40 So. 961, 145 Ala. 41, 117 Am. St. Rep. 17.

taken. He may excusably use this necessary force to save himself from any felonious assault.[79]

§ 2964. Fear of bodily injury less than felony

You are instructed that it should be voluntary manslaughter, if you are satisfied that the facts and circumstances surrounding the accused were such as to excite the fears of a reasonable man that some bodily harm, less than a felony, was imminent or impending.[80]

§ 2965. Belief by defendant in danger and reasonable cause for such belief as justification for killing

§ 2965(1). Alabama

You are instructed that it is not necessary under the evidence in this case that defendant should have been actually in danger of death or great bodily harm at the time he shot ———, if you believe that he shot him, or that retreat would have really increased his peril, in order for him to be justified in shooting ———. He had the right to act on the appearance of same at the time, taken in the light of all the evidence, and he had the right to interpret the conduct of ——— in the light of any threats that the evidence proved ——— to have made against defendant. If the circumstances attending the shooting were such as to justify a reasonable mind in the belief that he was in danger of great bodily harm or death, and that he could not have retreated without adding to his peril, and he honestly believed such to be the case, then he had the right to shoot ——— in his own defense, although as a matter of fact, he was not in actual danger, and retreat would not have endangered his personal safety, and if the jury believe that defendant acted under such conditions and circumstances as above set out, the burden of showing that he was not free from fault in bringing on the difficulty is on the state, and if not shown the jury should acquit defendant.[81]

The court charges the jury that the bare fear of the commission of the offense, to prevent which defendant used a deadly weapon, is not sufficient to justify it, but the circumstances must be sufficient to excite the fears of a reasonable man, and the attacking party must have acted under the influence of such fears alone. It is not necessary, however, to justify the use of a deadly weapon, that the danger be actual. It is enough that it be apparent danger; such an appearance as will induce a reasonable person in defendant's position to believe that he was in immediate danger of great

[79] Langston v. State, 75 So. 715, 16 Ala. App. 123; Black v. State, 59 So. 692, 5 Ala. App. 87; Twitty v. State, 53 So. 308, 168 Ala. 59.

[80] Goodman v. State, 40 S. E. 922, 122 Ga. 111.

[81] Richardson v. State, 68 So. 57, 191 Ala. 21.

bodily harm. Upon such appearance the party may act with safety, nor will he be held accountable, though it would appear afterwards that the indications upon which he acted were wholly fallacious, and that he was in no actual peril. The rule in such case is this: What would a reasonable person, a person of ordinary caution, judgment, and observation, in the position of defendant, seeing what he saw, and knowing what he knew, honestly believe from the situation and these surroundings? If such reasonable person, so placed, would have been justified in believing himself in such imminent danger, then defendant would be justified in believing himself in such peril, and in acting upon such appearances.[82]

§ 2965(2). Arkansas

The court instructs the jury that the defendant was entitled to act upon appearances, and if the language and conduct of deceased was such as to induce in the mind of a reasonable man, under all the circumstances then existing, and viewed from the standpoint of the defendant, a fear that death or great bodily harm was about to be inflicted by the deceased upon the defendant, it does not matter if such danger was real or only apparent; and, if defendant acted in necessary self-defense from real and honest convictions as to the character of the danger, he should be acquitted, even though he was mistaken as to the extent of the danger.[83]

§ 2965(3). Colorado

You are instructed that, if the jury believe from the evidence that the prisoner struck the fatal blow under a reasonable fear of receiving great bodily harm at the hands of the deceased, and that the blow was dictated by such fear, then they will find the defendant not guilty.[84]

The court instructs the jury that actual and positive danger is not indispensable to justify self-defense. If the jury believe from the evidence that the defendant was assaulted in such a way as to induce in him a reasonable and well-grounded belief (and would have induced such a belief in a reasonable person) that he was actually in danger of losing his life, or receiving great bodily harm, under the influence of such apprehension he will be justified in defending himself, whether the danger was real or only apparent.[85]

§ 2965(4). Delaware

The court instructs the jury that no one may take the life of another, even in the exercise of the right of self-defense, unless there is no other available means of escape from death or great

[82] Bailey v. State, 65 So. 422, 11 Ala. App. 8.

[83] Lee v. State, 172 S. W. 1025, 116 Ark. 588.

[84] May v. People, 6 P. 816, 8 Colo. 210.

[85] May v. People, 6 P. 816, 8 Colo. 210.

bodily harm. If the jury are satisfied from the evidence that the deceased first attacked the prisoner, and that from the character of such attack the prisoner had reasonable cause to believe, and did believe, that he was in imminent danger of death or great bodily harm, and that he had no other reasonable means of avoiding or preventing death or great bodily harm, then the killing of the deceased was a justifiable act of self-defense, and the prisoner should be acquitted of any crime whatever.[86]

You are instructed that, in defending himself from injury, a person is not obliged to wait until he is struck by an impending blow, for if a weapon be raised in order to shoot or strike, or the danger of other personal violence be imminent, the party in such danger may protect himself by striking the first blow. And when one is so assaulted upon a sudden affray, and, in the opinion of the jury, honestly believes, on reasonable and sufficient grounds, that he was in imminent danger of being killed or seriously injured, he would have the right to employ a deadly weapon in self-defense. But in exercising such a right at the risk of killing or injuring his assailant, he must be closely pressed by him, and when retreat or escape is possible, he must retreat as far as he safely can, in good faith, with an honest intent to avoid the violence and peril of the assault.[87]

§ 2965(5). Illinois

The court instructs the jury that the law is: If a person is assaulted, in such a way as to produce in the mind of a reasonable person a belief that he is in actual danger of losing his life, or of suffering great bodily harm, he will be justified in defending himself, although the danger be not real, but only apparent. Such a person will not be held responsible criminally if he acts in self-defense, from real and honest convictions as to the character of the danger induced by reasonable evidence, although he may be mistaken as to the extent of the actual danger.[88]

§ 2965(6). Indiana

The jury are instructed that if the assault of the attacking party be of such a character and so imminent as to warrant the party assaulted, considering his situation and apparent surroundings, to believe that he is in danger of the loss of life or great bodily harm, and he does so believe, he may without delay use such means as may be at hand, and reasonably seems to him to be necessary to repel the apprehended danger or attack, and if death follows as a result thereof, he will not be guilty of an unlawful homicide, and if in such case the danger appears to be real, and is reasonably be-

[86] State v. Creste, 86 A. 214, 4 Boyce, 118.

[87] State v. De Paolo, 84 A. 213, 3 Boyce, 176.

[88] Crews v. People, 11 N. E. 404, 120 Ill. 317.

lieved by him to be so, the fact, if such be the fact, that the danger was not real, but only apparent, and in fact he was not in danger, would not render him guilty, for the question of apparent necessity as well as the amount of force necessary to employ to resist an attack can only be determined from the standpoint of the defendant at the time and under all existing circumstances. Men when threatened with danger must determine from the appearance and actual state of facts concerning them as to the necessity of resorting to force in self-defense, and, if they act with reasonable and honest conviction, they will not be held responsible for a mistake as to the extent of actual danger where other judicious men would have likely been mistaken.[89]

§ 2965(7). Kentucky

The court instructs the jury that, although you may believe from the evidence beyond a reasonable doubt that the defendant, at the time and place stated to you in the other instructions herein, did shoot and wound C. with a pistol loaded with powder and leaden balls or other hard substances, yet the court further instructs you that if you shall further believe from the evidence at the time he did so he had reasonable grounds to believe, and did believe, as it then appeared to him, that he was then and there in danger of losing his life or suffering great bodily harm at the hands of said C., and as it then appeared to him there was no other safe means, or apparently safe means, of avoiding said danger, either real or apparent, except to shoot the said C., then you will find the defendant not guilty on the grounds of self-defense.[90]

You are instructed that, although the jury may believe from the evidence beyond a reasonable doubt that the defendant shot and killed ——— with a pistol loaded with powder and leaden ball as defined by the first or second instruction, still if they further believe from the evidence that at the time he did said shooting and killing, if he did do it, he believed, and had reasonable ground to believe, that he was then and there in immediate danger of death or great bodily harm then about to be inflicted on him, or which reasonably appeared to the defendant about to be inflicted on him, by the said ———, and there appeared to the defendant in the exercise of a reasonable judgment no other safe way to avert the danger or to the defendant apparent danger, if any, but to shoot and kill said ———, then, in that event, they will find the defendant not guilty on the ground of self-defense or apparent necessity.[91]

[89] Rigsby v. State, 91 N. E. 925, 174 Ind. 284.

[90] Greer v. Commonwealth, 175 S. W. 665, 164 Ky. 396.

[91] Hargis v. Commonwealth, 123 S. W. 239, 135 Ky. 578.

You are instructed that if you believe from the evidence that the accused, at the time of the shooting, in good faith believed, and had reasonable grounds to believe, that he was in immediate danger of loss of life or of suffering great bodily harm at the hands of said ———, then he (the accused) had the right to use such means as were necessary, or apparently necessary, to protect himself from such impending danger; and if, in so doing, he shot and killed ———, he (the accused) is excusable, and should be acquitted.[92]

§ 2965(8). Louisiana

You are instructed that, to entitle a party to the right of resorting to this extreme measure of taking the life of another, the party committing the homicide must have reason to believe, and must honestly believe, from all the facts and circumstances attending and surrounding the homicide and immediately preceding it, as they appear to him, that he is in imminent danger of losing his life, or suffering great bodily harm. That the danger need not be actual, but it is quite sufficient if the danger is only apparently actual and imminent, to the honest belief of the person taking the life of the assailant. That to justify this honest belief there must have been made by the deceased, immediately preceding the mortal blow or the firing of the fatal shot, what the law calls an overt act. That the overt act is such a felonious assault, or hostile demonstration, as reasonably puts the person committing the homicide in honest fear of the immediate loss of life, or sufferance of great bodily harm. That the jury must find from all the facts and circumstances attending and surrounding the homicide whether or not, in any given case, there was such an overt act, or, in other words, whether there was actual or apparent immediate danger of loss of life or the sufferance of great bodily harm to the honest belief of the party committing the homicide.[93]

The jury are instructed that, if a person is assaulted, but not in such a way as to endanger his life or to threaten him with great bodily harm, he may oppose force with force, and use such force as is necessary to repel the assault, but no more; and if, in the conflict which ensues, his adversary threatens to kill him or to inflict great bodily harm upon him, he may then kill his adversary in defense of his own person. But a conflict not apparently endangering life nor threatening great bodily harm will not justify or excuse the killing of his assailant. If he should kill under such circumstances, he would be guilty of manslaughter at least. To justify the killing, it must appear that his life was in danger, or that his person was in danger of receiving great bodily harm, and the

[92] Haverly v. Commonwealth, 23 S. W. 664, 95 Ky. 33.

[93] State v. Jackson, 77 So. 196, 142 La. 540, L. R. A. 1918B, 1178.

circumstances must be such as would lead a reasonable person to that conclusion. In such circumstances, it is not necessary that he should have been in actual danger of losing his life, or of receiving great bodily harm, but there should exist a reasonable appearance of danger, and he must have believed from the circumstances surrounding him that his life was in danger, or that his person was in danger of receiving great bodily harm, although such danger did not actually exist, and the circumstances guiding him in his conclusion as to his danger must have been reasonable, and such as would lead a reasonable person to such a conclusion. It is not enough that he should have believed himself in danger, but the facts and circumstances must have been such that the jury can say that he had reasonable ground for such belief. In determining whether the circumstances were such as to make his belief reasonable, the jury should take into consideration the excitement and confusion, if any existed, which would naturally result at such a time. It would be unjust to require the defendant in such circumstances to possess the same circumspection and cool and deliberate judgment in estimating danger, or the choice of means of repelling it, as we who are unaffected by the excitement or danger, if any existed, may now exercise in contemplating it, and it would be to ignore the law of our being and to require a degree of perfection to which we have not attained. Of the weight the jury should give to these considerations no safer guard can be found than their own judgment, based upon all the circumstances then existing, and the consideration of what they, with an honest intent of avoiding danger, without necessarily taking life, might have done.[94]

The jury are instructed that when, from the nature of the attack, one has reasonable ground to believe there is a design to destroy his life, or commit any felony upon his person, the killing of the assailant will be justifiable homicide, although it should afterwards appear that no felony was intended.[95]

§ 2965(9). Mississippi

The court instructs the jury, for the defendant, that if they believe from the evidence that defendant procured the ax with which he struck deceased only for the purpose of self-defense, and did not intend to use it for any other purpose, and that the conduct and words of deceased were such as to induce in (him) a reasonable belief that he was then and there in danger of great bodily harm at the hands of deceased, and that (believing act was necessary for

[94] State v. Simon, 59 So. 975, 131 La. 520.

[95] State v. Chandler, 5 La. Ann. 489, 52 Am. Dec. 599.

his self-defense) he struck the fatal blow, they must find defendant not guilty.[96]

The jury are instructed that if, after reviewing all the evidence in the case, the jury believe that the fatal shot was fired by defendant when he had cause to believe, and did believe, that he was in imminent and immediate danger of being killed by ———, or of receiving great bodily harm at the hands of ———, then the jury must acquit, even though it may now appear that the defendant was not at the time in imminent and immediate danger of being killed by ———, or of receiving any great bodily harm at his hands.[97]

The court instructs the jury that the law does not make actual or impending danger indispensable to the exercise of the right of self-defense, but that the law considers that, when threatened with danger, one is obliged to judge from appearances and to determine therefrom as to the actual state of things surrounding him, and in such case if one act from hurried consideration, induced by reasonable evidence, he will not be held responsible criminally for a mistake as to the extent of the actual danger; but if the jury believe from the evidence that, at the time of the shooting, the conduct of the deceased was such as to excite in the mind of a reasonably prudent man the belief that the deceased then had the means and purposed then to kill the defendant, or to do him some great bodily harm, he was justified in anticipating the attack, if it was present, urgent, and otherwise unavoidable, except by flight, and protecting his own life or limb by taking the life of his adversary, even though the jury in the light of subsequent developments may believe that the danger was not real, but only apparent; and if the jury so believe, it is their duty to acquit.[98]

The court instructs the jury that if they believe from the evidence that defendant and M. were enemies, and that when they met at the time of the homicide M., in a loud and angry tone of voice, called the defendant a "damned liar," or a "God damned liar," and immediately threw his hand behind him in a threatening and menacing manner, as though he intended to draw a pistol, and that his acts and conduct were such as to engender in the mind of defendant, and did engender in the mind of defendant, a reasonable belief that he (M.) was armed with a pistol, and was attempting to draw it to shoot defendant, when defendant was making no assault on him, and that defendant shot him under such circumstances, then defendant is justifiable, even if you should believe M. was unarmed at the time.[99]

[96] Blalock v. State, 31 So. 105, 79 Miss. 517.

[97] Johnson v. State, 30 So. 39, 79 Miss. 42.

[98] McCrory v. State, 25 So. 671.

[99] Fore v. State, 23 So. 710, 75 Miss. 727.

§ 2965(10). Missouri

The jury are instructed that, if they believe from the evidence that at the time of the stabbing of the deceased the defendant had good cause to believe and did believe, under all the facts and circumstances in evidence, that deceased, alone or along with others, was about to kill defendant, or do him great bodily harm, and that defendant had good cause to believe and did believe that it was necessary to stab the deceased in order to prevent such apprehended danger, then the jury should acquit the defendant on the ground of self-defense.[1]

The court instructs the jury that when a person apprehends that some one is about to do him great bodily harm, and there is reasonable cause for believing the danger imminent that such design will be accomplished, he may safely act upon such appearance, and may even kill the assailant, if that is necessary to avoid the apprehended danger; and the killing will be justifiable, although it may afterwards turn out that the appearances were false, and there was in fact neither design to do him serious injury, nor danger that it would be done. He must decide at his peril upon the force of circumstances in which he is placed, for that is a matter which will be subject to judicial review; but he will not act at his peril of making that guilt if appearances prove false which would be innocence had they proved true. If, therefore, you believe from the evidence that at the time of the killing the defendant had reasonable cause to apprehend, and did apprehend, a design on the part of the deceased to do him some great bodily harm or to take his life, and that defendant had reasonable cause to apprehend, and did apprehend, immediate danger of such design being accomplished, and that he shot and killed deceased in order to prevent the accomplishment of such design, then you will find the defendant not guilty, on the ground of self-defense; and you are further instructed that it is not necessary, in order to find the defendant not guilty, on the ground of self-defense, that the apprehended danger should have been actual or real, or about to fall upon him. It is sufficient if from all the appearances at the time the defendant had reasonable cause to apprehend, and did apprehend, a design on the part of deceased to do him some great bodily harm or to take his life, and that he shot and killed the deceased in order to prevent the accomplishment of such design.[2]

§ 2965(11). Nebraska

The jury are instructed that in this case the defendant sets up the plea of necessary self-defense. The rule of law on the subject of

[1] State v. Price, 84 S. W. 920, 186 Mo. 140.

[2] State v. Hudspeth, 60 S. W. 136, 159 Mo. 178.

self-defense is this: Where a man in the lawful pursuit of his business is attacked, and where from the nature of the attack there is reasonable ground to believe that there is a design to take his life or to do him great bodily harm, and the party attacked does so believe, then the shooting of the assailant under such circumstances will be excusable or justifiable, although it should afterwards appear that no injury was intended, and no real danger existed. The jury are instructed that if they find from the evidence that at the time the defendant is alleged to have shot said ——— the circumstances surrounding the defendant were such as to induce a reasonable and well-founded belief that defendant's life was in peril or great bodily harm impending and that the defendant, in doing what he then did, was acting from instinct of self-preservation, then he is not guilty, although there may in fact have been no real or actual danger.[3]

§ 2965(12). New Mexico

The court instructs the jury that the real issue raised in this case by the plea of self-defense is whether, at the time the fatal shot was fired, the defendant believed, and had reasonable grounds to believe, that he was in imminent danger of death or great bodily harm, and it is not necessary that you find the defendant to have been in actual danger at the time he fired; but if you find from the evidence that he was in apparent danger of death or great bodily harm at the time he fired the fatal shot, then his act was justifiable, and in determining whether or not the defendant was in apparent danger you are to view the circumstances at the time as they appeared to him situated as he was at the time.[4]

§ 2965(13). North Carolina

The court instructs the jury that the defendant contends that, at the time the fatal blow was given, he apprehended or believed that the deceased was about to take his life or do him great bodily harm. If that apprehension or belief was a reasonable one, and the defendant acted under the apprehension or belief that he was going to suffer death or great bodily harm, he was justified in killing the deceased, as it would be a case of self-defense, and you will acquit the defendant.[5]

§ 2965(14). Oklahoma

You are instructed that the defendant in this case admits the killing of the deceased, but contends that the killing was justifiable on the ground of self-defense, and that, viewed from his standpoint, it became and was necessary, in order to save his own life, or to

[3] Coil v. State, 86 N. W. 925, 62 Neb. 15.

[4] State v. Vansickel, 147 P. 457, 20 N. M. 190.

[5] State v. Blackwell, 78 S. E. 316. 162 N. C. 672.

protect himself from great bodily harm at the hands of the deceased, to take the life of the deceased; and in this connection you are instructed that in order to justify a homicide on the ground of self-defense it is not necessary that the party killing should have been in actual danger of losing his life, or of receiving serious bodily injury at the hands of the person killed at the time of the homicide, but it is sufficient to justify the killing if the acts or words, coupled with the acts of the party killed, viewed from the defendant's standpoint, were such as to reasonably cause the party killing to apprehend that he was in apparent danger of losing his life, or of having serious bodily injury inflicted upon him by the party killed; he would be justifiable in killing his antagonist, and it is immaterial whether the danger was real or not, it being sufficient in law to justify the homicide if it only be apparent.[6]

You are therefore instructed that if you believe from the evidence in this case that while the defendant was in his room the deceased came into said room, and that the defendant tried to get him to leave the room and to leave his house, and while thus trying to persuade the deceased to leave that the deceased threw his hand behind him to his hip pocket as though he intended to draw a revolver, and the defendant in good faith believed that he was about to draw a pistol, and that he in good faith, and with reasonable cause as viewed from his standpoint, believed that the deceased was about to do him great bodily harm, or take his life, and, acting under the circumstances, he shot and killed the deceased, it will be justifiable homicide, and it would be immaterial whether the deceased was armed or not, but if it appeared to the defendant that he was armed, and that he was about to draw his pistol and do him great bodily harm or take his life, the killing, as aforesaid, would be justifiable on the ground of self-defense, and if you so believe from the evidence, it will be your duty to return a verdict of not guilty; and in this connection you are instructed that, after a full and fair consideration of the whole case, if you entertain a reasonable doubt as to whether the killing was justifiable as defined to you in these instructions, you will give the benefit of such doubt to the defendant and acquit him.[7]

You are instructed what is meant by the term "reasonable expectation or fear of death, imminent and pressing," as used in these instructions, is that it is not necessary that the defendant be in any real danger, but apparent danger is enough to excuse him in acting in self-defense; that is, a danger which to his mind was real and imminent, and that the defendant at the time he fired the shot

[6] Creek v. State, 184 P. 917, 16 Okl. Cr. 492.

[7] Creek v. State, 184 P. 917, 16 Okl. Cr. 492.

that took the life of the deceased was about to suffer or receive great bodily injury at the hands of the deceased.[8]

Gentlemen of the jury, you are further instructed that, where the evidence shows beyond a reasonable doubt that the homicide was committed by the defendant, and the defendant seeks to avoid the responsibility for the killing on the grounds of self-defense, the defendant had a right to act in his own necessary self-defense upon a reasonable apprehension of danger, as viewed from the defendant's standpoint, although he may have been mistaken as to the actual extent of the danger. He would have a right to protect his person from great bodily harm or injury even to taking the life of the assailant, if it reasonably appears by acts or by words coupled with the acts of the person killed that it was the purpose and intent of such person to do the defendant great bodily harm or injury as the said acts or surrounding circumstances would reasonably appear, whether real or apparent, to the said defendant at the time of the homicide. Therefore if you believe from the evidence that the said defendant intentionally shot and killed the said ———, and further believe that at the time of so doing the deceased was in the act of making or about to make upon him an attack, which from the manner and character thereof, together with the weapons used or attempted to be used, if any, caused the defendant to have a reasonable expectation or fear of death or serious bodily injury at the hands of deceased as viewed from the defendant's standpoint at the time of the killing, and acting under such reasonable expectation or fear of death or serious bodily harm he intentionally shot and killed the said ———, then you will acquit him, or if there is a reasonable doubt in your minds thereof, you will resolve that doubt in his favor and acquit him.[9]

The jury are instructed that if, at the time the defendant fired the fatal shot, he had reasonable grounds to apprehend a design on the part of the deceased to take his life, or to do him some great personal injury, and that he was in imminent danger of such design being accomplished, and he fired such shot while laboring under such apprehensions, believing it necessary for his preservation or safety, then the firing of such shot, under such circumstances, was justifiable on the grounds of self-defense, and your verdict should be not guilty.[10]

The court instructs the jury that the defendant in this case has taken the witness stand in his own behalf, and has admitted that he shot the deceased, but claims that such shooting was done in

[8] Creek v. State, 184 P. 917, 16 Okl. Cr. 492.

[9] Horn v. State, 164 P. 683, 13 Okl. Cr. 354.

[10] Vance v. Territory, 105 P. 307, 3 Okl. Cr. 208.

self-defense. And the court instructs the jury that the law on the subject of self-defense is that if a person is assaulted in such a way as to induce in him a reasonable belief that he is in actual danger of losing his life, or of suffering great bodily harm, he will be justified in defending himself, although the danger be not real, but only apparent. And in this case, if the jury believe from the evidence that the defendant was assaulted by the deceased in such a way as to induce in the defendant a reasonable and well-grounded belief that he was in actual danger of losing his life or of suffering great bodily harm, then he was justified in defending himself, even to the extent of taking the life of his assailant, although the danger was not real, but only apparent.[11]

§ 2965(15). Oregon

You are instructed that the law gives to every man the right of self-defense. This means that, if a man is assaulted, he may defend his life or his person from great bodily harm. He may repel force by force and he may resort to such force as under the circumstances surrounding him may be reasonably necessary to repel the attack upon him, even to the taking of the life of his adversary. If, then, you should find in the consideration of this case the defendant honestly believed that he was being feloniously assaulted, and did honestly believe on reasonable grounds that he was then and there in danger of death or great bodily harm, he would be justified in defending himself even to the extent of taking the life of his adversary.[12]

§ 2965(16). Pennsylvania

You are instructed that, although the defendant was not in actual imminent peril of his life, or of great bodily harm at the time of the killing, he cannot be convicted of murder in the first degree, if in good faith he reasonably believed from the facts, as they appeared to him at the time, that he, the defendant, was in such imminent peril, even if it afterwards appears that he was mistaken, if the defendant believed he had no other means of escape.[13]

You are instructed that, if the jury find that the deceased approached the defendant in a threatening manner, and the defendant had a reasonable belief of great bodily harm, although mistaken, he cannot be convicted of murder in the first degree, if the jury believe from the evidence that the prisoner believed further that he had no other means of escape.[14]

The jury are instructed that if they believe from the evidence

[11] Wells v. Territory, 78 P. 124, 14 Okl. 436.

[12] State v. Butler, 186 P. 55, 96 Or. 219.

[13] Commonwealth v. McKwayne, 70 A. 809, 221 Pa. 449.

[14] Commonwealth v. McKwayne, 70 A. 809, 221 Pa. 449.

that the prisoner had reason to believe that it was necessary to shoot to prevent the deceased from inflicting grievous bodily injury upon him, and, so believing, did shoot to save himself from such injury, the shooting was excusable, and your verdict should be that of not guilty.[15]

§ 2965(17). Texas

You are instructed that, in order to justify a homicide, the attack must be such as produces reasonable expectation of fear of death or some serious bodily injury. It is not necessary in the right of self-defense that the danger should in fact exist, but if it reasonably appears from the circumstances of the case that the danger exists, such person threatened with such apparent danger has the same right to defend against it and to the same extent that he would have if the danger were real, and to determine whether or not there was reason to believe that danger did exist, the appearances must be viewed from the standpoint of the person who acted upon them, and from no other standpoint.[16]

You are instructed that a reasonable apprehension of death or serious bodily injury will excuse a person in the use of all necessary force to protect his life or his person, and it is not necessary that there should be actual danger providing he acts upon a reasonable apprehension of danger as it appeared to him from his standpoint at the time, and in such cases the party acting under such real or apparent danger is in no event bound to retreat in order to avoid the necessity of killing his assailant or apparent assailant. If from the evidence you believe that, at the time the defendant killed the deceased, the said deceased was making, or was about to make, an attack upon the defendant, and from the manner and character of such attack the defendant had a reasonable expectation or fear of death or serious bodily injury, and that acting under such reasonable expectation or fear the defendant shot and killed the deceased, then in such event you will find the defendant not guilty.[17]

You are instructed that a reasonable apprehension of death or great bodily harm will excuse a party in using all necessary force to protect his life or person, and it is not necessary that there should be actual danger, provided he acted upon a reasonable apprehension of danger as it appeared to him from his standpoint at the time, and in such case the party acting under such real or apparent danger is in no event bound to retreat in order to avoid the necessity of killing his assailant.[18]

[15] Commonwealth v. McGowan, 42 A. 365, 189 Pa. 641, 69 Am. St. Rep. 836.

[16] Bivens v. State, 198 S. W. 962, 82 Tex. Cr. R. 278.

[17] Waters v. State, 192 S. W. 778, 80 Tex. Cr. R. 573.

[18] Jackson v. State, 180 S. W. 260, 78 Tex. Cr. R. 100.

You are instructed that, if you shall believe from the evidence that defendant killed ———, yet if you believe the deceased made an attack on the defendant then indicating a purpose to take the life of the defendant, or of doing him some serious bodily injury, or if from the acts or words of the deceased at the time it then reasonably appeared to the defendant that he was in danger of losing his life, or of suffering serious bodily injury at the hands of the deceased, even though there was no actual danger in fact, but only apparent danger, and that such danger reasonably appeared to the defendant to be imminent and pressing, viewing the matter from the standpoint of the defendant alone, and in the light of the circumstances as they then reasonably appeared to the defendant, and under such circumstances defendant shot and killed ———, if you so find, in either event, you should acquit the defendant.[19]

You are instructed that an attack upon the person of an individual, in order to justify homicide, must be such as produces a reasonable expectation or fear of death or some serious bodily injury. But, in this connection, you are instructed that it is not necessary to the right of self-defense that the danger did in fact exist; if it reasonably appears from the circumstances of the case that danger existed, the person threatened with such apparent danger had the same right to defend against it and to the same extent that he would have were the danger real, and, in determining whether there was reason to believe that danger did exist, the appearance must be viewed from the standpoint of the defendant and from no other standpoint.[20]

You are instructed that, if you believe that at the time of the killing, if any, the deceased by his acts and conduct, or by his acts coupled with his words, if any, reasonably induced the defendant to believe that he was about to attack the defendant with a deadly weapon, or a weapon which would probably cause the defendant's death or some serious bodily injury; or if by the acts of the deceased, or his acts coupled with his words, if any, it reasonably appeared to defendant at the time from his standpoint that the deceased was then about to attack him, defendant, with a deadly weapon, or a weapon which would probably cause the defendant's death or some serious bodily injury, and if the same was reasonably calculated to create in the mind of the defendant, and did create in his mind a reasonable expectation or fear of death or some serious bodily injury, and you further believe that the defendant then and there moved and actuated by such reasonable expectation or fear of death or serious bodily injury, if any, shot and killed the deceased, then, under such circumstances, the same would be in

[19] Eads v. State, 176 S. W. 574, 76 Tex. Cr. R. 647.

[20] Carey v. State, 167 S. W. 366, 74 Tex. Cr. R. 112.

his lawful self-defense, and, if you so believe from the evidence, you will acquit the defendant; and if the deceased was armed at the time he was killed and was making such attack on defendant, and if the weapon used by him and in the manner of its use were such as were reasonably calculated to produce death or serious bodily harm, then the law presumes the deceased intended to murder or aimed to inflict serious bodily injury upon the defendant.[21]

You are instructed that it is not essential to the right of self-defense that the danger should in fact exist. It may be only apparent and not real. If it reasonably appears from the circumstances of the case that danger existed, the person threatened with such apparent danger has the same right to defend against it, and to the same extent that he would were the danger real. And in determining whether or not there was reason to believe that danger did exist, the appearances must be viewed from the standpoint of the person acting on them, and from no other standpoint. Now if you shall find and believe from the evidence that the defendant shot and killed ———, but further believe that, at the time of so doing, the acts and conduct of the deceased toward the defendant were such as to indicate a present purpose on the part of the deceased to take the life of the defendant or of doing him serious bodily injury, or if from the acts or conduct of the deceased at the time it reasonably appeared to the defendant that he was in such danger, and that it was then imminent and pressing, viewing the matter from the standpoint of the defendant alone, and that under such circumstances defendant shot and killed ———, he would be justified in so doing, and in the event you so find you should acquit the defendant, or if you have a reasonable doubt, under the foregoing instructions, as to whether or not the defendant was justifiable in killing the deceased, then you will acquit him.[22]

You are instructed that if, from the evidence, you believe beyond a reasonable doubt that the defendant killed the said ———, but you further believe that at the time of so doing the deceased had made an attack on him, which from the manner of it, and all the facts and circumstances surrounding the parties at the time, and the defendant's knowledge of the character and disposition of the deceased, caused him to have a reasonable expectation or fear of death or serious bodily injury, and that, acting under such expectation or fear, the defendant killed the deceased, then you should acquit him; and if the deceased was armed at the time he was killed and was making such attack on the defendant, and if the weapon used by him and the manner of its use were such as were

[21] Kelly v. State, 151 S. W. 304, 68 Tex. Cr. R. 317.

[22] Fifer v. State, 141 S. W. 989, 64 Tex. Cr. R. 203.

reasonably calculated to produce death or serious bodily injury, then the law presumes that the deceased intended to murder or aimed to inflict serious bodily injury on the defendant. And if the deceased made demonstrations as if he were armed, and as if he were about to draw a weapon, the defendant had the same right to act as if the deceased had been armed.[23]

You are instructed that homicide is permitted and justified by law, when committed for the purpose of protecting one against an unlawful attack producing a reasonable fear or expectation of death or serious bodily injury. If you find that the defendant did shoot and kill the said ——— with a pistol, and if you believe that at the time he so shot and killed the said ——— that said ——— had made, or was making, or was in the act of making, an unlawful attack upon the defendant of such a character as to put the defendant in danger of death or serious bodily injury, or of such character as to cause it reasonably to appear to the defendant, viewed from his standpoint, that he was in danger of death or serious bodily harm, and that he killed the said ——— to protect himself against such attack, you will find the defendant not guilty. A person has the same right to defend himself against the reasonable appearance of danger, as he has against actual danger; and in determining whether or not it reasonably appeared to the defendant that he was in such danger you will view the case from the standpoint of the defendant, and view the facts and circumstances of the case as they then reasonably appeared to him. A party attacked is never bound to retreat, but may stand his ground and make his defense.[24]

§ 2965(18). Washington

You are further instructed that a person need not be in actual imminent peril of his life or limb or of great bodily harm before he may defend himself. It is sufficient if he, in good faith, has a reasonable belief from the circumstances that appear to him at the time that he is in imminent peril or danger, and if he honestly believes such to be the case, then he has a right to act in self-defense. When a man without fault on his part is suddenly and violently assaulted under circumstances such as to induce or cause in his mind an honest belief or a reasonable apprehension that he is in danger of life or limb and the assault is of such a character as to make an attempted retreat hazardous, he may use the necessary force to prevent the threatened injury; and, where one is assaulted at a place where he has a right to be, he need not retreat, but he may stand his ground and defend himself and repel force by

[23] Barnes v. State, 133 S. W. 887, 61 Tex. Cr. R. 37.

[24] Clark v. State, 120 S. W. 179, 56 Tex. Cr. R. 293.

force even to the extent of taking life. However, in relation to the law of self-defense, one cannot claim its benefits after he has intentionally placed himself where he knows or believes he will have to invoke its aid. Circumstances justifying assault for the purposes of self-defense must be such as to render it unavoidable. If you believe from the evidence beyond reasonable doubt that the defendant could have avoided any conflict between himself and ——— without increasing the danger to himself, it was his duty to avoid such conflict and so render a resort to the law of self-defense unnecessary. The right of self-defense is based upon the broad ground of necessity which is evidenced by a real or apparent exhibition of force, superinducing a reasonable apprehension of imminent danger which justifies the use of force to repel force, but without such necessity the right to resort thereto does not exist. If you find from the evidence in this case that at the time and place alleged in the information, the defendant had a right to be at the place where the evidence shows him to have been, and that he honestly believed himself to be in imminent danger of life or limb or of great bodily harm at the hands of said ——— whether he was in actual danger or not, and that he was without fault, then I instruct you that it will be your duty to acquit the defendant.[25]

§ 2965(19). West Virginia

The court instructs the jury that when one without fault is attacked by another in such a manner or under such circumstances as to furnish reasonable grounds for apprehending a design to take away his life or to do him some great bodily harm, and there is reasonable ground for believing the danger imminent that such design will be accomplished, and the person assaulted has reasonable ground to believe, and does believe, such danger is imminent, he may act upon such appearances, and, without retreating, kill his assailant, if he has reasonable grounds to believe, and does believe, that such killing is necessary in order to avoid the apparent danger; and the killing under such circumstances is excusable, although it may afterwards turn out that the appearances were false,—that there was in fact neither design to do him some serious injury, nor danger that it would be done; but of all this the jury must judge from all the evidence and circumstances of the case.[26]

The jury are instructed, with respect to the imminency of the danger which threatened the defendant and the necessity of the killing, that he is, in the first instance, the judge, and if the jury,

[25] State v. Lance, 162 P. 574, 94 Wash. 484.

[26] State v. Allen, 30 S. E. 209, 45 W. Va. 65.

viewing the action of defendant from his standpoint at the time of the killing, believe from all the facts and circumstances in the case that defendant had reasonable ground for belief, and did believe, the danger was imminent, and that the killing was necessary to preserve his own life or to protect himself from great bodily harm, he is excused from using a deadly weapon in his defense; otherwise, he is not.[27]

§ 2966. Necessity of belief of defendant in danger

§ 2966(1). Missouri

The court instructs the jury that they cannot acquit the defendant on the ground of self-defense unless they believe from the evidence in the case, on both sides, that defendant had reasonable ground to believe, and did believe, that deceased was about, then and there, to take his (defendant's) life or to do him some great bodily harm, and that the danger of his doing so was then and there imminent and impending; and in this connection the court further instructs the jury that if the defendant did not have reasonable cause to believe, and did not believe, that at the time and place of the shooting and killing, as set forth in the indictment, that such danger was imminent and impending, and if they believe from the evidence that defendant could, with safety to himself, have avoided thus shooting and killing deceased at the time and by the means mentioned in the indictment he did such shooting and killing, but, notwithstanding he could, with safety to himself, have avoided such shooting and killing, he then and there willfully, feloniously, on purpose, and of his malice aforethought, as heretofore defined in these instructions, with a pistol, as set forth in the indictment, shot and killed deceased, you will find him guilty of murder in the second degree, and assess his punishment as hereinbefore provided.[28]

§ 2966(2). Texas

The jury are instructed that self-defense is founded upon the law of nature, and cannot be superseded by any law of society; but self-defense is a defensive, not an offensive act, and it must not in any case exceed the bounds of defense and prevention. There must at least be an apparent necessity to ward off by force some unlawful and violent attack. The important question for the jury to determine is: (1) Was the defendant in present danger of death or serious bodily injury, or were the circumstances such as to afford him reasonable grounds to believe himself to be in such danger? (2) Was the killing done in good faith, to protect himself from such danger or threatened danger? If both these questions can be an-

[27] State v. Cain, 20 W. Va. 679.

[28] State v. McKenzie, 76 S. W. 1015, 177 Mo. 699.

swered in the affirmative, then the killing would be in self-defense and justifiable.[29]

§ 2967. Necessity that belief in danger and not spirit of revenge should actuate defendant

§ 2967(1). Arizona

You are instructed that the question for you to determine is not only whether, as a matter of fact, the deceased then and there attempted or threatened to murder any person, or to do some great bodily injury to any person; but you should consider whether the defendant, in the position in which he was then placed, and with the light and knowledge which he then had upon the subject, had reasonable ground to believe that the deceased intended to kill him or do him some great bodily injury; and if the circumstances, as they came to his knowledge at that time, were sufficient to excite the fears of a reasonable person that the deceased was about to murder any person, or to commit a felony, or to do him a great bodily injury, and that the danger thereof was imminent, and if, acting upon these fears alone, the defendant killed the deceased to protect himself therefrom, then such killing, under such circumstances, was justifiable.[30]

§ 2967(2). Georgia

You are instructed that a bare fear or a mere apprehension of a shooting to prevent which a killing was done will not justify it. The circumstances must be such as to excite the reasonable fears in a rational mind, and the person shooting must act under the influence of such fears, and not in a spirit of revenge. Not only must the shooting be in defense, but it must be absolutely necessary to prevent the attack and injury on the person shooting, or the person shooting must really and honestly so believe at the time, and in good faith act upon such belief, and not in a spirit of revenge.[31]

§ 2967(3). Illinois

The jury are instructed that if the jury believe, from the evidence, that the defendant did not renew the fight, but in good faith sought to decline any further struggle, yet, if they further believe, from the evidence, that the defendant had no reason to believe that ——— intended to take his life, or to inflict on him great bodily harm, or to have any thing more than a fair fight, and that he struck the blow in revenge, or in a reckless spirit, then the defendant is not entitled to claim exemption from punishment on the

[29] Freeman v. State (Cr. App.) 72 S. W. 185.

[30] Morgan v. Territory, 64 P. 421, 7 Ariz. 224.

[31] Frazier v. State, 38 S. E. 349, 112 Ga. 868.

ground that the killing was in self-defense. It must appear that the defendant not only really and in good faith endeavored to decline any further struggle, or to escape from his assailant before the blow was given, but it must also appear that the circumstances were sufficient to excite the fears of a reasonable person, and that the defendant really acted under the influence of those fears, and not in a spirit of revenge, to entitle the defendant to an acquittal on the ground of a justifiable homicide.[32]

§ 2968. Necessity of reasonable ground to apprehend danger to life

§ 2968(1). Alabama

The court instructs the jury that the bare fear of the commission of the offense, to prevent which the defendant used a deadly weapon, is not sufficient to justify it; but the circumstances must be sufficient to excite the fears of a reasonable man, and the attacking party must have acted under the influence of such fears alone. It is not necessary, however, to justify the use of a deadly weapon, that the danger be actual. It is enough that it be apparent danger; such an appearance as will induce a reasonable person in defendant's position to believe that he was in immediate danger of great bodily harm. Upon such appearances the party may act with safety; nor will he be held accountable, though it would afterwards appear that the indication upon which he acted was wholly fallacious, and that he was in no actual peril. The rule in such a case is this: What would a reasonable person, a person of ordinary caution, judgment, and observation, in the position of the defendant, seeing what he saw and knowing what he knew, honestly believe from this situation and these surroundings? If such reasonable person, so placed, would have been justified in believing himself in imminent danger, then the defendant would be justified in believing himself in such peril, and in acting upon such appearance.[33]

The court charges the jury the apparent necessity which will excuse the taking of human life under the doctrine of self-defense, in cases of homcide, involves two considerations: First, the defendant himself must have entertained an honest belief in the existence of such necessity; and, second, the circumstances surrounding him must have been such as to impress a reasonable man under the same state of facts with the belief in his imminent peril and in the existence of an urgent necessity to take the life of the assailant as the only apparent alternative of saving his own life, or else of the preventing the infliction on defendant of grievous bodily harm.[34]

[32] Reins v. People, 30 Ill. 256.

[33] Black v. State, 59 So. 692, 5 Ala. App. 87.

[34] Bluett v. State, 44 So. 84, 151 Ala. 41; Bondurant v. State, 27 So. 775, 125 Ala. 31.

§ 2968(2). Arkansas

The court instructs the jury that, in ordinary cases of one person killing another in self-defense, it must appear that the danger was so urgent and pressing that in order to save his own life, or to prevent his receiving great bodily harm, the killing of the other was necessary, and must also appear that the person killed was the assailant, or that the slayer had really and in good faith endeavored to decline any further contest before the mortal blow or injury was given. To be justified, however, in acting on the facts as they appear to him, the defendant must honestly believe, without fault or carelessness on his part, that the danger is so urgent and pressing that it is necessary to kill his assailant in order to save his life, or to prevent his receiving great bodily injury. He must act with due circumspection. If there was no danger, and his belief in the existence thereof be imputable to negligence, he is not excused, however honest his belief may be.[35]

The court instructs the jury that the defendant in entering his plea of not guilty seeks to justify the killing in this case by alleging that he killed ——— in his necessary self-defense. The defense of justification as claimed by the defendant turns upon the answer to one question, and that is: What was the deceased doing at the time the defendant fired the fatal shot or shots? To establish the plea of self-defense, you must find that, at the time the fatal shot or shots were fired, there was some conduct on the part of the deceased, some overt act, some demonstration or apparent demonstration which induced in the mind of the defendant, while acting in good faith and as a reasonably prudent person under all circumstances surrounding the fatal encounter as they then appeared to him, an honest belief that he was in great danger of losing his life or of receiving great bodily harm. But a mere honest belief on the part of the defendant that the killing was necessary is not sufficient; in addition to that it must appear that the circumstances were such as made it reasonable for him to entertain such belief as the circumstances appeared to him acting as a reasonable person.[36]

You are instructed that a bare fear of those offenses, to prevent which the homicide is alleged to have been committed, shall not be sufficient to justify the killing. It must appear that the circumstances were sufficient to excite the fears of a reasonable person, and that the party killing really acted under this influence, and not in the spirit of revenge.[37]

The court instructs you that in determining whether or not de-

[35] Adkisson v. State, 218 S. W. 167, 142 Ark. 34.

[36] Branscum v. State, 203 S. W. 13, 134 Ark. 66.

[37] Plumley v. State, 171 S. W. 925, 116 Ark. 17.

fendant acted within his rights under the law of self-defense, you may render the question very simple by adopting the rule which the court now instructs you is the law, as follows: First. In so far as is possible, you are to place yourself in the position and under the circumstances surrounding the defendant at the time of the shooting, acting without carelessness on his part, as those circumstances and his position have been disclosed by the evidence, viewing it from the standpoint of the defendant at the time, as you believe from the evidence it appeared to him, you will ask: (1) Did it appear to the defendant at the time he fired the fatal shot, acting without carelessness on his part, that he was in danger of losing his life or of receiving great bodily harm at the hands of the defendant? (2) If it did so appear, did the defendant reach the conclusion that he was in danger of losing his life or of receiving great bodily harm at the hands of the deceased after the exercise of such caution and prudence in judging the appearance and circumstances by which he was surrounded as appeared to him to be reasonably consistent with his safety?[38]

You are instructed that, before the defendant can justify the killing of deceased upon the grounds of self-defense, it must appear to him at the time as a reasonable person that the danger of losing his own life or receiving a great bodily injury at the hands of the deceased was so urgent and pressing that the killing was necessary to save his own life, or prevent his receiving great bodily injury. He must have acted with due caution and circumspection. If there was no danger, and his belief in the existence thereof be imputable to negligence, he is not excused, however honest the belief may be. He must have used all reasonable means in his power, consistent with his safety, to avoid the danger and avert the necessity of killing the deceased.[39]

You are instructed that a bare fear of these offenses, to prevent which the homicide is alleged to have been committed, shall not be sufficient to justify the killing.[40]

§ 2968(3). Colorado

The court instructs the jury that it was for the prisoner, from the appearances and the actual state of things surrounding him, to determine as to the necessity of resorting to self-defense; and if the jury believe from the evidence that defendant stabbed ——— upon an honest belief, based upon what had immediately before occurred, and upon all the surrounding circumstances, that he was in danger of great bodily harm, such killing is a killing in self-defense,

[38] Plumley v. State, 171 S. W. 925, 116 Ark. 17.

[39] Bruder v. State, 161 S. W. 1067, 110 Ark. 402.

[40] Hankins v. State, 145 S. W. 524, 103 Ark. 28.

although the jury are satisfied that in fact no real danger of the infliction of great bodily harm existed. Our statute says that a bare fear of such danger shall not be sufficient to justify the killing. It must appear that the circumstances were sufficient to excite the fears of a reasonable person, and that the party killing really acted under the influence of those fears, and not in a spirit of revenge.[41]

§ 2968(4). Connecticut

The court instructs the jury that a man may thus do what seems reasonably necessary under the circumstances in which an assault is made upon him to preserve himself from personal danger, with this limitation: That he must not take the life of a fellow being who is assaulting him when such fellow being is doing no more than committing an ordinary assault and battery upon him, but only in case of extreme necessity as the only practicable method of saving his own life or protecting himself from great bodily harm, and even then he must not have brought upon himself the necessity which he set up in his defense by beginning or continuing the fight. A man who is attacked by another under circumstances which denote an intention to take his life or to do him great bodily harm may lawfully kill the assailant, provided he uses such means as he reasonably can to avoid the necessity. It is only when the circumstances are such as to authorize a reasonable belief that the assault is made by the first aggressor with a design to take life or inflict extreme bodily harm that a man would be justified in attempting to kill the assailant or using violence upon him likely to kill him. What it is reasonably necessary to do in making a defense against the first aggressor depends upon all the circumstances of the particular case, the nature of the attack, and the degree of danger in which an accused person was at the time, or reasonably believed he was in. If the circumstances at the time reasonably appear to him to indicate great danger, and he acts upon such belief, he will not be deprived of the benefit of the law of self-defense because in fact the danger was less than he reasonably believed it to be. It will, of course, be a question for the jury whether the circumstances were such as could reasonably give him the belief in the existence of such great danger.[42]

§ 2968(5). Delaware

You are instructed that, in order to justify or excuse the accused in striking the fatal blow, it is not sufficient that he at the time believed himself to be in danger of death or great bodily harm at the hands of the deceased; but the circumstances must have been such as to justify a reasonable man in such belief, and, further, that

[41] May v. People, 6 P. 816, 8 Colo. 210.

[42] State v. Perkins, 91 A. 265, 88 Conn. 360, L. R. A. 1915A, 73.

there was no reasonable way of avoiding or escaping from such danger except by slaying the assailant.[43]

§ 2968(6). Florida

You are instructed that men do not hold their lives at the mercy of the unreasonable fears or excessive cowardice of others, and if from such motives the defendant killed ———, if you find that he did kill him, without any lawful reason for so doing, he could not justify his acts, if he committed any, as being in self-defense unless he had used all reasonable means in his power consistent with his own safety, to avoid the danger and avert the necessity of killing ———, if he did kill him, and you are to determine from the evidence whether he has used such reasonable means. If you believe from the evidence that the defendant acted in his lawful self-defense in killing ———, if you find he did kill him, or if you entertain a reasonable doubt whether the defendant was acting within his lawful rights of self-defense, you should find him not guilty.[44]

§ 2968(7). Georgia

You are instructed that the danger must be imminent or apparently so, and he must not kill upon an imaginary fear. He must have some justification, or some ground for such fear.[45]

§ 2968(8). Idaho

You are instructed that a bare fear of the commission of any of the offenses mentioned in the second and third subdivisions of the preceding instruction, to prevent which homicide may be lawfully committed, is not sufficient to justify it; but the circumstances must be sufficient to excite the fear of a reasonable person, and the party killing must have acted under the influence of such fears alone.[46]

§ 2968(9). Iowa

The jury are instructed that, to justify the taking of ———'s life in self-defense, it must appear from the evidence that the defendant not only really and in good faith endeavored to decline any further combat, and to escape from ———, before the fatal blow was given, but it must also appear that the circumstances were such as to excite the fears of a reasonable person that ——— intended to take his life, or to inflict on him a great bodily harm; and, further, that the defendant really acted under the influence of these fears, and not in a spirit of revenge.[47]

[43] State v. Cephus, 67 A. 150, 6 Pennewill, 160.

[44] Pelham v. State, 70 So. 87, 70 Fla. 295.

[45] Short v. State, 80 S. E. 8, 140 Ga. 780.

[46] State v. Lyons, 64 P. 236, 7 Idaho, 530.

[47] State v. Bone, 87 N. W. 507, 114 Iowa, 537.

§ 2968(10). Michigan

You are instructed that in no case is human life to be lightly disregarded, and if you should find, beyond a reasonable doubt, that defendant shot and killed ——— through mere cowardice, or from intentionally pointing his gun at him, and carelessly shooting to frighten him away, and under circumstances which, as they appeared to him at the time of the shooting, were not sufficient to induce in him a reasonable belief that he was in danger of bodily harm, the law will not justify the killing on the ground of self-defense.[48]

§ 2968(11). Mississippi

The jury are instructed that, while the jury should put themselves in the place of the defendant, and judge of his act by the facts and circumstances by which he was surrounded, they should not give him the benefit of personal timidity or needless fear.[49]

§ 2968(12). Missouri

The jury are instructed that it is not necessary, in order to acquit on the ground of self-defense, that the danger should have been actual or real, or that the danger should have been impending and about to fall. All that is necessary is that defendant had cause to believe, and did believe, those facts. On the other hand, it is not enough that defendant should have so believed. He must have had reasonable cause to so believe. Whether or not he had reasonable cause is for you to determine under all the facts and circumstances given in evidence. If you believe from the evidence that defendant did not have reasonable cause for such belief, you cannot acquit him on the ground of self-defense, although you may believe that the defendant really thought that he was in danger. If upon a consideration of all the evidence in the case, including that upon the question of self-defense, you have a reasonable doubt of defendant's guilt, you should acquit him.[50]

The court instructs the jury that the defendant admits the shooting and wounding, but claims that he acted in self-defense. Upon this question the court instructs you that if you find from the evidence that when defendant shot and wounded said ——— he had reasonable cause to believe, and did believe, that said ——— was about to take his life or do him some great personal injury, and, further, that he had reasonable cause to believe, and did believe, that it was necessary for him to shoot and wound said ——— in order to protect himself from such danger. then he ought to be acquitted on the ground of self-defense. Whether defendant had reasonable grounds to believe that such danger existed, and whether he

[48] People v. Coughlin, 35 N. W. 72, 67 Mich. 466.

[49] Saffold v. State, 24 So. 314, 76 Miss. 258.

[50] State v. Hostetter (Sup.) 222 S. W. 750.

shot and wounded said ——— in the honest belief that it was necessary for the protection of his life or person, are questions which you must determine from all the evidence in the case. If you believe from the evidence that the defendant shot and wounded the deceased, ———, unnecessarily, and, when he did not have reasonable cause to believe that the said ——— was then about to kill him or do him great bodily harm or personal injury, then there is no self-defense in the case, and you cannot acquit the defendant on that ground.[51]

You are instructed that the defendant admits the shooting, but claims he acted in self-defense. Upon this question the court instructs you that if you find from the evidence that, when defendant shot the said ———, he had reasonable cause to believe, and did believe, that said ——— was about to take his life, or do him some great personal injury, and, further, that he had reasonable cause to believe, and did believe, that it was necessary for him to so shoot said ——— in order to protect himself from such danger, then he ought to be acquitted on the ground of self-defense. Whether defendant had reasonable grounds to believe that such danger existed, and whether he shot said ——— in the honest belief that it was necessary for the protection of his life or person, are questions which you must determine from all the evidence in the case. Although defendant may have really believed himself to be in danger, yet he cannot be acquitted on the ground of self-defense unless it further appears from the evidence that he had reasonable cause for such belief. On the other hand, even if no real danger existed, yet if the defendant had reasonable ground to believe, and did believe, that it existed, he would be justified in acting upon such belief. If you believe from the evidence that the defendant shot the deceased, ———, unnecessarily, and when he did not have reasonable cause to believe that the deceased was then about to kill him or do him some great bodily harm or personal injury, then there is no self-defense in the case, and you cannot acquit the defendant on that ground.[52]

The court instructs the jury that, to justify the killing of ——— by the defendant, it is not sufficient that defendant may have acted upon an honest belief that danger was impending to his life, or that deceased was about to inflict great injury to defendant, but it must appear from the evidence that he had reasonable cause to apprehend danger, real and imminent, at the time of the killing, and the jurors herein are final judges of the reasonableness of his apprehensions.[53]

[51] State v. Greaves, 147 S. W. 973, 243 Mo. 540.

[52] State v. King, 102 S. W. 515, 203 Mo. 560.

[53] State v. McKenzie, 76 S. W. 1015, 177 Mo. 699.

§ 2968(13). Montana

The court instructs you, that in order to justify the use of a deadly weapon in self-defense, it must appear to the defendant that the danger was so urgent that, in order to save his own life, or to save himself from great bodily harm, the attack upon the deceased was absolutely necessary. And it must appear that the deceased was the assailant, or that the defendant had really and in good faith endeavored to decline any further struggle before the fatal shot was fired. A bare fear of the commission of the offense, to prevent which defendant used a deadly weapon, is not sufficient to justify it; but the circumstances must be sufficient to excite the fears of a reasonable man, and the party attacking must have acted under the influence of such fears alone. It is not necessary, however, to justify the use of a deadly weapon, that the danger be actual. It is enough that it be an apparent danger; such an appearance as would induce a reasonable person to believe he was in danger of great bodily harm. Upon such appearance a party may act with safety, nor will he be held accountable though it should afterwards appear that the indications upon which he acted were wholly fallacious, and that he was in no actual peril. The rule in such case is this: What would a reasonable person—a person of ordinary caution, judgment, and observation—in the position of the defendant, seeing what he saw, knowing what he knew, suppose from this situation and these surroundings? If such reasonable person so placed would have been justified in believing himself in imminent danger, then the defendant would be justified in believing himself in such peril and acting upon such appearances.[54]

§ 2968(14). Nebraska

The court further instructs the jury that if a person shoots another through mere cowardice, or under circumstances which are not, in the opinion of the jury, sufficient to induce a reasonable and well-grounded belief of danger to life or of great bodily harm in the mind of an ordinarily courageous person, the law will not justify the shooting on the ground of self-defense.[55]

§ 2968(15). North Dakota

The jury are instructed that the fact that defendant believed himself to be in danger from deceased is not enough to justify defendant in killing deceased, unless from all the facts and circumstances known to defendant, or believed by him to be true, the jury can say he had reasonable ground for such belief, but if from all the facts and circumstances known to defendant, or believed by him to be true, you as jurors can say that defendant had reasonable ground to believe that he was in imminent danger of great personal in-

[54] State v. Houk, 87 P. 175, 34 Mont. 418.

[55] Coil v. State, 86 N. W. 925, 62 Neb. 15.

jury from the deceased, then he was justified in killing deceased, and you should find defendant not guilty.[56]

§ 2968(16). Ohio

The jury are instructed that, if the state has proved beyond a reasonable doubt that the defendant did shoot and kill the deceased, then it is not sufficient that the defendant show you that he honestly believed, at the time he fired the fatal shot, that he was in danger of loss of life or of suffering great bodily harm from an assault made by the deceased, but he must go further, and satisfy you by a preponderance of all the evidence that, at the time he fired the fatal shot, he had reasonable ground to believe he was in such danger.[57]

The jury are instructed that it must appear that the defendant, at the time of firing the fatal shot, in good faith and in the proper and careful exercise of his faculties, believed, and had reasonable ground for believing, that he was in imminent danger of death or great bodily harm from such assault. The mere belief alone in such danger is not sufficient to excuse the homicide. He must have arrived at such belief by the careful and reasonable use of his faculties, and further he must have had reasonable ground for believing in the existence of such danger. You are to determine, not only whether he entertained such belief in good faith, but also whether his conclusion was, under all the circumstances, a reasonable one for him to arrive at. The reasonableness or unreasonableness of his conclusion is to be judged by placing yourselves as nearly as possible in his position at the fatal moment, with such information as he had concerning the disposition of his assailant towards him, and subject to whatever influence the evidence may show was operating on his mind. In determining whether he had such reasonable ground, you must take into account the nature of the attack made upon him, the apparent power to prevent the same, the relations existing between himself and deceased, his own knowledge that his assailant had threatened to take his life, and all the other circumstances of the occasion. If he in good faith believed, upon reasonable grounds, under the circumstances, that he was in such danger, then he had the right to act as if such danger existed, notwithstanding the fact that he may have been mistaken, and subsequent investigation may show that there was no such danger.[58]

§ 2968(17). Oklahoma

The court instructs the jury that what is or is not an overt action —that is, what act upon the part of the person slain will justify the

[56] State v. Woods, 139 N. W. 321, 24 N. D. 156.

[57] Donald v. State, 21 Ohio Cir. Ct. R. 124.

[58] Martin v. State, 17 Ohio Cir. Ct. R. 406.

person taking his life—varies with the circumstances of each particular case. Under some circumstances the slightest movement may justify instant action on the part of the person threatened with danger, upon the ground of reasonable apprehension of danger. Under other circumstances this might not be true, and it is for the jury, viewing the facts and circumstances in evidence from the defendant's standpoint, to determine how this may be in each case.[59]

The court instructs the jury that if a person kills another through mere cowardice, or under circumstances which are not, in the opinion of the jury, sufficient to induce a reasonable and well-grounded belief of danger to life or of great bodily harm in the mind of an ordinarily courageous man, the law will not justify the killing on the ground of self-defense.[60]

§ 2968(18). Oregon

The court instructs the jury that the law regards human life as the most sacred of all interests committed to its protection, and there can be no setting up of self-defense unless the necessity of taking human life is actual, present, urgent, or apparently so—unless, in a word, the taking of his adversary's life is the only reasonable resort of the party to save his own life or his person from deadly harm or severe calamity felonious in its character, or from all of the circumstances he had reasonable ground to believe his life or person was in such grave danger.[61]

§ 2968(19). South Carolina

The court instructs the jury that the law says that self-defense is based upon necessity—that is, the proof must show that the defendant at the time that he struck believed that it was necessary for him to strike to save his own life or save himself from serious bodily harm; that it was necessary for him to do it. Now, then, gentlemen, it is for you to say under the facts that you have heard detailed here does this evidence show that at the time the defendant struck the deceased the blow that produced death that he was without fault himself in bringing on a necessity for the stabbing, that he believed himself that he was in danger of losing his own life or sustaining some serious bodily harm, and that he had no other probable means of escape than to stab, cut, or shoot, as the case might be, and that he had no other probable means of escape; that it was necessary for him to have acted as he did to save his own life or

[59] Green v. United States, 101 P. 112, 2 Okl. Cr. 55.

[60] Wells v. Territory, 78 P. 124, 14 Okl. 436.

[61] State v. Rader, 186 P. 79, 94 Or. 432; State v. Butler, 186 P. 55, 96 Or. 219. In this case the court replies to a criticism of the use of the word "felonious" by saying that, while the use of such word is not to be recommended as being more or less technical, and liable to confuse the jury, such use has support, both under the statute and independent thereof.

save himself from serious bodily harm. Not only must he have believed that, but you must be satisfied that a man of ordinary reason and firmness would be justified in believing as he did.[62]

§ 2968(20). Tennessee

I further charge you that if you find from the proof beyond a reasonable doubt that, at the time the defendant shot ———, the latter was not advancing upon him with a knife, but was only interceding as a peacemaker, and had thrown himself between the defendant and C. to prevent a difficulty, having nothing in his hands, and that the defendant could see that he had no knife in his hands, and had no reasonable ground on which to base an honest belief that he was in danger of death or great bodily harm at the hands of ———, then he would not have the right to shoot ———, and the plea of self-defense would not avail him; and this is so, even if he believed that C. was putting him in danger of death or great bodily harm, provided he shot the deceased purposely.[63]

§ 2968(21). Texas

You are further instructed, as a part of the law of self-defense as the same applies in this case, that the deceased had the legal right to go to the place where he was killed for the purpose of peacefully interviewing his wife and asking her to go with him, and if he had been informed that threats had been made against him and believed that his life was in danger, or that he was in danger of serious bodily injury, then he had the right to arm himself with a pistol and go to the place where he was killed, and if from all the evidence you believe beyond a reasonable doubt that the deceased did not draw his pistol, and did not make any motion or gesture with his hand indicating an immediate intention to draw said pistol before the defendant started at him with his knife, and that there was no danger or reasonable appearance of danger to the defendant, judged from his standpoint, at the time the defendant started at the deceased with his knife, then you are instructed that the defendant would not be acting in self-defense, even though you should find that after the defendant started towards the deceased the deceased drew a pistol and struck the defendant with it.[64]

You are instructed that it is not enough that the party killing another believe himself in danger from the person killed, unless the facts were such that the jury, in the light of all the facts and circumstances known to the slayer, or believed by him to be true, can say that he had reasonable ground for such belief.[65]

[62] State v. Scruggs, 77 S. E. 944, 94 S. C. 304.

[63] Johnson v. State, 143 S. W. 1134, 125 Tenn. 420, Ann. Cas. 1913C, 261.

[64] Roberts v. State, 168 S. W. 100, 74 Tex. Cr. R. 150.

[65] Todd v. State (Cr. App.) 44 S. W. 1096.

§ 2968(22). Virginia

You are instructed that there must be some act by the deceased meaning present peril, or something in the attending circumstances indicative of the present purpose to make the apprehended attack. The act so done, or circumstances thus existing must be of such a character as to afford a reasonable ground for believing there is a design for committing a felony, or to do some serious bodily harm, and imminent danger of carrying such design into immediate execution.[66]

§ 2969. Necessity of overt act indicative of danger

See, also, ante, § 2965(8).

§ 2969(1). Oklahoma

The court instructs the jury that mere fear, however well grounded, that another intends to kill the defendant, or to do him some great bodily harm, will not justify a killing, unless there is some overt act indicating a purpose to immediately carry out such an intention; and you are instructed that it is not enough that the defendant should show that he believed himself in danger, unless the facts were such that in the light of all the facts and circumstances known to the defendant at the time, or by him then believed to be true, you can see that as a reasonable man he had grounds for such belief.[67]

§ 2969(2). Virginia

The court further instructs the jury that the bare fear that one intends to commit murder or other atrocious crime, however well grounded, unaccompanied by any overt act indicative of any such intention, will not warrant killing the party by way of prevention. There must be some overt act indicative of imminent danger at the time.[68]

§ 2969(3). West Virginia

The jury are instructed that the bare fear that a man intends to commit murder or other atrocious felony, however well grounded, unaccompanied by any overt act indicative of any such intention, will not warrant the killing of the party by way of prevention. There must be some overt act indicative of imminent danger at the time, but the jury will judge whether the conduct and acts of the deceased, at the time of the shooting were of such a character as to create in the mind of the defendant a reasonable fear that deceased intended to commit murder or other felony or to do defendant great bodily harm. Apprehension of danger, to justify a

[66] Hodges v. Commonwealth, 15 S. E. 513, 89 Va. 265.

[67] Robinson v. Territory, 85 P. 451, 16 Okl. 241.

[68] Hodges v. Commonwealth, 15 S. E. 513, 89 Va. 265.

homicide, ought to be based not alone on surmises, but there ought to be coupled therewith some act on the part of the party from whom danger was apprehended evidencing an immediate intention to carry into execution his threats or design and the jury are to judge of the reasonable grounds for such apprehension on the part of defendant from all the facts and circumstances as they existed at the time of the killing.[69]

§ 2970. Appearance of circumstances to defendant at time of killing as test of danger

§ 2970(1). Alabama

The court instructs the jury that, if defendant shot the deceased under a bona fide belief that he was in impending danger of life or limb, and that he had, under all the circumstances, reasonable cause to believe that he was in imminent danger at the time the shooting was done, it would be immaterial whether there was such danger or not.[70]

The court charges you that if the killing was in the home of defendant, and if the circumstances attending the killing were such as to justify a reasonable man in the belief that she was in danger of great bodily harm, and defendant believed such to be, then she was justified in shooting deceased, although she was not in actual danger; and if defendant acted under such circumstances, the burden of showing that she was not free from fault in bringing on the difficulty is on the state.[71]

The court instructs the jury that it is not necessary, under the evidence in this case, that defendant should have been actually in danger of death or great bodily harm at the time he killed his wife. He had the right to act on the appearances of things at the time, taken in the light of all the evidence, and he had the right to interpret the conduct of his wife in the light of any threat that the evidence proves his wife to have made against him. If the circumstances of the killing were such as to justify a reasonable man in the belief that he was in danger of great bodily harm, or death, and he honestly believed such to have been the case, then he had a right to shoot his wife in his own defense, although, as a matter of fact, he was not in actual danger; and if the jury believe from the evidence that defendant acted under such conditions and circumstances as above set out, the burden of showing that he was not free from fault in bringing on the difficulty is on the state, and, if not shown, the jury should acquit.[72]

[69] State v. Cain, 20 W. Va. 679.

[70] Glass v. State, 78 So. 819, 201 Ala. 441.

[71] Williams v. State, 78 So. 312, 16 Ala. App. 396.

[72] Watts v. State, 59 So. 270, 177 Ala. 24.

§ 2970(2). Arkansas

The court instructs the jury that, in ordinary cases of one person killing another in self-defense, it must appear to the defendant, acting without fault or carelessness on his part, that the danger was so urgent and pressing that in order to save his own life, or prevent his receiving great bodily harm or injury, the killing was necessary, and it must appear also that the person killed was the assailant, or that the slayer had really and in good faith endeavored to decline any further contest before the mortal blow or injury was given.[73]

You are instructed that if the defendant believed that it was the intention of the deceased to kill him or do him great bodily injury, and that the defendant, without fault or carelessness on his part, shot the deceased, he was justified in so doing; that it was sufficient if the defendant acting without fault or carelessness on his part honestly believed that the killing was necessary, if he acted under such circumstances as made it reasonable to entertain that belief.[74]

You are instructed that, to justify a killing in self-defense, it is not essential that it should appear to the jury to have been necessary; but it is sufficient, if the defendant honestly believed, acting upon the facts and circumstances from his standpoint, and without fault or carelessness on his part, that the danger was so urgent and pressing that the killing was necessary to save his own life or to prevent him from receiving great bodily injury.[75]

The jury are instructed that, in passing on the question as to whether the defendant was acting in his necessary self-defense, you are to consider his condition and surroundings at the time, and determine whether the circumstances and surroundings were such as to induce in his mind an honest belief that he was in danger of losing his own life or of receiving great bodily injury at the hands of the deceased; and if you believe from the evidence that such was the case, and that the defendant, at the time he fired the fatal shot, was acting under such belief, and that he acted with due caution and circumspection and without negligence, then it will be your duty to acquit the defendant.[76]

You will note that you must place your findings upon what you believe from the evidence the defendant, acting without carelessness on his part, actually thought of the circumstances and appearances by which he was surrounded at the time. It is not how

[73] Smith v. State, 213 S. W. 403. 139 Ark. 356. See Plumley v. State, 171 S. W. 925, 116 Ark. 17.

[74] Smith v. State, 213 S. W. 403, 139 Ark. 356.

[75] Smith v. State, 213 S. W. 403. 139 Ark. 356.

[76] Smith v. State, 213 S. W. 403, 139 Ark. 356.

you think those circumstances and appearances might have affected or impressed you, nor what the defendant might have done, or ought to have done. The question for you to decide on this issue of self-defense is, What, in good faith, acting under the test the court has given you, the defendant thought he ought to do. It really comes at last to this: Was the defendant really trying to save his own life or to prevent great bodily harm to himself, or did he shoot deceased simply out of malice or revenge? If he shot to save his own life or to prevent great bodily harm to himself, acting without carelessness on his part, as it appeared necessary to him under the test above laid down, he is not guilty, and you will acquit him.[77]

§ 2970(3). Kansas

In this connection I instruct you that the defendant was justified in acting upon the circumstances as they appeared to him at the time. And in determining whether or not the defendant took the life of deceased under circumstances to render the act justifiable, as hereinbefore explained, you will determine whether or not the circumstances as they appeared to him were such as to lead a reasonable man to believe that there was a design to kill him or do immediate bodily harm, coupled with immediate danger of such design being accomplished.[78]

§ 2970(4). Kentucky

You are instructed that, although you may believe from the evidence in this case beyond a reasonable doubt that the defendant did shoot and kill ——— at the time and place stated in instruction No. ——— herein, and that the defendant J. was present aiding, assisting, or encouraging said shooting and killing, yet if you shall further believe from the evidence in this case that, at the time said L. shot and killed the said ——— (if you shall believe from the evidence beyond a reasonable doubt he did shoot and kill him), said ——— had first assaulted the defendant L. or his father, J., or both, and that defendant L. then and there had reasonable grounds to believe, and did believe, that he or his said father was in immediate danger, or apparent danger, of losing his life, or of suffering great bodily harm, at the hands of said deceased, and as it then appeared to him there was no other safe means, or apparent safe means, of avoiding said danger, except to shoot and kill the said deceased, then he had a right to so shoot and kill said deceased, and such shooting and killing would be in self-defense; and if you

[77] Plumley v. State, 171 S. W. 925, 116 Ark. 17.

[78] State v. Appleton, 78 P. 445, 70 Kan. 217.

shall so believe from the evidence in this case, then the law is for each of the defendants, and you will find each of them not guilty.[79]

§ 2970(5). Mississippi

The court charges the jury that, in passing upon the action of the accused, the jury should not try him by the light of after-developed events, nor hold him to the same cool and correct judgment which they are able to form. They should put themselves in his place, and judge of his act by the facts and circumstances by which he was surrounded.[80]

§ 2970(6). Missouri

The jury are instructed that, in passing upon the question whether or not the defendant had reasonable grounds for believing there was imminent danger that the deceased was about to kill him or do him some great bodily harm, the jury should look at the transaction from the standpoint of the defendant, and under his surroundings at the time he acted. And if you believe from the evidence that the defendant had good cause to believe, and did believe, that the deceased was about to take his life or do him some great bodily harm, and that the defendant, so believing, acted in a moment of apparently impending danger, then it was not required of him to nicely gauge or measure the proper quantity of force necessary to repel the assault. The question to be determined by the jury from the evidence is, not whether some other or lesser force might not have been adequate to protect defendant from great bodily harm or death, but whether when the defendant acted he had reasonable cause to believe that such act was necessary to protect himself from immediate danger of great bodily harm or death.[81]

The court instructs the jury that the right of self-defense is a right not only conceded, but guaranteed by law, to every person. So, if you find and believe from the evidence that at the time defendant did the shooting, if you believe he did, the defendant had reasonable cause to believe and did believe it necessary for him to use his pistol on ———, the deceased, in the way he did in order to protect himself from some great personal injury at the hands of deceased, then you must acquit him on the grounds of self-defense. In such case it is not necessary that the danger should have been real. All that is necessary is that defendant believed and had reasonable cause to believe that such danger existed; on the other hand, it is not enough that defendant believed in the existence of

[79] Futrell v. Commonwealth, 132 S. W. 555, 141 Ky. 310. This instruction was objected to on the ground that it required the danger to be apparent to the jury.

[80] McCrory v. State, 25 So. 671.

[81] State v. Hostetter (Sup.) 222 S. W. 750.

such danger, but he also must have had reasonable cause for so believing before he can be acquitted on the grounds of self-defense.[82]

The jury are instructed that, if they believe from the evidence that witness ——— assaulted defendant with such violence as to give defendant reasonable ground to apprehend a design upon the part of said ——— to do him some great bodily injury, and to believe that there was danger of the immediate accomplishment of such design, then the defendant had the right to repel such assault, and, in doing so, to use such force and means as would seem to be necessary, under the appearances of the case as presented to defendant at the time.[83]

§ 2970(7). North Carolina

The court instructs the jury that, in passing upon the reasonableness of defendant's belief or apprehension, it is not proper or just to the defendant that you should judge him by the circumstances, as you are now sitting and looking coolly back upon the transaction, in the light of the evidence, but you should put yourselves in the situation of the defendant, and surround yourselves with the same circumstances that surrounded him, and then determine whether or not his apprehension was reasonable, if you find that he had such apprehension.[84]

§ 2970(8). Oklahoma

The court instructs the jury that, in determining the question as to whether or not the defendant was in danger or apparent danger, under these instructions you are told that the law requires you to view the circumstances at the time from the defendant's standpoint as they reasonably appeared to him.[85]

The court instructs the jury that, when an attack has been made by one person upon another and the person making the attack is killed, in determining whether the killing is justifiable, the nature and purpose of the attack, the existence of or appearance of danger and extent thereof, the amount or degree of force necessary and sufficient to be used to avoid the apparent or threatened danger, and all of the facts and circumstances in the case, must be viewed and considered from the standpoint of the person doing the killing, at the time of the killing, and from no other standpoint, and if, when viewed from his standpoint it reasonably appears that the killing was necessary to prevent death or great bodily harm to the person who did it the killing will be justifiable.[86]

[82] State v. Parmenter, 213 S. W. 439, 278 Mo. 532.

[83] State v. Brooks, 12 S. W. 633, 99 Mo. 137.

[84] State v. Blackwell, 78 S. E. 316, 162 N. C. 672.

[85] Brantley v. State, 175 P. 51, 15 Okl. Cr. 6.

[86] Brantley v. State, 175 P. 51, 15 Okl. Cr. 6.

The court instructs the jury that a person who is unlawfully attacked is not bound to retreat to avoid the necessity of injuring his assailant, or of killing him, when it reasonably appears necessary to save his own life or to avoid serious bodily injury from the person killed. The killing under such circumstances will be self-defense, and it is not necessary to the right of self-defense that the danger should in fact exist, and, if it reasonably appears from the circumstances of the case that danger exists, the person threatened with such apparent danger has the same right to defend against it and to the same extent that he would have were the danger real.[87]

You are instructed that, when an unlawful attack has been made upon a person by another, and the person making the attack is killed, in determining whether the killing was necessary and in self-defense, the nature and apparent purpose of the attack, the intention with which it is made, the existence or appearance of danger, and the extent thereof, the amount or degree of force necessary and sufficient to be used to avoid the apparent or threatened danger, and all the facts and circumstances in the case must be viewed and considered by the jury from the standpoint of the person doing the killing at the time thereof, and from no other standpoint, and if, when viewed from his standpoint, it appears that he might reasonably have believed the killing, or the act which resulted in death, was necessary to prevent death or great bodily harm to himself, the killing will be justifiable.[88]

You are instructed that in determining whether at the time of the killing there was an act done by the deceased in advance of any act done by the defendant, and which act upon the part of the deceased manifested a purpose to carry such threats into execution, it is your duty to view the matter from the standpoint of the defendant, and if you believe that he had reason to believe and did believe that such was the purpose and intent of the deceased, and that it was necessary or apparently necessary for him to shoot to prevent the execution of such threats, if any, and under such circumstances the defendant fired the fatal shot, he should be acquitted.[89]

§ 2970(9). South Carolina

You are instructed that a person has a right to act on the appearance of danger. For illustration, if one should point an unloaded gun at you at a distance of ten or twelve steps, though the gun might be unloaded and though there might not be any actual

[87] Brantley v. State, 175 P. 51, 15 Okl. Cr. 6.

[88] Gransden v. State, 158 P. 157, 12 Okl. Cr. 417.

[89] Turner v. State, 111 P. 988, 4 Okl. Cr. 164.

danger, you would have a right to act on appearances. A man must believe at the time it was necessary, or it must have appeared to be necessary, and the circumstances must be such as to warrant that conclusion in the mind of a person of ordinary reason, prudence, and courage.[90]

§ 2970(10). South Dakota

The court further instructs you that, in determining whether the defendant was in imminent danger of being killed or receiving great bodily injury by the deceased at the time he shot the deceased, you are to determine that fact from the standpoint of the defendant, acting as a reasonable man, in his position when he fired upon the deceased, and you should take into consideration the evidence whether or not the deceased had a loaded pistol upon his person at the time, and the danger, if any, the defendant would be placed in if he had attempted to turn and flee from the assault made by the deceased, if any was made by him.[91]

§ 2970(11). Texas

You are instructed that if you believe from the evidence that the deceased came upon the defendant in an angry or threatening manner, stating that he would make him take down the fence which he accused the defendant of putting up, and that such act and conduct of the deceased produced in the mind of the defendant a reasonable apprehension or fear of death or serious bodily injury, viewed from the defendant's standpoint alone, and that the defendant thereupon shot and killed the deceased, his right of self-defense would be complete, and you will return a verdict of not guilty.[92]

You are charged the law to be that, should you find from the evidence that at the time the defendant killed the deceased the deceased, by any act done, or by words coupled with such acts, induced the defendant to believe that he (the deceased) was then in the act, or was about to inflict either death or serious bodily injury upon the defendant, and you further believe from the evidence that at the time it reasonably appeared to the defendant that it was then the intention of the deceased to inflict death or serious bodily injury upon the defendant, then, in such case, if the defendant under such circumstances shot and killed the deceased, he would be justifiable, and you will find him not guilty. You are further charged that, in such case, and under such circumstances, it matters not whether the danger was real, whether in fact it existed, or whether it was merely colorable, if, from the defendant's standpoint, taking into consideration all the circumstances of the case,

[90] State v. Hardin, 103 S. E. 557, 114 S. C. 280.

[91] State v. Stumbaugh, 132 N. W. 666, 28 S. D. 50.

[92] Zimmerman v. State, 215 S. W. 101, 85 Tex. Cr. R. 630.

it would reasonably appear to him that he was in danger of death, or serious bodily injury from the deceased, he had the right to kill him, although in fact such danger did not exist.[93]

You are instructed that, if you believe from the evidence that the defendant believed his life was in danger or that serious bodily injury would be inflicted upon him, such fear being caused by the hostile act on the part of the deceased, if any, and that at the time he fired the fatal shot it reasonably appeared to him from all the circumstances, viewed from the standpoint of the defendant alone, that ——— was about to inflict death upon him or serious bodily injury upon him by cutting him with a knife, then if you so believe you will acquit him.[94]

You are instructed that, bearing in mind the foregoing instructions, if you believe beyond a reasonable doubt the defendant killed ———, but you further believe from the evidence that at the time of so doing the said ——— was making or in the act of making an attack upon the defendant with a knife, which from the manner and character of its use, caused him to have a reasonable expectation of fear of death or serious bodily injury at the hands of ———, viewing it from the defendant's standpoint alone and that acting under such reasonable expectation of fear of death or serious bodily injury, the defendant killed the said ———, then you should acquit him.[95]

You are instructed that, in determining whether or not, at the time the defendant shot the deceased, he was in danger of losing his life or sustaining serious bodily injury, and also in determining whether or not from the facts and circumstances in the case that at the time he shot the deceased he believed that he was in danger of losing his life or sustaining serious bodily injury, and had a reasonable apprehension of such danger, you will view the transaction from the defendant's standpoint and from no other standpoint, and if you have a reasonable doubt as to such matters you will give the defendant the benefit of such doubt and say by your verdict not guilty.[96]

You are instructed that, if you find and believe from the evidence that the defendant killed ——— at the time and place alleged in the indictment, but you further believe that prior thereto said ——— had made threats against the defendant to do him serious bodily harm or injury, and that at the time of the killing said ——— by some act then done manifested an intention to execute the threats so made, or do the defendant some serious bodily in-

[93] Hays v. State, 199 S. W. 621, 82 Tex. Cr. R. 427.

[94] Bivens v. State, 198 S. W. 962, 82 Tex. Cr. R. 278.

[95] Bivens v. State, 198 S. W. 962, 82 Tex. Cr. R. 278.

[96] Waters v. State, 192 S. W. 778, 80 Tex. Cr. R. 573.

jury, or you believe that at the time of the killing said ——— had made or was making an unlawful attack upon the defendant, or had done, or was doing, some act or acts which produced in the defendant's mind, as viewed from his standpoint, a reasonable apprehension of assault or death or serious bodily injury at the hands of ———, and that he killed said ——— to protect himself from such danger, or apparent danger, then said killing was justifiable in self-defense, and if you so find or have reasonable doubt as to whether said killing was justifiable in self-defense you will find the defendant not guilty.[97]

The court instructs the jury that homicide, which means the killing of one person by another, is justifiable when committed in self-defense. If you find from the evidence, beyond a reasonable doubt, in this case, that the defendant killed said ——— about the time charged in the indictment, and by the means charged in the indictment, he would be justifiable if he did so to prevent ——— from killing him, the defendant, or inflicting serious bodily injury on him, if it reasonably appeared by the acts of said ——— or by the words of the said ———, coupled with his acts, at the time of such killing, if any, that it was the purpose and intention of the said ——— to kill the defendant or to inflict on him some serious bodily injury, and you will acquit the defendant. The defendant would be justifiable in killing the said ———, if he did so, if the said ——— was attempting to cut the said defendant with a knife, and if, to prevent the said ——— from cutting or inflicting on the defendant death or serious bodily injury, the defendant shot and killed the said ———, you will acquit the defendant. In passing on the question of self-defense, the jury can take into consideration all acts of the said ———, if any, done at the time of such killing, and any and all words spoken by him, if any, and, in fact, all of the facts and circumstances in evidence, transpiring at the time, or immediately before, and said acts and circumstances are to be viewed from the defendant's standpoint; and if it reasonably appeared to the defendant's mind, viewed from his standpoint, that it was the purpose and intent of the deceased to kill or inflict on him, the defendant, some serious bodily harm, the defendant had a right, in law, to act on such danger, or apparent danger, if any, the same as it reasonably appeared to the defendant, at the time, and the defendant would have the same right to act on the appearance of danger as though the danger were real. The defendant was not bound to retreat to avoid the necessity of killing the deceased. If you should find from the evidence, or believe from the evidence, that the defendant's life was not in danger, or that he

[97] Waters v. State, 192 S. W. 778, 80 Tex. Cr. R. 573.

was not in danger of serious bodily injury from the deceased, ———, you are instructed that the defendant had the same right to act on the appearance of danger, as if the danger had been, in fact, real, if it reasonably appeared to the defendant, as viewed from his standpoint, that the danger was real. When a homicide takes place to prevent death or the infliction of serious bodily injury, and the weapon, if any, or means, if any, used by the deceased, on the occasion of the homicide was such as would have been calculated to have produced death or serious bodily injury, the law presumes that the person so using said weapon, if any, designed to inflict death or serious bodily injury on the defendant. A deadly weapon is one that is calculated to produce death or serious bodily injury in the manner in which the same is used. If you have a reasonable doubt as to whether or not the defendant acted in self-defense, you will give the defendant the benefit of such doubt, and acquit him.[98]

I charge you that a reasonable apprehension of death or serious bodily injury will excuse a party for using all the necessary force to protect his person or his life, and it is not necessary that there be actual danger, provided the defendant acted on a reasonable apprehension of danger, such reasonable apprehension of danger being viewed from the defendant's standpoint; therefore, if you believe from the evidence in this case that the defendant did shoot and kill the deceased, and if you believe at the time of so doing he acted upon a reasonable apprehension of death, or serious bodily injury, viewing it from the defendant's standpoint, you will find the defendant not guilty and so say by your verdict.[99]

You are instructed that, if the defendant killed the deceased, he was justified in doing so, if he did so to prevent the deceased from murdering or inflicting serious bodily injury upon him (the defendant), provided it reasonably appeared to the defendant by the acts or by the words, coupled with the acts of the deceased, taking into consideration the relative strength of the parties and other circumstances of the case, that it was the purpose and intent of the deceased to murder the defendant, or to inflict serious bodily injury upon him (the defendant), provided the killing took place while the deceased was in the act of committing such murder or of inflicting such injury on the defendant or after some act done by him showing evidently an intent to murder the defendant or to inflict serious bodily injury upon him (the defendant), viewed from the defendant's standpoint.[1]

[98] Marshall v. State, 189 S. W. 499, 80 Tex. Cr. R. 235.

[99] Manly v. State, 176 S. W. 724, 76 Tex. Cr. R. 606.

[1] Carey v. State, 167 S. W. 366, 74 Tex. Cr. R. 112.

The jury are instructed that, if you believe from the evidence that the defendant shot and killed ———, but further believe that at the time he did so the deceased was making or about to make an unlawful and violent attack upon him, the defendant, which then reasonably appeared to him to be of such a character that he was in danger of losing his life or of suffering serious bodily injury, at the hands of the deceased, viewing the whole matter from the defendant's standpoint alone, and, under such circumstances, he shot and killed the said ———, he would be justifiable; or, if you believe from the evidence that from the acts and words of the deceased at the time that the defendant had a reasonable apprehension that the deceased was about to inflict death or serious bodily injury upon him, and such danger, or apparent danger, was imminent and pressing, even though there was no real danger, but was only apparent, viewing the matter from the defendant's standpoint alone at the time, and under such circumstances to save himself from such apparent danger to his life or person, he shot and killed the deceased, he would be justifiable, and in either or both events, if you so believe from the evidence, you will acquit the defendant.[2]

You are instructed that it is not essential to the right of self-defense that real danger should exist. If from the defendant's standpoint, taking into consideration all of the facts and circumstances surrounding the parties, it reasonably appeared to the defendant that he was in danger of death, or serious bodily injury, under the law he had the right to defend against such apparent danger, to the same extent as if the danger were real, although in fact no danger existed. And in each case, in order to determine whether or not the defendant had a reasonable fear of danger to his life or serious bodily injury at the time of the killing, each juror must put himself in the defendant's place and determine from all facts and circumstances as they appeared to the defendant at the time whether his apprehension or fear of death or of serious bodily injury was reasonable, and, if you find that they were reasonable, then you must acquit the defendant.[3]

You are instructed that a reasonable apprehension of death or great bodily harm will excuse a party in using all necessary force to protect his life or person, and it is not necessary that there should be actual danger, provided he acted upon a reasonable apprehension of danger as it appeared to him from his standpoint at the time, and in such case the party acting under such real or apparent danger is in no event bound to retreat in order to avoid the necessity of killing his assailant. If from the evidence you believe

[2] Williams v. State, 148 S. W. 763, 67 Tex. Cr. R. 287.

[3] Tilmeyer v. State, 136 S. W. 1060, 62 Tex. Cr. R. 272.

the defendant killed the said ———, but further believe that at the time of so doing the deceased by his acts, if any, or by his acts coupled with his words, if any, caused him to have a reasonable expectation or fear of death or serious bodily injury, viewing the case from the defendant's own standpoint, and that, acting under such reasonable expectation or fear, the defendant killed the deceased, then you should acquit him.[4]

§ 2970(12). Utah

As to what force or circumstances are sufficient to justify or mitigate the act, I instruct you that if the deceased, at the time he was shot and killed, was attacking the defendant, and if the attack was of such a character as to imperil the life, or do some great bodily harm, so imminent and pressing that a man of ordinary prudence, in the same or like circumstances, would believe that it was necessary to take the life of his assailant to save his own or prevent his receiving great bodily harm, and the defendant, so menaced, acting in good faith, using no more force than was necessary to save his own life, or to prevent great bodily harm to himself, then, in such case, although it may afterwards appear that such danger was only apparent, and not real or absolute, the defendant was justified in killing deceased, and the act is excusable; and in determining the question you may take into consideration the time of the day or night it was done, and the degree of darkness or light existing at the time, and who fired the first shot.[5]

§ 2970(13). Vermont

You are instructed that defendant's act is not to be judged wholly in the light of subsequent events, nor by the fact that you can see, in cool thought, that the defendant might have acted differently. But, assuming his claim to be true, in the situation he claims he was in, in the time he had to think and act, were there means to have escaped, and means that to him then seemed available for escape? If not, then he had a right to use means sufficient to protect himself from harm, and if he used no more force than was necessary, or at the time seemed to him necessary, then he is not responsible for the consequences. And if he saw no available means of escape, or of disarming his assailant, and was obliged to resist ———'s assault with force, in order to protect himself, then he should be acquitted.[6]

§ 2970(14). West Virginia

The court instructs the jury that as to the imminency of the danger which threatened the prisoner, and the necessity of killing

[4] Glover v. State (Cr. App.) 107 S. W. 854.

[5] People v. Callaghan, 6 P. 49, 4 Utah, 49.

[6] State v. Roberts, 21 A. 424, 63 Vt. 139.

in the first instant, the prisoner is the judge; and that the jury must pass upon the prisoner's action in the premises, viewing said action from the prisoner's standpoint at the time of the killing; and if the jury believe from all the facts and circumstances in the case, viewed from the standpoint of the prisoner at the time of the killing, that the prisoner had reasonable ground to believe, and did believe, the danger imminent, and that the killing was necessary to preserve his own life, or to protect him from great bodily harm, he was excusable for using a deadly weapon in his defense and the jury should find the defendant not guilty.[7]

§ 2971. Condition of defendant's mind at very time of homicide

You are instructed that, if the jury believe that the deceased threatened the life of the defendant, and that he approached the defendant in a manner which threatened defendant's life, producing in his mind such great fear and terror that he was unable to think, reflect, and weigh the nature of his act, he cannot be convicted of murder in the first degree, if you further believe from the evidence that, by the acts of the deceased as above stated, the prisoner's mind was in the condition above stated at the time of the shooting by the prisoner of the deceased.[8]

§ 2972. Matters considered in determining reasonableness of apprehension of defendant

§ 2972(1). Colorado

You are instructed that, in determining the reasonableness of such fear the jury may take into consideration all the circumstances surrounding the defendant at the time the fatal blow was struck, as to difference in physical strength and the like, and if the jury believe from the evidence that a reasonable person placed in the same condition as the prisoner, and surrounded by like circumstances, would have entertained fears of great bodily harm, then the prisoner was justified in striking the fatal blow, and should be acquitted.[9]

§ 2972(2). Delaware

You are instructed that in determining what constitutes such reasonable fear, you may consider the conduct of the deceased just before the shooting, the violence of his assault, if any, the character of the weapon he employed, if any, his superior advantage of size and strength, if such existed, as well as the prisoner's

[7] State v. Donahue, 90 S. E. 834, 79 W. Va. 260.

[8] Commonwealth v. McKwayne, 70 A. 809, 221 Pa. 449.

[9] May v. People, 6 P. 816, 8 Colo. 210.

knowledge of his assailant's reputation for being quarrelsome and violent.[10]

§ 2972(3). Kentucky

You are instructed that, if the jury believe from the evidence that, at the time defendant shot and killed deceased, he was being assaulted or menaced by the deceased, and he (defendant) believed, and had reasonable grounds to believe, from the character of the deceased, his previous threats, if any proven, and from the circumstances of the meeting, and the nature of the assault or menace, that he (defendant) was then and there in danger of loss of life or suffering great bodily harm, and he believed, and had reasonable grounds to believe, that he had no safe, or to him apparently safe, means of avoiding said danger, then the defendant had the right to use such force as was necessary, or to him apparently necessary, to repel such assault, and protect himself from such danger; and, if he shot deceased under such circumstances, the jury should acquit defendant on the grounds of self-defense.[11]

§ 2972(4). Texas

You are instructed that every person is permitted by law to defend himself against any unlawful attack, reasonably threatening injury to his person, and is justified in using all necessary and reasonable force to defend himself, but no more than the circumstances reasonably indicate to be necessary. Homicide is justified by law when committed in defense of one's person against any unlawful and violent attack, made in such a manner as to produce a reasonable expectation or fear of death or some serious bodily injury. A reasonable apprehension of death or great bodily harm will excuse a party in using all necessary force to protect his life or person, and it is not necessary that there should be actual danger, provided he acted upon a reasonable apprehension of danger as it appeared to him from his standpoint at the time, and in such case the party acting under such real or apparent danger is in no event bound to retreat in order to avoid the necessity of killing his assailant. If from the evidence you believe that defendant E. killed ———, but further believe at the time of so doing ——— had made an attack on him which, from the manner and character of it, and the instrument used caused defendant E. to have a reasonable expectation or fear of death or serious bodily injury, and that, acting under such reasonable expectation or fear, the defendant E. killed ———, then you should acquit the defendant G.[12]

[10] State v. Brooks, 84 A. 225, 3 Boyce, 203.

[11] Connor v. Commonwealth, 81 S. W. 259, 118 Ky. 497.

[12] Goodwin v. State, 126 S. W. 582, 58 Tex. Cr. R. 496.

You are instructed that a reasonable apprehension or fear of death or serious bodily injury will excuse a person for using all necessary force to protect himself; and it is not necessary that there should be actual danger of death or serious bodily injury, provided he acted upon a reasonable apprehension of danger as it appeared to him, viewed from his standpoint at the time; and in such case the party acting upon such real or apparent danger is not bound to retreat in order to avoid the necessity of killing his assailant. If, therefore, you believe from the evidence that the said defendant intentionally shot and killed the said ———, but further believe that at the time of so doing the deceased was in the act of making or about to make an attack upon him, which from the manner and character of it, together with the weapon used or attempted to be used, if any, caused the defendant to have a reasonable expectation or fear of death or serious bodily injury at the hands of deceased, and acting under such reasonable expectation or fear of death or serious bodily injury he intentionally shot and killed the said ———, then you will acquit him, or, if there is in your minds a reasonable doubt thereof, you will acquit him, and so say by your verdict. And in this connection, and in connection with the succeeding charge on self-defense, you are instructed further that if the deceased was armed at the time he was killed, and that he made an attack upon defendant with a weapon, and if the weapon used or attempted to be used by deceased in making said attack, if any, and the manner of its use or attempted use were such as were reasonably calculated to produce death or serious bodily injury, then and in that event the law presumes it was the intention of the deceased to kill defendant or inflict serious bodily injury upon him. If you believe from the evidence that at the time deceased was shot and killed he had made an assault upon defendant with a bottle, and that immediately thereafter he seized or attempted to seize a pistol, or that he seized a pistol and was in the act of bringing it up, and that from the acts and conduct of deceased as they reasonably appeared to defendant, or viewed from his standpoint at the time, and under all the facts and circumstances in evidence in this case, that he was in danger of being killed by deceased, or of receiving serious bodily injury at the hands of deceased, and that thereupon he intentionally shot and killed deceased to avoid being shot by deceased, then and in that event such killing would, under the law, be justifiable, as being done by defendant in his own proper self-defense; and if you so believe the facts to so have been, or have a reasonable doubt thereof, you will acquit defendant. If you believe from the evidence that defendant intentionally shot and killed the said deceased, ———, but further believe that at the time deceased was attempting to shoot

or was in the act of shooting defendant with a pistol, or was drawing or attempting to draw a pistol upon defendant, and that defendant thereupon intentionally shot and killed deceased, to save himself from death or serious bodily injury at the hands of deceased, then, and in that event, you will acquit defendant, or if you have a reasonable doubt of such being the fact you will acquit him.[13]

You are instructed that a reasonable apprehension of death or great bodily harm will excuse a party in using all necessary force to protect his life or person, and it is not necessary that there should be actual danger, provided he acted upon a reasonable apprehension of danger as it appeared to him from his standpoint at the time; and in such case the party acting under such real or apparent danger is in no event bound to retreat in order to avoid the necessity of killing his assailant. If, from the evidence, you believe defendant killed said ———, but further believe that at the time of so doing the deceased had made an attack on him which, from the manner and character of it, and the relative strength of the parties, and the defendant's knowledge of the character and disposition of the deceased, caused him to have reasonable expectation or fear of death or serious bodily injury, and that, acting under such reasonable fear, the defendant killed the deceased, then you should acquit him. If you find from the evidence that the defendant struck and killed ——— with a stick or club, but you find, at the time he struck him, the deceased was advancing on him with a chair, and you find from the acts of the deceased, as viewed by the defendant from his standpoint, it reasonably appeared to him that it was the object and intent of ——— to kill him (the defendant), or to inflict on him some serious bodily harm, and in order to protect himself from such death or injury, as viewed by him, he struck and killed ———, then such killing would be in self-defense.[14]

§ 2973. Same—Effect of hostile demonstrations of companion of deceased

You are charged that, if you believe from the evidence that the defendant and F., on the day of the killing of the deceased, were traveling along the ——— public road, and approached deceased, W., and T. as they were seated in a buggy in front of the residence of ———, and that W. shot at the defendant and F., or either of them, or that W. raised a gun as if to shoot the defendant and F., or either of them, or that W. shot the car in which the defendant and F. were seated, and you further believe that by reason of

[13] Teel v. State (Cr. App.) 73 S. W. 11.

[14] Logan v. State, (Cr. App.) 53 S. W. 694.

said acts, if any, on the part of W., or by reason of any or all of said acts on the part of W., if any, either when taken alone or in connection with all or any of the relevant facts and circumstances in evidence, you believe that there was created in the mind of the defendant, or F., a reasonable expectation or fear of death or serious bodily injury at the hands of W., or T., or the deceased, or either of them, viewed from the standpoint of the defendant or F. at the time, and you believe that defendant, acting upon such reasonable expectation or fear of death or serious bodily injury of himself or F., at the hands of W. or T., or deceased, or either of them, shot and thereby killed the deceased, or if you have a reasonable doubt thereof, then you will find the defendant not guilty.[15]

You are instructed that, when there is more than one assailant, the slayer has the right to act upon the hostile demonstration of either one or all of them, and to kill either one of them, if it reasonably appears to him that they are present for the purpose and acting together to take his life or to do him serious bodily injury.[16]

§ 2974. Same—Character of deceased for violence

§ 2974(1). Alabama

The court charges the jury that the law gives a citizen the right to take prompt and decisive steps to defend himself against a felonious assault made against him, if by such assault he is placed in a position of peril of losing his life or of suffering grievous bodily harm, and there is no reasonable mode of escape without increasing his peril, and he is free from fault in bringing on the difficulty, and if the person making the assault had made threats against such person which have been communicated, and is a person reputed to be quarrelsome, dangerous, and bloodthirsty, then the one assaulted would have the right to take more prompt and decisive steps to defend himself from such assault.[17]

§ 2974(2). Missouri

The court instructs the jury that if you believe and find from the evidence that the deceased was of a rash, turbulent, and violent disposition, and that the defendant had knowledge of such disposition, then such disposition is a circumstance for the consideration of the jury in considering the reasonable cause for defendant's apprehension of great personal injury to himself.[18]

The jury are instructed that they will take into consideration the evidence as to the quarrelsome, turbulent, and dangerous character of deceased, and give it such weight as you deem it entitled to. You

[15] Anderson v. State, 217 S. W. 390, 86 Tex. Cr. R. 207.

[16] Carson v. State, 123 S. W. 590, 57 Tex. Cr. R. 394, 136 Am. St. Rep. 981.

[17] Bone v. State, 62 So. 455, 8 Ala. App. 59.

[18] State v. Fletcher (Sup.) 190 S. W. 317.

may consider such evidence for the purpose of throwing light upon the conduct and demeanor of deceased during the difficulty between him and the defendant, and also for the purpose of throwing light upon the defendant's apprehensions, if any, at the time of the shooting.[19]

The jury are instructed that the character of the deceased is a proper matter for your consideration, and you should give it such weight as you deem proper in determining whether or not he, by his acts at the time of the wounding, gave the defendant reasonable cause to apprehend such danger as to justify his act of wounding on the ground of self-defense, according to the law upon that subject as stated in these instructions. The mere fact, however, that the deceased was a man of bad character, if you believe he was of such character, will not justify the taking of his life.[20]

§ 2974(3). Oklahoma

You are instructed that the knowledge of the defendant derived from personal observation as well as otherwise of the violent temper of the deceased, if you find such to be the case, and of his violent and turbulent character, if such you find to be the case, and his liability to attack persons when angered or aroused, if such you find to be the case, and also the knowledge of the defendant that the deceased was in the habit of carrying a pistol or other deadly weapons, and his disposition to use the same when aroused or angered, if such you find to be the case, should be considered by you and given just such weight as you deem the same entitled to have in determining, from the standpoint of the accused, the reasonableness of the danger apprehended by him and from which the defendant might estimate the conduct of the deceased, the character of the attack or threatened attack, if you find the deceased made any attack or threatened attack, or apparent attack, and what he might have expected from the deceased as well as that which he might have at the time deemed necessary to guard himself against.[21]

You are instructed that evidence has been offered before you for the purpose of showing the reputation of the deceased as a quarrelsome, dangerous man. You should consider this evidence in connection with the other evidence in the case, and, if you believe that the deceased had the reputation of being a quarrelsome, dangerous man, you may consider that fact in connection with the other proof, in ascertaining whether or not he was the aggressor and brought on the difficulty, and if you find that he had such reputation, and that it was known to the defendants, you may consider

[19] State v. Hudspeth, 60 S. W. 136, 159 Mo. 178.

[20] State v. Vansant, 80 Mo. 67.

[21] Brantley v. State, 175 P. 51, 15 Okl. Cr. 6.

that fact, in connection with the other proof in the case, in ascertaining whether or not the defendant reasonably and in good faith believed that he, or his brother, or both, were in danger of losing their lives or receiving great bodily injury.[22]

You are instructed that in determining whether or not the defendant, as a reasonable man, in good faith, believed at the time of the killing that he was in danger of suffering death or serious bodily injury at the hands of the deceased, you should take into consideration all the facts and circumstances that transpired at the house of the defendant just prior to and at the time of the killing, and also the defendant's knowledge of the deceased, and his reputation, as a violent and dangerous man.[23]

§ 2975. Same—Relative size and strength of parties

You are authorized, in considering the imminency of the danger of the defendant from the deceased, to take into consideration their relative size and strength.[24]

§ 2976. Prior difficulties with deceased and threats by him as bearing on reasonableness of apprehension of danger

§ 2976(1). Arkansas

The jury are instructed that some of the witnesses have deposed that the deceased, a short time before his death, made threats against the life of the defendant. You are instructed that previous threats or acts of hostility of the deceased towards the defendant, however violent they may have been, were not of themselves sufficient to justify defendant in seeking and slaying the deceased. To excuse him, or justify him, he must have acted under an honest belief that it was necessary at the time to take the life of the deceased in order to save his own, and it must appear that there was reasonable cause to excite this apprehension on his part; so that, if you find that the deceased, at the time he was killed, did nothing to excite in the mind of defendant the fear that deceased was about to execute his threats, then the threats and bad character of deceased, whatever you may find them to have been, are unavailing, and should not be considered by you. But if the evidence leaves you in doubt as to what the acts of the deceased were at the time, or immediately before he was killed, you may consider the threats and character of deceased, in connection with all the other evidence, in determining who was probably the aggressor. The jury are instructed that no mere threats made by deceased, before or at the time of killing, unaccompanied at the time of killing with any at-

[22] McDaniel v. State, 127 P. 358, 8 Okl. Cr. 209.

[23] Mulkey v. State, 113 P. 532, 5 Okl. Cr. 75.

[24] State v. Donahue, 90 S. E. 834, 79 W. Va. 260.

tempt to carry them into execution, are sufficient to justify the killing, or reduce it to a lower degree of homicide than murder; and if they find that defendant shot and killed the deceased because of such threats, and because defendant thought such threats would justify him in killing deceased, and that when he shot and killed him he was in no fear of imminent danger, he is guilty of murder; and if the killing was the result of a deliberate purpose fixed in his mind to kill, it was murder in the first degree.[25]

§ 2976(2). Delaware

The court instructs the jury that if you believe from the evidence that the deceased did first attack the prisoner, and that the prisoner had previously received information which led him to believe and which justified him to believe at the time he committed the fatal act that the deceased had threatened his life or that the deceased was in any wise connected with the threatening letters introduced in the case, then such threats and letters taken in connection with the character of the attack made upon the accused by the deceased become the proper subject for your consideration in determining whether or not the deceased by his acts created in the mind of the accused, at the time of the shooting, a reasonable belief that he was in danger of death or great bodily harm.[26]

§ 2976(3). Georgia

I charge you that threats alone will not justify a killing, but such threats may be considered by the jury, in connection with any overt act of the deceased at the time of the killing, in passing upon the question of reasonable fears. Did the deceased at that time do anything which justified the defendant in believing he then intended to carry out his previous threats? And were such acts sufficient to excite the fears of a reasonable man—one reasonably courageous, reasonably self-possessed, and not those of a coward or one seeking an opportunity or an excuse for the killing?[27]

§ 2976(4). Mississippi

The court instructs the jury for the defendant that, if you believe from the evidence that on a day prior to the killing defendant found a letter from his wife to the deceased, and that the defendant and deceased got into a difficulty on account of same, and if you believe when defendant and deceased separated the latter said to the defendant: "You be God damned sure you are ready the next time we meet; I'll never give you this chance again"—or words

[25] Mize v. State, 36 Ark. 653.

[26] State v. Creste, 86 A. 214, 4 Boyce, 118.

[27] Taylor v. State, 49 S. E. 303, 121 Ga. 348.

to that effect, then you may take this into consideration in determining who was the aggressor in the difficulty at ———.[28]

§ 2976(5). Missouri

You are instructed that, in determining whether the defendant was justified in acting upon appearances and shooting the deceased, the jury may take into consideration any threats that may have been made by deceased against the life of the defendant and communicated to defendant prior to the killing, if the jury find from the evidence that any such threats were made and communicated. You shall consider all the threats which you may believe from the evidence were made by the deceased against the defendant, and may give them such weight in determining the nature of the transaction, giving rise to the charge for which the defendant is now on trial, as you deem proper. Mere threats, however, will not justify on the ground of self-defense the shooting of one by another; nor will threats alone warrant the party against whom they are made in attacking and killing the party who made them, unless at the time of the shooting the party making such threat or threats does some act indicating a purpose to execute the same, or that the party against whom they are made then has reasonable ground to believe, and does believe, that such threat or threats are about to be executed.[29]

The court instructs the jury, if they believe from the evidence that ——— made any threats against the life of defendant, and that such threats were communicated to defendant before the killing, the jury may take into consideration such threats in determining whether defendant was justified in acting upon appearances when he struck ——— with the billiard cues, provided the jury believe from the evidence that ——— provoked and entered into the difficulty with the defendant.[30]

The court instructs the jury, if they believe from the evidence that the defendant provoked and entered into the difficulty with ———, and had previously prepared himself for an assault upon ——— with the intent to take his life or do him some great bodily harm, and that ———, at the time of the difficulty, did not attempt to assault or strike the defendant, then any threats that ——— may have made against the life of defendant would not justify or excuse him in striking and killing ———.[31]

You are instructed that you will take into consideration the evidence as to threats made by the deceased prior to the killing. If you believe that any of such threats were communicated to defend-

[28] Leverett v. State, 73 So. 273, 112 Miss. 394.

[29] State v. King, 102 S. W. 515, 203 Mo. 560.

[30] State v. Smith, 65 S. W. 270, 164 Mo. 567.

[31] State v. Smith, 65 S. W. 270, 164 Mo. 567.

ant, then such threat or threats may be considered by you as explaining the conduct and apprehensions, if any, of defendant at the time of the shooting. You will also consider any threats you may believe were made by deceased and not communicated to defendant, for the purpose of explaining the conduct and demeanor of deceased at the time of the shooting.[32]

The jury are instructed that if they believe from the evidence that the deceased, ———, had shortly before the homicide threatened to take the life of the defendant, and such threats were communicated to the defendant, and caused the defendant to fear that an attack would be made upon him with intent to take his life or to do him some great bodily harm, then such threats will justify the defendant in acting more promptly and upon less demonstration of hostility than if such fears had not been so aroused; and if, from the nature of the threats, and the character of him who made them, together with his appearance, conduct, and demonstrations at the time of the shooting, you believe from the evidence that defendant had reasonable cause to apprehend, and did apprehend, that such threats were about to be accomplished, and that the deceased was about to kill the defendant or to do him some great bodily harm, then the defendant was justified in killing the deceased, and your verdict must be "Not guilty," although the object of the person (———) so threatening him was only to frighten him, and there was no real danger.[33]

§ 2976(6). Oklahoma

The court instructs the jury that evidence has been introduced herein relative to a difficulty or difficulties between the deceased and defendant which have occurred previous to the fatal difficulty. This evidence should be considered by you, with the other evidence in the case, for the purpose of assisting you in ascertaining the state of mind of the respective parties at the time of the homicide, and for the purpose of assisting you in determining whether or not the defendant, in good faith, believed that he was in danger of losing his life or of receiving serious bodily injury at the hands of the deceased at the time of the subsequent difficulty in which the deceased was killed.[34]

The court instructs the jury that evidence has been introduced herein upon the part of the defendant tending to prove that prior to the fatal difficulty the deceased had made threats of violence against defendant, and such threats, should you find the same to have been made, should be considered by you, in connection with

[32] State v. Hudspeth, 60 S. W. 136, 159 Mo. 178.

[33] State v. Hudspeth, 60 S. W. 136, 159 Mo. 178.

[34] Brantley v. State, 175 P. 51, 15 Okl. Cr. 6.

all the other evidence in the case, to assist you in determining the deceased's feeling toward the defendant and to assist you to determine who was the probable aggressor in the fatal difficulty; also, if you find from the evidence that prior to the fatal difficulty, the defendant had been informed that the deceased had made threats of violence against him, and in good faith believed the information (whether such information was in fact true or not being immaterial), then you should consider that fact, should you so find, together with all the other facts and circumstances in evidence before you in this case, to enable you to determine the state of the defendant's mind, and what he might have reasonably apprehended from the overt acts and demonstrations of the deceased, if you find he made any, on the occasion of the fatal difficulty; and if you have a reasonable doubt as to whether the deceased, at the time of the fatal difficulty, was making an attack upon the defendant in such a manner as, viewed from the defendant's standpoint, that it reasonably appeared to him that the deceased was about to take his life or inflict serious bodily injury upon him, then in that event you shall consider any threats you find the deceased made against the defendant, and give the same such weight and value as you deem the same entitled to; but mere threats alone, though actually made and communicated and however violent they may be, will not justify, excuse, or mitigate a homicide. The law does not permit one person to kill another merely because the other has made threats against him or previously assaulted him, unless the deceased, at the time of the fatal difficulty, without being willfully provoked thereto by the defendant, and without the defendant having brought on the difficulty, made some overt act or demonstration, indicating to the defendant as a reasonable man, an intention to kill him or to do him some great bodily harm; and should you find in this case beyond a reasonable doubt that at the time of the fatal difficulty, the deceased did not make some overt act or demonstration indicating to the defendant, as a reasonable man, an intention to assault him and do him some serious bodily harm or kill him, then any threats previously made against the defendant, and the fact that there had been a previous difficulty, are immaterial for any purpose in the case, and should not be considered by the jury, but entirely disregarded, and given no weight whatever under such circumstances.[35]

The jury are instructed that if you find from the evidence that the deceased made threats against the defendant which, if carried into execution, would endanger his life or subject him to great bodily harm, and that the defendant feared or had reason to fear that

[35] Brantley v. State, 175 P. 51, 16 Okl. Cr. 6.

such threats were liable to be carried into execution, then you are instructed that the defendant could not lawfully assault the deceased on account of such threats or because of fear induced thereby, unless the deceased at the time of the fatal difficulty made some demonstration or performed some overt act that caused reasonable apprehension that such threats were about to be put into execution, and, in case of such demonstration or overt act, the defendant may lawfully become the aggressor only to the extent of putting himself in a position of safety as against the unlawful threatened acts of the deceased. If, under the circumstances and facts of this case, you find beyond a reasonable doubt that the defendant intentionally carried his acts of aggression, if any there be, further than were reasonably necessary to place himself in a situation of apparent safety, his acts then would be such as to render his acts of aggression unlawful, and you should, under such circumstances, consider the evidence as a whole, together with such acts of aggression, if any such act you find, in determining his guilt or innocence under the charge made in the information.[36]

You are further instructed that homicide cannot be justified or excused on the ground that the person killed, prior to the killing, had committed a mere assault and battery upon the person who did the killing, but when, at the time of the killing or just prior thereto, the person killed committed an assault and battery upon the person who did the killing, this may be taken into consideration by the jury in determining whether it reasonably appeared to the person who did the killing that he was at the time in danger of death or great bodily injury at the hands of the deceased.[37]

You are instructed that evidence has been offered before you for the purpose of showing that the deceased had made threats of violence towards the defendants prior to the difficulty, and also that he had been carrying a weapon. You should consider this evidence, and if you believe that the deceased had made threats of a violent nature towards the defendants, and was carrying a weapon for the purpose of engaging in a difficulty, with the defendants and for the purpose of taking their lives, you should consider these circumstances in connection with the other facts in the case for the purpose of ascertaining whether or not the deceased was probably the aggressor in the difficulty and began the conflict in which he lost his life, and, if you believe that threats of a violent nature by the deceased against the defendants had been communicated to the defendants prior to the homicide, you may take this fact into consideration in connection with the proof in the case for the purpose of ascertaining whether or not the defendant A. reasonably and

[36] Brantley v. State, 175 P. 51, 15 Okl. Cr. 6.

[37] Gransden v. State, 158 P. 157, 12 Okl. Cr. 417.

in good faith believed that he, or his brother, or both, were in danger of losing their lives, or receiving great bodily injury at the hands of the deceased at the time of the homicide.[38]

You are instructed that neither insulting words or insulting conduct or epithets, or assaults previously made—that is, anterior to the actual time of the killing—had and done to the defendant at other and different places than at the scene of the homicide, if you find that any such were had and done, nor insulting epithets, no matter how opprobrious, uttered at the time of the killing, will justify or mitigate a homicide. You are further instructed that threats to kill another, communicated to the latter prior to the homicide, are not sufficient to either justify or mitigate homicide, and before a defendant can justify a homicide upon the ground of threats to take his life that have been made by the deceased and communicated to the defendant before the homicide, if any, or before he can be justified in shooting a person so threatening his life, there must have been done at the time of the killing some act upon the part of the person so threatening, which viewed in the light of the threats manifested a purpose on the part of the person doing the threatening to carry said threats into execution, or to do some great personal injury to the person threatened. On the other hand you are instructed that if you believe from the evidence that the deceased in this case had threatened to take the life of the defendant, and that such threats to take his life were prior to the homicide communicated to the defendant, and that at the time of the killing the deceased, by some act then done, manifested a purpose to carry such threats into execution and that the threatened attack had then begun, before any act upon the part of the defendant, which manifested a purpose on his part to first attack the deceased with a deadly weapon, and that under such circumstances the defendant shot and killed the deceased, said homicide is justifiable and he should be acquitted.[39]

§ 2976(7). Texas

The court instructs the jury that, if you find and believe from the evidence that prior to the homicide the deceased had made threats against the life of the defendant, and if you further find that at the time of the homicide the deceased did some act which, together with all the surrounding circumstances, as viewed from the standpoint of the defendant at the time, reasonably manifested to the defendant an immediate intention on the part of the deceased to kill the defendant, or to inflict upon him serious bodily injury, and if from such threats, if any were made, and from such act or acts up-

[38] McDaniel v. State, 127 P. 358, 8 Okl. Cr. 209.

[39] Turner v. State, 111 P. 988, 4 Okl. Cr. 164.

on the part of the deceased, if any, at the time, and all the other circumstances of the case, you believe that the defendant killed the deceased in the defense of himself against danger or the reasonable appearance of danger of loss of life or serious bodily injury at the hands of the deceased, you will acquit him.[40]

You are instructed that, if you believe from the evidence in this case that prior to the homicide the deceased had made threats against the life of the defendant and to inflict serious bodily injury on defendant, and that at the time of the homicide the deceased, by some act then done, manifested an intention to execute the threats so made, or, if you have a reasonable doubt as to whether or not he did, then you will give the defendant the benefit of such doubt and acquit him.[41]

You are instructed that, where a defendant accused of murder seeks to justify himself on the ground of threats against his own life, he may be permitted to introduce evidence of the threats made, but the same shall not be regarded as affording a justification for the offense, unless it be shown that at the time of the homicide the person killed by some act then done manifested an intention to execute the threats so made. If you believe from the evidence in this case that the deceased did make such threats against the life of the defendant, and it reasonably appeared to the defendant at the time of the killing that deceased made such an act or demonstration as reasonably to produce in the mind of defendant a belief that deceased then and there intended to take the life of defendant, or do him some serious bodily harm, you will acquit; and if the defendant at the time of the killing did reasonably believe from some act or demonstration then and there made by the deceased, as it reasonably appeared to him, the defendant, judging from his own standpoint that the deceased did then and there intend to kill defendant or to do him some serious bodily harm, then you should acquit the defendant. You are instructed that it is not essential to the right of self-defense that real danger should exist. If from the defendant's standpoint, taking into consideration all the facts and circumstances surrounding the parties, it reasonably appeared to the defendant that he was in danger of death or serious bodily injury, under the law, he had the right to defend against such apparent danger to the same extent as if the danger were real.[42]

You are instructed that, if you believe from the evidence that the deceased did make such threats against the life of the defendant, and it reasonably appeared to the defendant at the time of the killing

[40] Roberts v. State, 168 S. W. 100, 74 Tex. Cr. R. 150.

[41] Carey v. State, 167 S. W. 366, 74 Tex. Cr. R. 112.

[42] Kelly v. State, 151 S. W. 304, 68 Tex. Cr. R. 317.

the deceased made such an act or demonstration as reasonably to produce in the mind of the defendant the fear that the deceased then and there intended to take the life of the defendant or do him some serious bodily harm, you will acquit. And if the defendant at the time of killing did reasonably believe, from some act or demonstration then and there made by the deceased, as it reasonably appeared to him, the defendant, judged of from his own standpoint, that deceased did then and there intend to kill the defendant or do him some serious bodily harm, then you should acquit.[43]

You are instructed that where the defendant, accused of murder, seeks to justify himself on the ground of threats against his life, he may be permitted to introduce evidence of the threats made, but the same shall not be regarded as affording a justification for the offense, unless it be shown that at the time of the homicide the person killed, by some act then done, manifested an intention to execute the threat so made.[44]

§ 2977. Same—Threats in presence of defendant

The jury are instructed that when a defendant, accused of murder, seeks to justify himself on the ground of threats against his own life, he is permitted to introduce evidence of the threats made, but the same shall not be regarded as affording a justification for the killing, unless it be shown that at the time thereof the person killed, by some act then done, manifested an intention to execute the threat so made. If you believe that deceased had made in defendant's presence threats to take his life, and if you further believe that at the time defendant killed deceased the deceased did or was doing some act which, from defendant's standpoint, appeared to him to indicate or manifest an intention on the part of the deceased to carry such threat into execution, and that defendant then killed deceased, you will acquit defendant on the ground of threats against his own life.[45]

§ 2978. Same—Threats communicated by others

§ 2978(1). Missouri

The court instructs the jury that, in determining whether the defendant was justified in acting upon appearances and shooting the deceased, you may take into consideration any threats that may have been made by deceased against the life of the defendant, and communicated to defendant prior to the killing, if you find from the evidence that any such threats were made and communicated. You should consider all the threats which you may believe from the evidence were made by the deceased against the defendant, and may

[43] Tilmeyer v. State, 136 S. W. 1060, 62 Tex. Cr. R. 272.

[44] Carey v. State, 167 S. W. 366, 74 Tex. Cr. R. 112; Tilmeyer v. State, 136 S. W. 1060, 62 Tex. Cr. R. 272.

[45] Shed v. State, 153 S. W. 125, 68 Tex. Cr. R. 373.

give them such weight in determining the nature of the transaction giving rise to the charge for which the defendant is now on trial as you deem proper. Mere threats, however, will not justify on the ground of self-defense the shooting of one by another, nor will threats alone warrant the party against whom they are made in attacking and killing the party who made them.[46]

§ 2978(2). Texas

You are instructed that if you believe from the evidence in this case that prior to the homicide the deceased made threats against the defendant's life, and if you further find that such threats were communicated to the defendant, and the defendant believed that such threats were true, and if you further find that at the time of the homicide the deceased, by some act then done or some words then said, coupled with such acts, if any, reasonably created in the mind of the defendant an apprehension that the deceased was in the act of executing the threats so made, or if the deceased by his acts or demonstrations, if any, either alone or coupled with the words, if any, indicated that he was then and there about to unlawfully attack the defendant, and inflict upon him death or serious bodily injury, and that defendant, so believing, shot and killed the deceased, then the same would be justifiable homicide; and if you so believe from the evidence you will find the defendant not guilty, and so say by your verdict; and in passing upon this you may take into consideration the character and disposition of deceased as the same was known to defendant, as well as the habit of deceased, if any, of going armed, if the defendant knew of such habit.[47]

You are instructed that, when a defendant accused of murder seeks to justify himself on the ground of threats against his own life, or threats to do him serious bodily injury, he is permitted to introduce evidence of the threat or threats so made; but the same are not to be regarded as affording a justification, unless it be shown that at the time of the homicide by some act then done an intention was manifested to execute the threat or threats so made. And in this case if you believe from the evidence that prior to the homicide it was communicated to the defendant that threats had been made by the deceased to kill or inflict serious bodily injury upon the defendant, and the defendant believed that such communication as to threats made to him were true, and at the time of the homicide the deceased by any act then done, or by words coupled with such acts, if any, reasonably created in the mind of the defendant an apprehension that the said deceased was in the act of executing the threats so made, or was about to execute the same, or the de-

[46] State v. Greaves, 147 S. W. 973, 243 Mo. 540.

[47] Harper v. State, 170 S. W. 721, 75 Tex. Cr. R. 124.

ceased by his conduct, coupled with words, if any, indicated that he was then and there about to unlawfully attack the defendant and inflict upon him death or serious bodily injury, and that the defendant so believing shot and killed the deceased, then the same would be justifiable homicide. If, however, you should believe from the evidence, beyond a reasonable doubt, that the defendant with a shotgun fired upon and killed ———, not for the purpose of protecting his person from unlawful violence from the said ——— and not because of reasonable apprehension at the time that the said ——— was using, or about to use, unlawful violence upon him, the defendant, then he cannot justify the killing of said ———, if he did kill him, as done in his lawful self-defense.[48]

§ 2979. Same—Communication of alleged threats not actually made

§ 2979(1). Texas

You are instructed that, if you shall find that the deceased made threats against the life of the defendant, and that such threats had been communicated to the defendant before the difficulty in which deceased lost his life, or if you find that report of threats had been communicated to the defendant, whether they were actually made or not, and you find at the time of the homicide, if any, the deceased did some act which then reasonably indicated to the defendant that he was then in imminent and pressing danger at the hands of the deceased of losing his life or of suffering serious bodily injury, and that deceased was then about to put such threats into execution, and acting upon such danger or apparent danger, as it reasonably appeared to the defendant at the time, viewed from his standpoint, and under such circumstances he shot and killed the deceased, he would be justified, and you should acquit the defendant.[49]

You are instructed that if you shall find that, prior to the homicide, the defendant had been informed that the deceased had threatened his (defendant's) life, and if you shall further find that at the time he fired the first fatal shot, viewing the facts and circumstances from his standpoint, it reasonably appeared to the defendant that the deceased, by some act then done or by words coupled with some act then done, manifested an immediate intention to execute the threat, if any, of which defendant had been informed, you will acquit the defendant, although you may find the deceased had made no threat against the life of defendant, and he was in no real danger at the time he fired such shot.[50]

[48] Lewis v. State, 126 S. W. 1137, 59 Tex. Cr. R. 51.

[49] Eads v. State, 176 S. W. 574, 76 Tex. Cr. R. 647.

[50] Harper v. State, 170 S. W. 721, 75 Tex. Cr. R. 124.

The jury are instructed that, where a defendant accused of murder seeks to justify himself on the ground of threats against his own life, he is permitted to introduce evidence of the threats made, but the same cannot be regarded as affording a justification for the killing, unless it be shown that at the time of the homicide the person killed by some act then done manifested an intention to execute the threats so made; and the same rule would apply where others had communicated to the accused a threat or threats purporting to have been made by the deceased, provided the accused believed them to be true and believed that deceased made them, even though you may believe no such supposed threats had in fact been made. Now, if you believe from the evidence that the deceased had made a threat or threats against the life of the defendant, or that other persons had communicated to defendant a threat or threats purporting to have been made by deceased, against defendant's life, prior to the killing, and that such threats, or purported threats, had been communicated to defendant before the homicide was committed, and the defendant believed such information of threats to be true, and you further believe, from the evidence, that at the time of the killing the deceased by some act then done, word spoken, or by making some demonstration manifesting an intention to execute the threats, or purported threats, so made, which act, word, or demonstration reasonably appeared to the defendant, viewed from his standpoint alone, to show that the threats were about to be executed, and that his life was then in danger, or his person in danger of serious bodily injury, then and in such case the defendant was not bound to retreat, but could stand his ground, and would be justified in slaying the said ———, and, if you so believe from the evidence, you will acquit the defendant.[51]

You are further instructed that if the witness ——— told the defendant, before the shooting, that the deceased had threatened to take the life of the defendant, then even if the deceased had in fact made no such threats, if the defendant believed what he was told, if he was told, by the witness ———, and if you believe that said deceased did any act or made any movement toward said defendant, viewed from the defendant's standpoint, taking into consideration all things that had previously passed between the deceased and the defendant, which led the defendant to believe that such threat was about to be executed, and that defendant drew his pistol to protect himself and killed the deceased, or if you have a reasonable doubt of this, you will acquit the defendant and say by your verdict not guilty.[52]

[51] Williams v. State, 148 S. W. 763, 67 Tex. Cr. R. 287.

[52] Carden v. State, 129 S. W. 362, 59 Tex. Cr. R. 501.

You are further instructed, in connection with the law of self-defense, that where a defendant, accused of murder, seeks to justify himself on the ground of threats against his own life, he is permitted to introduce evidence of the threats made; but the same shall not be regarded as affording a justification for the homicide unless it be shown that at the time of the homicide the person killed, by some act then done, manifested an intention to execute the threat so made. It is not practicable to fix on what the act manifesting the intention of the deceased to execute his threats shall be; but it must be some act reasonably calculated to induce the belief in the mind of the defendant, viewing the case from his standpoint, that the threatened attack has then commenced to be then executed. So, if you believe from the evidence that the deceased had made a threat against the life of defendant, and that such threat had before the homicide been communicated to the defendant, or, whether the deceased had made such threat or not, if it had been communicated to defendant that such threat had been made against his life, and defendant honestly believed that such information was true, and, further, you find that at the time of the homicide the deceased made some demonstration or did some act manifesting an intention to execute such threat—that is, did some act which reasonably indicated to defendant or induced in his mind the belief that the threatened attack had then commenced to be then executed—viewing the case from defendant's own standpoint, then he was justifiable in shooting the deceased, even unto death; and if you so find you will return a verdict of not guilty.[53]

§ 2979(2). Virginia

The court instructs the jury that if they believe that threats were communicated, which he believed, it is immaterial whether the threats were true or false, so far as their influence upon the action of the prisoner is concerned.[54]

§ 2980. Duty to retreat

§ 2980(1). Alabama

The court instructs the jury that it is not necessary under the evidence in this case that defendant should have been actually in danger of death or great bodily harm at the time he killed the deceased, or that retreat would have really increased his peril in order for him to have been justified in shooting the deceased. He had the right to act on the appearance of things at the time, taken in the light of all the evidence, and he had the right to interpret the conduct of the deceased in the light of any threat or threats that the evidence proves the deceased to have made against defendant. If

[53] Glover v. State (Cr. App.) 107 S. W. 854.

[54] Green v. Commonwealth, 94 S. E. 940, 122 Va. 862.

the circumstances attending the killing were such as to justify a reasonable man in the belief that he was in danger of great bodily harm or death, and that he could not have retreated without adding to his peril, and he honestly believed such to be the case, then he had the right to shoot the deceased in his own defense, although as a matter of fact he was not in actual danger, and retreat would not have endangered his personal safety; and, if the jury believe that the defendant acted under such conditions and circumstances as above set out, the burden of showing that he was not free from fault in bringing on the difficulty was on the state, and, if not shown, the jury should acquit defendant.[55]

The court instructs the jury that, if you believe from the evidence that defendant was attacked in her own home by deceased, in such a manner as to raise in the mind of a reasonable man the belief that she was in imminent danger of great bodily harm, and that she had such belief at the time she fired the fatal shot, then she was under no obligation to retreat, and was justified in taking the life of deceased, provided she was without fault in bringing on the difficulty; and the burden of proof in such a case is on the state to show that defendant was at fault in bringing on the difficulty.[56]

You are instructed that the defendant contends that he acted in self-defense in killing ———. The state contends he did not. There are three essential elements of self-defense, and they are, first, defendant must be free from all fault from provoking or bringing on the difficulty. He must not say or do anything to provoke or bring on the difficulty, nor be unmindful of the consequences in this respect of any wrongful word or act; and there must be no convenient mode of retreat or by declining the combat. If you are satisfied that defendant was free from all fault in provoking or bringing on the difficulty, and you are further satisfied that there was a present, impending peril to life or danger of great bodily harm, either real or so apparent as to create the bona fide necessity to take life, you must go further, and find that there was no convenient or reasonable mode of escape by retreat or by declining the combat, before the defendant can be acquitted.[57]

You are instructed that, in order for the defendant to sustain his plea of self-defense, it was necessary for him to retreat, if he could have done so without materially increasing his danger, and in this connection you can take into consideration the circumstances and conditions surrounding him.[58]

[55] Glass v. State, 78 So. 819, 201 Ala. 441.

[56] Williams v. State, 78 So. 312, 16 Ala. App. 396.

[57] McBryde v. State, 47 So. 302, 156 Ala. 44.

[58] Patterson v. State, 41 So. 157, 146 Ala. 39.

§ 2980(2). Arkansas

You are instructed that, before the defendant would be justified in taking the life of the deceased even in his necessary self-defense, it must appear from the evidence that he did all reasonably within his power consistent with his safety to avoid the danger to himself and avert the necessity of the killing; if the defendant in this case could reasonably have avoided the danger to himself by going away from the deceased at any time from the beginning to the end of the difficulty, and if he failed to do so, he would be guilty of murder in the second degree or manslaughter, according as he acted with or without malice.[59]

You are instructed that, in ordinary cases of one person killing another in self-defense, it must appear that the danger was so urgent and pressing that in order to save his own life, or to prevent his receiving great bodily injury, the killing of the other was necessary, as it appeared to the defendant, acting without negligence on his part, and it must appear, also, that the person killed was the assailant, or that the slayer had really and in good faith endeavored to decline any further contest before the mortal injury was given.[60]

You are instructed that, in order to justify the taking of life in self-defense, the defendant must have employed all the means within his power and consistent with his safety to have avoided the danger and averted the necessity of the killing, and if you find that the defendant, consistent with his own safety, could have avoided the danger to himself as it actually appeared to him, and have averted the necessity of shooting the deceased by retreating, then you are told it was his duty to retreat, and, if he failed to do so, he cannot plead self-defense in justification of his act.[61]

The court instructs the jury that, if you believe from the evidence that the defendant could have at any time from the beginning of the first difficulty, if you find that there was a prior difficulty, to the ending of the last meeting between himself and the deceased, when the deceased was killed, reasonably withdrawn from or avoided the difficulty, with safety to himself, but failed to do so, he could not justify the killing by self-defense.[62]

§ 2980(3). California

The court instructs the jury that, where one without fault is placed under circumstances sufficient to excite the fears of a reasonable person that another designs to commit a felony, or some great bodily injury upon him, and to afford grounds for reasonable belief that there is imminent danger of the accomplishment of this

[59] Lee v. State, 172 S. W. 1025, 116 Ark. 588.

[60] Plumley v. State, 171 S. W. 925, 116 Ark. 17.

[61] Plumley v. State, 171 S. W. 925, 116 Ark. 17.

[62] Striplin v. State, 139 S. W. 1128, 100 Ark. 132.

design, he may, acting under these fears alone, slay his assailant, and be justified by the appearances; and, where the attack is sudden and the danger imminent, he may stand his ground and slay his aggressor, even though it may be proved that he might more easily have gained his safety by flight.[63]

The jury are instructed that, before the defendant can claim that he was acting in self-defense it must appear that the defendant really and in good faith endeavored to decline any further struggle before the homicide was committed. And in this case, if you believe from the evidence that the defendant was engaged in mortal combat with the deceased, and that the defendant did not really and in good faith endeavor to decline any further struggle before the homicide was committed, if one were committed, then, and in such case, the defendant cannot avail himself of the plea of self-defense.[64]

§ 2980(4). Colorado

The court instructs the jury that a person assaulted is not bound to evade the combat or to flee, if the assault is of such a character as to render retreat impossible, or where a reasonable man, under all the circumstances, including his knowledge of the reputation or character of his assailant for violence or brutality, would be justified in believing that flight would not save him from his assailant's violence.[65]

§ 2980(5). Delaware

You are instructed that, where one is assaulted upon a sudden affray and, in the judgment of the jury, honestly believed, on reasonable and sufficient grounds, that he was in imminent danger of being killed or of receiving great bodily harm, he would have, in self-defense, the right to use a deadly weapon against his assailant. But, in exercising such right, in a manner likely to cause death or great bodily harm to his assailant, he must be closely pressed by him, and must have retreated as far as he conveniently and safely could in good faith, with the honest intent to avoid the violence and peril of the assault. If these be so sudden, fierce or urgent as not to allow him to retreat, or to have other probable means of escape, then he may rightfully use a deadly weapon in his defense, but not otherwise.[66]

The court instructs the jury that, if the deceased first attacked the accused, even though the attack was of such a character as to create in the mind of the accused a reasonable belief that he was in danger of death or great bodily harm, it was his duty to retreat, if he could safely do so, or to use such other reasonable means as

[63] People v. Cyty, 106 P. 257, 11 Cal. App. 702.

[64] People v. Robertson, 8 P. 600, 67 Cal. 646.

[65] May v. People, 6 P. 816, 8 Colo. 210.

[66] State v. Brooks, 84 A. 225, 3 Boyce, 203.

were within his power to avoid killing his assailant. No one may take the life of another, even in self-defense, unless there is no other available means of escape from death or great bodily harm.[67]

§ 2980(6). Iowa

You are instructed that, where a person is assaulted by another, it is the duty of the person so assaulted to retreat, if retreat is safely open to him, before he can justify the use of a dangerous and deadly weapon in a dangerous manner upon his assailant. If it is apparent that the danger which seems to threaten him can be averted or prevented by any other means apparently within his power, he is not justified in adopting or using a dangerous and deadly weapon in a dangerous manner upon his assailant.[68]

You are instructed that it is a general rule of law that, where one is assaulted by another, it is the duty of the person thus assaulted to retire to what is termed in the law a wall or ditch before he is justified in repelling such assault in taking the life of his assailant. But cases frequently arise where the assault is made with a dangerous or deadly weapon, and in so fierce a manner as not to allow the party thus assaulted to retire without manifest danger of his life or great bodily injury; in such cases he is not required to retreat.[69]

§ 2980(7). Kansas

You are instructed that a person assaulted may repel force with force in defense of his person. A person is not compelled to retreat or flee from his adversary; and one who is unlawfully attacked by another, or is approached or is pursued by another under the reasonable belief that he is about to be attacked, may stand his ground and use such force as at the time reasonably appears to him to be necessary.[70]

§ 2980(8). Louisiana

The jury are instructed that, in cases of sudden affray or conflict, a homicide is not excusable on the ground of self-defense, unless the accused retreats as far as he safely can in order to avoid the violence of the deceased, and the necessity of taking his life. If he fails to do this, the homicide would be manslaughter at least. If the assault is so fierce as to endanger his life or his person by retreating, and his only safety is to kill his adversary, this he may do in defense of his own person. But if a man who is not at fault is suddenly assaulted by another, who intends to kill him or to inflict on him great bodily harm, he is not bound to retreat at all,

[67] State v. Miele, 74 A. 8, 1 Boyce, 33.

[68] State v. Thomas, 132 N. W. 51, 151 Iowa, 572.

[69] State v. Donnelly, 27 N. W. 369, 69 Iowa, 705, 58 Am. Rep. 234.

[70] State v. Keehn, 118 P. 851, 85 Kan. 765.

but he may stand his ground and kill his assailant if there is reasonable, apparent necessity for so doing to save his life or to protect his person.[71]

§ 2980(9). North Carolina

The jury are instructed that if, when defendant C. approached the deceased and his companions and handed one of them his time, and gave notice of discharge, they immediately drew deadly weapons and used threatening language, or attempted to make a deadly assault on C. or G., who accompanied him, C. was justified in meeting force with force necessary to protect himself and companion from bodily harm; that, if C. was where he had a right to be or it was his duty to be, he was not required by the law to retreat to the wall from a deadly assault, though if he stepped back when ——— had drawn a knife within reach of him, and was impeded, so he could not get out of ———'s reach, by ———, he did retreat to the wall.[72]

§ 2980(10). Oklahoma

In this connection you are told that self-defense, under the law, is a defensive and not an offensive act, and for a person to avail himself of a plea of self-defense, in order to justify a killing, it must reasonably appear to him at the time he fired the fatal shot that the act upon the part of the deceased by which the defendant seeks to justify the killing was such an act as made it reasonably appear to him at the time that he was in danger either of losing his life or of great personal injury being done him, and it is the duty of a person so threatened with danger to his life or of great personal injury being done him to use at the time all reasonable means apparent to a reasonable person under the circumstances to avoid such danger before taking human life, except that he is not bound to retreat to avoid such necessity or apparent necessity of killing, provided he has done no act upon his part to bring about the attack, or threatened attack, if any, by the deceased.[73]

You are instructed that a person who is unlawfully attacked by another is not bound to retreat in order to avoid the necessity of injuring his assailant, or of killing him, if it reasonably appears to him to be necessary in order to save his own life, or to avoid serious bodily injury by the person killed; and the person so unlawfully attacked has the right to stand his ground and use such force as reasonably appears to him necessary to repel the attack upon him, and if the person making such attack is killed under such circum-

[71] State v. Simon, 59 So. 975, 131 La. 520.

[72] State v. Castle, 46 S. E. 1, 133 N. C. 769.

[73] Brantley v. State, 175 P. 51, 15 Okl. Cr. 6.

stances, the killing will be justifiable in self-defense; and it is not necessary to the right of self-defense that the danger should in fact exist; and if it reasonably appears to the defendant from all the facts and circumstances in the case that danger exists, he has the same right to defend against it and to the same extent that he would have, were the danger real.[74]

You are instructed that every person has the right to act in his own necessary self-defense, and where a person is in a place where he has a right to be, and is not the aggressor in bringing on the conflict, and is assaulted by another person in such a way as to place him in danger of death or great bodily harm, the person thus assaulted is not bound to retreat, but, on the contrary, may stand his ground and repel the danger in which he is placed with such force as will repel the attack and protect his person from serious bodily harm.[75]

The jury are instructed, as a matter of law, that if a person believes, and has reasonable cause to believe, that another has sought him out for the purpose of killing him or of doing him great bodily harm, and that he is prepared therefor with deadly weapons, and the latter makes demonstrations manifesting an intention to commence an attack, then the person so threatened is not required to retreat, but he has a right to stand and defend himself, and pursue his adversary until he has secured himself from danger; and if, in so doing, it is necessary, or it appears upon reasonable grounds to be necessary, to kill his antagonist, the killing is excusable upon the grounds of self-defense.[76]

§ 2980(11). Oregon

I instruct you that, when a man is where he has a right to be, retreat is not necessary, and he is not bound to retreat until his back is at the wall, as is the old saying, but he may stand his ground and repel the attack and meet force with force if necessary, even to the extent of taking the life of his adversary.[77]

§ 2980(12). South Carolina

You are instructed that, if you are satisfied that defendant believed he was in danger of serious bodily injury and that he had reasonable grounds for such belief, then he has got to go a step further and show you that he had no other probable means of escape except to take the life of his assailant. The law does not permit one to take human life lightly. If by retreating he can avoid taking human life without increasing his own danger of receiving serious

[74] Gransden v. State, 158 P. 157, 12 Okl. Cr. 417.

[75] Mulkey v. State, 113 P. 532, 5 Okl. Cr. 75.

[76] Kirk v. Territory, 60 P. 797, 10 Okl. 46. Defendant was at his residence.

[77] State v. Rader, 186 P. 79, 94 Or. 432.

bodily harm or losing his own life, he must do it. When a man is in his own house, he need not retreat. The imaginary wall to which the law says he must retreat is immediately behind his back, and, when by retreating he would increase his danger, he need not retreat. In olden times, when the first law books were written, the law said that before a man could strike he must retreat to the wall. In those times they fought with sticks and stones and javelins, and, if he retreated to the wall, he might then turn and strike, and strike to the death; but he must avoid taking human life, if he can do it by stepping aside or retreating, provided he does not increase his own danger thereby. The law does not require him to put himself in any worse condition or position. A man must have no other probable means of escape except to take the life of his assailant. These are the four elements of self-defense. If he has failed on any one of them, he has failed to establish his plea of self-defense. If you have a reasonable doubt as to whether or not he has made out his plea of self-defense, give him the benefit of it and acquit him. If you have a reasonable doubt as to whether or not he is guilty on the whole testimony, give him the benefit of it and acquit him.[78]

What is self-defense? That is, what is the law of self-defense? What does the law require of a man who sets up the plea of self-defense? He must satisfy the jury by the preponderance of the evidence that he was without fault in bringing on the difficulty; and if you find that the defendant in this case has satisfied you that he was without fault in bringing on the difficulty, he must go further and show, not merely that the other man was at fault, but that it was necessary to take the life of his assailant, to take the life of the other man to save himself from serious bodily harm or from losing his own life. He must show to the satisfaction of the jury by the preponderance of the evidence that any man of ordinary reason, courage, and discretion would have been warranted in believing or coming to the conclusion that the danger was such that his life was in danger or that he was in danger of receiving serious bodily harm or of losing his own life at the hands of the deceased at the time of the homicide. He must also show by the preponderance of the evidence that there was no other probable means of escape but to strike to death, because the law will not allow a man to take the life of his fellow man if he can avoid it with reasonable safety to himself. He must get out of the way if he is assailed by his fellow man and save himself if he can reasonably do so. A man must avoid the taking of human life, if he can do so and save himself reasonably, under the law of the land, that is,

[78] State v. Hardin, 103 S. E. 557, 114 S. C. 280.

if he could reasonably do so. The obligation does not rest upon him to retreat, if he could possibly do so, because after a man has calmed off he might see where there was other probable means of escape; but when he is assaulted he might not have time to look for all the avenues of escape. Therefore the law says a man must avoid taking human life when he can do so, with reasonable safety to himself.[79]

§ 2980(13). South Dakota

The court further instructs you that, if you find from the evidence that the deceased made the first assault upon the defendant with an ax, and that the defendant had a right to be at the place where the shooting occurred, and was there for an honest purpose of dividing the fence, and that the defendant had reason to believe, and did believe, that he was in imminent danger of being killed by the deceased, or receiving great bodily harm, then the defendant was not required to retreat.[80]

§ 2980(14). Texas

You are instructed that a party whose person is unlawfully attacked is not bound to retreat in any event in order to avoid the necessity of killing his assailant.[81]

You are instructed that, if you believe from the evidence in this case that the deceased unlawfully attacked the person of defendant, so as to create in defendant a reasonable fear of death or great bodily harm, or if it reasonably appeared to the defendant, viewed from his standpoint, that the deceased was about to make, or was in the act of making, such an unlawful attack upon him (the defendant), or if you have a reasonable doubt as to whether or not the deceased did make such an attack or was about to make such an attack, or as to whether or not it reasonably appeared to the defendant that the deceased was about to make such attack, viewed from the standpoint of the defendant, then you are instructed that the defendant was not bound to retreat in any event in order to avoid the necessity of killing the deceased.[82]

You are instructed that the defendant enters a plea of not guilty, and also relies for an acquittal on the ground of justifiable homicide, and on this branch of the case you are instructed: A reasonable apprehension of death or great bodily harm will excuse a party in using all necessary force to defend his life or his person, and it is not necessary that there should be actual danger, provided he acted upon a reasonable apprehension of danger as it appeared to

[79] State v. Rish, 88 S. E. 531, 104 S. C. 250. In this case the defendant was not on his own premises.

[80] State v. Stumbaugh, 132 N. W. 666, 28 S. D. 50.

[81] Carey v. State, 167 S. W. 366, 74 Tex. Cr. R. 112.

[82] Carey v. State, 167 S. W. 366, 74 Tex. Cr. R. 112.

him, from his standpoint at the time, and in such case the party acting under such real or apparent danger is in no event bound to retreat in order to avoid the necessity of killing his assailant. The questions for your determination are: Was the defendant in present danger or apparent danger? Was the homicide committed in a bona fide effort to preserve himself from impending danger or apparent danger to his life, or to prevent serious bodily injury to himself?[83]

You are instructed that homicide is permitted in the necessary defense of one's person, or the person of another, from any unlawful and violent attack, such as produces a reasonable expectation or fear of death, or of some serious bodily injury; and the person who is so unlawfully attacked or acts in the defense of another from such attack is not bound to retreat in order to avoid the necessity of killing the assailant. If it reasonably appear to the defendant, judging from his standpoint alone, that his life is in danger, or that he is in danger of serious bodily injury, or that the life of another on whose behalf the defendant acts is in danger, or that such other is in danger of serious bodily injury, from any unlawful and violent attack made or about to be made by the deceased or by any one apparently acting with him, then the defendant or any one acting in his behalf had the right to slay such person; and, under such circumstances, the defendant would be guilty of no offense.[84]

§ 2980(15). Vermont

You are instructed that, when a person is unlawfully assaulted by another, the party assaulted has a right to defend himself and to use sufficient force to make his defense effectual. But the law never permits the unnecessary use of force. Therefore, when a man is attacked he must not use force to defend himself if he can otherwise protect himself. If he has other means or ways of avoiding the assault that appear to him at the time sufficient and available and that are in fact sufficient and available, he must resort to them, and cannot justify the use of force for his defense, for in that case its use would be unnecessary.[85]

§ 2980(16). Wisconsin

The jury are instructed that the law does not require that a party must establish as a fact that the danger he apprehended was actual, and in fact existed; but, if the accused had reasonable grounds to apprehend a design that his life was in danger, or that there was reasonable ground to apprehend that great personal in-

[83] Fifer v. State, 141 S. W. 989, 64 Tex. Cr. R. 203.

[84] Hunter v. State, 129 S. W. 125, 59 Tex. Cr. R. 439.

[85] State v. Roberts, 21 A. 424, 63 Vt. 139.

jury was to be done him, then he had a right to act upon such apprehension, though it may turn out that he was not in actual danger of life or great personal injury. In this connection mention has been made as to the duty of defendant to employ all reasonable means to avoid the taking of life by escaping from the assailant or retreating. The taking of human life is a matter of such deep significance that it cannot be justified by some slight appearance of danger, and, if the defendant was in fault in creating the situation of danger, his right of self-defense does not arise until he shall have done all that reasonably could be done by him to avoid the necessity of killing his assailant in order to protect himself.[86]

§ 2981. Same—Duty as dependent on whether peril will be increased

You are instructed that, if the defendant was free from fault in bringing on the difficulty, he was under no duty to retreat, unless you believe he could have retreated without increasing his danger or with reasonable safety.[87]

You are instructed that it is not necessary, under the evidence in this case, that the defendant should have been actually in danger of death or great bodily harm at the time he killed ———, or that retreat would have really increased his peril, in order for him to have been justified in shooting ———. He had the right to act on the appearance of things at the time, taken in the light of all the evidence, and he had the right to interpret the conduct of ——— in the light of any threats that the evidence proves ——— to have made against defendant. If the circumstances attending the killing were such as to justify a reasonable man in the belief that he was in danger of great bodily harm or death, and that he could not have retreated without adding to his peril, and he honestly believed such to be the case, then he had the right to shoot ——— in his own defense, although as a matter of fact he was not in actual danger, and retreat would not have endangered his personal safety; and, if the jury believe that the defendant acted under such conditions and circumstances as above set out, the burden of showing that he was not free from fault in bringing on the difficulty was on the state, and, if not shown, they should acquit the defendant.[88]

[86] Frank v. State, 68 N. W. 657, 94 Wis. 211.

[87] Bluett v. State, 44 So. 84, 151 Ala. 41; Bailey v. State, 63 So. 73, 183 Ala. 78.

[88] Bluett v. State, 44 So. 84, 151 Ala. 41.

§ 2982. Duty to retreat where one attacked in his own home or on his own premises

§ 2982(1). Alabama

I charge you, gentlemen of the jury, that it was not necessary for the defendant to retreat, because the facts in the case show that the defendant was in her own castle.[89]

The jury are instructed that, while the law requires, under some circumstances, that a person assailed shall avail himself of all reasonable means of escape from the danger before he is excused for taking the life of his assailant, yet it is never required that he shall leave his home or place of business to escape such danger.[90]

The jury are instructed that if you believe, from the evidence, that the defendant at the time of the killing was in the building where he was doing business, and which was occupied by him as his place of business, and that he was there assailed by the deceased under such circumstances as to reasonably impress him with the belief that his assailant intended to inflict on him great bodily harm, and that there was imminent danger that such injury would be inflicted upon him, then the defendant had the right to repel such assault by shooting the deceased, and he must be acquitted, provided he did nothing to provoke the assault.[91]

§ 2982(2). Connecticut

The court instructs the jury that a man is not obliged to retreat if assaulted in his dwelling, but may use such means as are absolutely necessary to prevent the assailant's forcible entry, even to the taking of life. If a man is making an unlawful entry by force into the house of another, the owner may, for the sole purpose of preventing the execution of such unlawful act, make resistance sufficient in degree and in time to prevent it. He is under no obligation to admit the unlawful intruder, or to flee from the house and permit him to effect an unlawful entrance. If the resistance is neither greater in degree nor earlier in time than is necessary, and it results in the death of the assailant, it is justifiable homicide; and the slayer is to be judged as the circumstances really appeared to him at the moment. If the resistance is unnecessarily great in degree, or early in time, and therefore unreasonable, and therefore unlawful, and results in the death of the assailant, it is manslaughter. But even if the circumstances are such as would justify the householder in taking the life of the assailant who is violently and unlawfully breaking into the house for the purpose of preventing such breaking in, still, if the houseowner take the opportunity of the breaking in to kill the intruder, not for the sake of preventing

[89] Hutcherson v. State, 54 So. 119, 170 Ala. 29.

[90] Jones v. State, 76 Ala. 8.

[91] Jones v. State, 76 Ala. 8.

the unlawful intrusion, but to gratify his hatred, malice, or ill will against the intruder, then the killing will be at least manslaughter, if not murder. You should apply these principles to the facts in this case as you find them from the evidence. First, was the accused, as the defense claims, making a reasonable and necessary defense against the deceased in an attempt, either real or apparently real, to take the life or do serious bodily harm to herself or the children who were under her charge and part of her family? Second, was the deceased, as the defense claims, violently and unlawfully breaking into the house of the accused against her will, and was her resistance, as the defense also claims, no greater or earlier than necessary to prevent such breaking in? Third, if the defense made by the accused was no greater or earlier than necessary to prevent such breaking in, was it made in good faith, for the sole purpose of preventing such breaking in, or did the accused merely take advantage of the opportunity afforded by the breaking in to gratify ill will against the deceased by killing him?[92]

§ 2982(3). Florida

The court instructs the jury that if, while one is lawfully on her own premises, another advances in a threatening manner and under such circumstances that the former believes and has reason to believe that she is in danger of losing her life or of suffering great bodily harm, she is not obliged to retreat, but may stand her ground and meet any attack made upon her in such a way and with such force as under all the circumstances she at the moment believes and has reason to believe is necessary to save her life or protect herself from great bodily harm.[93]

§ 2982(4). Oklahoma

You are instructed that every person has the lawful right to be and remain upon his own premises at any and all times.[94]

§ 2982(5). South Carolina

You are instructed that a person has the right to approach any one committing a trespass upon his land, and to use such force as is necessary to eject such person; and if, while so doing, he is assaulted by the trespasser, then he is not in this case bound to flee, but he may stand his ground against such trespasser, and repel his assault; and, if the fierceness of the assault made by the trespasser renders it necessary that his life be taken in order that the defendant might save his own life, then the defendant might do so, and he will be excused under the plea of self-defense. As I have

[92] State v. Perkins, 91 A. 265, 88 Conn. 360, L. R. A. 1915A, 73.

[93] Russell v. State, 54 So. 360, 61 Fla. 50.

[94] Mulkey v. State, 113 P. 532, 5 Okl. Cr. 75.

said to you, in order that, ordinarily, a man may avail himself of the laws of self-defense, he must show that he used every probable means of escaping the necessity of taking life; he must even retreat to the wall. But, when he is on his own premises, he may stand his ground. He is not obliged to retreat, but may stand his ground, and repel force by force, and not retreat; and that is the chief difference between being attacked on his own premises, and somewhere else.[95]

§ 2982(6). West Virginia

The court instructs the jury that the dwelling house where a man lives is his home or castle, and that he may repel force by force in the defense of his person, habitation, or property against one who manifestly intends and endeavors by violence to commit a known felony on either, and in such case he is not bound to retreat, but may pursue his adversary until he has secured himself from all danger; and, if he kill his adversary in so doing, it is justifiable self-defense.[96]

§ 2983. Right to arm in anticipation of attack

§ 2983(1). Mississippi

The court instructs the jury that if they believe from the evidence the defendant had an engagement to go home with ——— from the quilting, and that he had started with her, and deceased drew a pistol on him, and drove him away, then he had the right to get his gun, and carry the same with him, if the jury believe from the evidence it was necessary to have said gun to protect himself in escorting the said ——— home.[97]

§ 2983(2). Missouri

The court instructs the jury that if you believe from the evidence that during the first part of the difficulty deceased declared to defendant his intention of going to his home and getting his shotgun and killing defendant, and that deceased went to his home for his shotgun for the purpose of killing defendant, then defendant had a right to go to his home and arm himself with a shotgun for his own defense, and to return to ———'s store, or the street about the same, and to bring his shotgun with him for his defense; and if defendant did no overt act, and did not return to said store or street for the purpose of killing deceased, whether wrongfully assaulted by deceased or not, then defendant did not lose his right of self-defense. If he was assaulted or was about to be killed by deceased, or was about to suffer great bodily harm from deceased,

[95] State v. Bodie, 11 S. E. 624, 33 S. C. 117.

[96] State v. Manns, 37 S. E. 613, 48 W. Va. 480.

[97] Hunter v. State, 21 So. 305, 74 Miss. 515.

and if you find that defendant returned to the street near ———'s store under the circumstances above indicated, and was without fault himself, then he had the right, if attacked by deceased in such a manner as to furnish reasonable ground for apprehending a design to take his life or to do him great bodily harm, to act upon appearances, and to defend his life; and defendant was not required to flee from the public highway in which he had been assailed, even though he could have fled with safety. In such case defendant had a right to stand his ground and defend himself, as defined in other instructions.[98]

§ 2983(3). Oklahoma

You are instructed that, if the defendant A. secured the shotgun and started back towards the station without any intent of engaging in a conflict with the deceased, or without any purpose or desire to do so, or either he or his brother were assaulted by the deceased in such a way as reasonably caused him to believe that he or his brother were in danger of losing his life, or receiving great bodily injury, then the homicide in this case is justifiable, and it will be your duty to acquit the defendants, and that would be true, even though at the time the defendant A. started towards the station he may have feared an attack from the deceased, and may have intended to use the gun to protect himself or his brother should the deceased make a deadly assault upon him.[99]

§ 2983(4). Texas

You are charged that the defendant had the right, together with his father, F., to seek the deceased, or to seek W., or either of them, for the purpose of having an interview with them in regard to any difference that might have arisen between them as to a division of the feed crop raised by deceased on the farm of F. in the year ———, and also had the right to arm himself against any attacks which he might reasonably fear the deceased, or W., or T. might make upon him, or might make upon F., while having such interview.[1]

§ 2984. Right to strike in anticipation of attack

The court instructs the jury for the defendant that the law is that a man assaulted, or about to be assaulted, with a deadly weapon is not required by the law to wait until his adversary is on equal terms with him, but may rightfully anticipate his action and kill him, when to strike in anticipation reasonably appeared to be nec-

[98] State v. Hudspeth, 60 S. W. 136, 159 Mo. 178.

[99] McDaniel v. State, 127 P. 358, 8 Okl. Cr. 209.

[1] Anderson v. State, 217 S. W. 390, 86 Tex. Cr. R. 207.

essary to self-defense; and, unless the jury are satisfied to a moral certainty and beyond every reasonable doubt that the deceased, at the time of the killing, was not attempting to draw or use a pistol, then they must find the defendant not guilty.[2]

§ 2985. Duty not to use greater force to repel attack than reasonably appears to be necessary

Effect of blows, not mortal, not given in self-defense, see ante, § 2798(2).

§ 2985(1). Arkansas

The court instructs the jury that, although you may believe that the defendant fired the first shot in necessary self-defense, still, if you believe that the second shot was fired at a time when it was not necessary to further defend himself, then the defendant would be guilty of murder in the first degree, or murder in the second degree, or manslaughter, provided you believe that the second shot contributed in any manner to the death of the deceased.[3]

§ 2985(2). California

You are instructed that you should also consider whether or not the conduct of the defendant in resisting that assault upon him, if any such you find, was the exercise of such reasonable force as was reasonably commensurate with the apparent danger. If you should find from the evidence beyond a reasonable doubt that the firing of one shot or more was all the force appearing to the defendant as a reasonable man to be necessary, under all the circumstances as they appeared to a reasonable man situated as defendant was situated, to successfully resist such assault, the court instructs you that the firing of any other shot would not under such circumstances and conditions be justified by the law of self-defense; and the court instructs you that, if you find the defendant fired any more shots at the deceased than would so appear to the defendant acting as a reasonable man under all the circumstances as they appeared to him as a reasonable man at the time than was or appeared to be really necessary to resist the assault upon his person aforesaid, you should find that such shot, if any such you find, so fired in excess of those appearing to the defendant as a reasonable man to be reasonably necessary, for his defense as aforesaid were not justifiable, and the defendant is as fully liable for the consequences of any shots fired in excess of those reasonably necessary as aforesaid, or appearing to be as aforesaid, as though they were not preceded by any acts on his part, or the firing of any shots which of themselves would be justifiable under the law of self-defense; if therefore you should find from the evidence beyond a reasonable doubt that the shot or shots which killed the deceased, if you find from the

[2] Leverett v. State, 73 So. 273, 112 Miss. 394.

[3] Caughron v. State, 139 S. W. 315, 99 Ark. 462.

evidence beyond a reasonable doubt that he was so killed, were fired by the defendant at the deceased while the deceased was lying upon the floor and after all apparent danger which would justify a reasonable man in further resistance had passed, then in that event the defendant would not be justifiable under the law of self-defense.[4]

§ 2985(3). Colorado

You are instructed that, if you should find from all the evidence that the killing was in necessary self-defense, the law does not impute any crime, and the prisoner will be entitled to an acquittal. The law upon this subject is, if a person kill another in self-defense, it must appear that the danger was so urgent and pressing that, in order to save his own life, or to prevent his receiving great bodily harm, the killing of the other was absolutely necessary; and it must appear also that the person killed was the assailant, or that the slayer had really and in good faith endeavored to decline any further struggle before the mortal blow was given. If the prisoner was unlawfully assaulted by the deceased, he had a right to repel the attack, using sufficient force for that purpose, but he could not lawfully do more; and if the assault ceased before the fatal blow was struck, or if the prisoner was not reduced to such apparent extremity or danger as reasonably appeared to be absolutely necessary for the prisoner to take the life of the deceased to save his own life, or to prevent him receiving great bodily harm, then, in such case, you cannot find that the act was done in self-defense.[5]

§ 2985(4). Delaware

The court instructs the jury that, in repelling or resisting an assault, no more force may be used than is necessary for the purpose, and if the person assailed use in his defense greater force than is necessary for that purpose, he becomes the aggressor. A man may defend himself against his assailant, but he cannot do so as he pleases. If one be assaulted with the fist he may not defend himself with a club or a deadly weapon, because the defense is disproportioned to the offense, and if in such defense death ensues, the law implies malice from the character of the weapon used. It is for the jury to determine, under all the circumstances of the case, whether the prisoner was justified in using a deadly weapon in self-defense at the time and in the manner proven in the testimony. You must be satisfied that the peril or danger was such as would justify an ordinarily prudent man in taking such measures of defense. It is not what a man may see fit to think in such strait, but what an ordinarily prudent man would do, and what the prisoner reasonably

[4] People v. Barrett, 136 P. 520, 22 Cal. App. 780.

[5] May v. People, 6 P. 816, 8 Colo. 210.

believed from the circumstances surrounding him and known to him at that time.[6]

You are instructed that the law accords to every one the right to protect his person from assault and injury by opposing force to force, and he is not obliged to wait until he is struck by an impending blow. If a weapon be raised in order to shoot or strike, or the danger of other personal violence be imminent, the party in such imminent danger may protect himself by striking the first blow, for the purpose of repelling and preventing the attempted injury. But the opposing force or measure of defense must not be unreasonably disproportionate to the requirements of the occasion. Although so much force as is reasonably necessary may be used, yet if the violence used is greater than was necessary, under the circumstances, to repel the assault or avert the peril, the party using it is himself guilty of an offense. The law recognizes the right of self-defense for the purpose of preventing, but not of revenging, an injury to the person.[7]

You are instructed that every display of force exerted by one person toward another does not constitute an assault, nor is every homicide a crime. The law accords to every one the right to protect his person from assault and injury by opposing force with force, and if, in the proper use of that right, injury or death results, no crime is committed. But in resisting or repelling an attack, the opposing force or measure of defense must not be disproportionate to the exigency. All necessary force may be used, but if the force or violence used is greater than is necessary under the circumstances to repel the assault or avert the peril, the party using it in turn becomes the assailant, and is guilty, for the law recognizes the right of self-defense for the purpose of preventing, but not of avenging, an injury to the person of the accused.[8]

You are instructed that, in repelling or resisting an assault, no more force may be used than is necessary for the purpose, and if the person assailed use in his defense greater force than is necessary for that purpose he becomes the aggressor.[9]

You are instructed that if, on the other hand, the attack was of a trifling character, and manifested no purpose or intention on the part of the assailant to inflict any serious injury, the repelling of such attack by the use of a weapon likely to produce death would not be an act of justifiable self-defense.[10]

[6] State v. Creste, 86 A. 214, 4 Boyce, 118.

[7] State v. Brooks, 84 A. 225, 3 Boyce, 203.

[8] State v. De Paolo, 84 A. 213, 3 Boyce, 176.

[9] State v. Cephus, 67 A. 150, 6 Pennewill, 160.

[10] State v. Cephus, 67 A. 150, 6 Pennewill, 160.

§ 2985(5). Iowa

The jury are instructed that where a person assaulted, acting as a reasonably prudent and cautious man, believes that his assailant is about to take his life, or inflict upon him a great bodily injury, he is not required to make nice calculations and draw nice distinctions as to just how much force he may use to shield himself from danger, but he is justified in using such force as an ordinarily prudent and cautious man, acting upon appearances, would in a like situation probably exercise.[11]

§ 2985(6). Kansas

The law allows an individual in the defense of his person to use such means as are necessary. In the selection and use of these means he must of necessity exercise his own judgment; but he acts at his peril, and, if he goes beyond what is necessary to accomplish the object and violates the law, he must abide the consequences. In the exercise of his judgment he must act rationally; but he is justified in acting upon the facts as they appear to him, and he is not to be judged by the facts as they actually are. While a person assaulted may repel force by force, yet it does not follow that he may, without any apparent necessity, use a deadly weapon or deal a deadly blow for that purpose. If two men of equal strength meet and one strike the other with the fist, the law would not usually justify the assaulted party in shooting or stabbing his assailant to death. A man may protect himself, but the law does not justify him in slaying his assailant, without a necessity therefor, either real or apparent.[12]

The jury are instructed that, if the jury believe from the evidence that at the time of the shooting in question the said ——— made an attack upon the defendant with a chair under such circumstances as to create in the mind of a reasonably and ordinarily prudent man a belief that he was in danger of being killed or of receiving great bodily harm immediately, and if the jury further believe from the evidence that the defendant at the time did honestly believe that he was in imminent danger of receiving great bodily harm, and in good faith shot to protect himself therefrom, and if you further believe that the defendant, acting in good faith, did not fire any more shots than he had a reasonable right to believe, under the circumstances in which he was placed, was necessary to protect himself or his wife from death or great bodily harm, then you should find the defendant not guilty.[13]

[11] State v. Thomas, 132 N. W. 51, 151 Iowa, 572.

[12] State v. Keehn, 118 P. 851, 85 Kan. 765.

[13] State v. Buffington, 81 P. 465, 71 Kan. 804, 4 L. R. A. (N. S.) 154.

§ 2985(7). Louisiana

You are instructed that the right of self-defense lasts only as long as the necessity, real or apparent, for it exists. In other words, if A. is attacked by B. with a deadly weapon, and a struggle ensues, and during the struggle A. obtains possession of the weapon, thus disarming B., and upon obtaining possession of the weapon, B. being disarmed, A. shoots or stabs him, A. cannot avail himself of the plea of self-defense.[14]

§ 2985(8). Missouri

The court instructs the jury that if the defendant and the deceased had a difficulty at the depot, and deceased went to his house and armed himself with a shotgun, but that thereafter deceased withdrew from said difficulty, and that the defendant after such withdrawal voluntarily renewed said difficulty, with the intention at the time of killing deceased or inflicting great personal injury upon the deceased, and did kill the deceased, then the danger, if any, in which the defendant found himself during said difficulty would not extenuate his offense or reduce its grade at all, but he is guilty of murder, and the jury should so say in their verdict.[15]

The court declares the law to be that, although you may find and believe from the evidence that the defendant in this case, acting as a police officer, was, at the time of the killing of the deceased, attempting to arrest deceased for a breach of the peace, and although you may further find that just prior to the shooting the deceased had resisted arrest by said defendant, and had used force in said resistance, and although you may further find and believe from the evidence that at the time of the firing of the fatal shot by the defendant (if you find that he did fire the fatal shot) the deceased had ceased to resist arrest by the defendant, and was at the time of the killing making no resistance, yet if you further believe from the evidence that the defendant, as such police officer, in firing the fatal shot (if he so fired the same), used no more force than was necessary under all the circumstances, then you should acquit the defendant.[16]

§ 2985(9). Ohio

The jury are instructed that, if you find that the shot that killed S. was fired when the two men were lying in the gutter on the west side of ——— street, and that during the conflict preceding their falling into the gutter S. had become disabled or disarmed, or both, and the danger to which defendant had been subjected, prior to their fall into the gutter, had passed, regardless of how it may have been brought on, and defendant, in the proper use of his faculties, if at

[14] State v. Varnado, 52 So. 1006, 126 La. 732.

[15] State v. Hudspeth, 60 S. W. 136, 159 Mo. 178.

[16] State v. Rose, 44 S. W. 329, 142 Mo. 418.

the time he had the proper use of his faculties, knew, or had reasonable grounds to know, and should have known, that S. had, after the beginning and during the continuance of the conflict, become disabled or disarmed, or both, and was not in a condition to kill defendant or to do him great bodily harm, by reason of being so disabled or disarmed, or both, then the defendant would not be in a situation to invoke the law of self-defense and take the life of S under such circumstances, if he did so take it.[17]

§ 2985(10). Oklahoma

You are instructed that while one unlawfully attacked has the right to use such force as under the circumstances reasonably appears to him to be necessary to repel the attack and avoid injury to himself, yet he will not be justified in using greater force than reasonably appears to him necessary and sufficient to do so; and if he does use greater force than reasonably appears to him to be necessary and sufficient to avoid the danger or apparent danger, and thereby kills the person who made the attack, he will be guilty of manslaughter in the first degree; and as applied to this case, if you find that ———, at the time and place alleged in the information, made an unlawful attack upon the defendant, and should you further find beyond a reasonable doubt that in resisting such attack it was not necessary for defendant to shoot the said ———, and that from the nature of such attack, and under all the facts and circumstances as shown by the evidence, it did not reasonably appear to the defendant that it was necessary to shoot the said ——— to prevent serious bodily injury then and there to himself, and that he then, under such condition, shot and killed the said ———, the defendant will be guilty of manslaughter in the first degree, and it will be your duty to so say by your verdict, unless you should find the shooting was justifiable or have a reasonable doubt thereof, in which case you should acquit him.[18]

You are instructed that while one unlawfully attacked has the right to use such force as under the circumstances reasonably appears to him necessary and sufficient to repel the attack and avoid injury to himself, he will not be justified in using greater force than so reasonably appears to him necessary and sufficient to avoid the danger apparently intended to be inflicted upon him, and if he uses greater force than so reasonably appears necessary to avoid death or great bodily injury to himself and thereby kills the person who made the attack, or if the killing is committed after it reasonably appears to him that the person who made the attack has abandoned the same, and that danger to himself no longer exists, then the kill-

[17] Donald v. State, 21 Ohio Cir. Ct. R. 124.

[18] Brantley v. State, 175 P. 51, 15 Okl. Cr. 6.

ing will not be justifiable, and the person who did it will be guilty of manslaughter in the first degree.[19]

The jury are instructed that the state in this case presents for your determination the question: Conceding that defendant was justifiable in firing the shots from the shotgun which killed P. W. C., and caused F. C. to fall or crawl from the wagon to the ground, then was he justifiable in drawing his revolver and firing the fatal shot at F. C. after he was out on the ground? If, after he fired the loads from the shotgun, and F. C. was out of the wagon, and he had no further reasonable grounds to apprehend that he was in imminent danger of losing his life or suffering some great bodily harm, then he cannot be acquitted on the ground of self-defense, and, if he fired the fatal shot with a premeditated design to take the life of F. C., he is guilty of murder.[20]

The jury are instructed that if they find from the evidence that the deceased made threats against the defendant which, if carried into execution, would endanger his life or subject him to great bodily harm, and the defendant feared or had reason to fear that such threats were liable to be carried into execution, then the defendant might lawfully arm himself for the purpose of self-defense in anticipation of such threats being carried into execution; but you are instructed that the defendant could not lawfully assault the deceased on account of such threats, or because of fear induced thereby, unless the deceased at the time made some demonstration or performed some overt act that caused reasonable apprehension that such threats were about to be put into execution, and in case of such demonstration or overt act the defendant might lawfully become the aggressor only to the extent of putting himself in a position of safety as against the unlawful threatened acts of the deceased. If, under the circumstances and facts in this case, you find the defendant intentionally carried his act of aggression further than was reasonably necessary to place himself in a situation of apparent safety, his acts would be such as to render his act of aggression unlawful, and you should under such circumstances consider the evidence as a whole, together with such act of aggression in determining his guilt or innocence under the charge laid in the indictment.[21]

§ 2985(11). Texas

Upon the law of self-defense, the jury is instructed that, when a person is unlawfully attacked by another in such manner that there is created in the mind of the person so attacked a reasonable expec-

[19] Gransden v. State, 158 P. 157, 12 Okl. Cr. 417.

[20] Morris v. Territory, 99 P. 760, 1 Okl. Cr. 617.

[21] Robinson v. Territory, 85 P. 451, 16 Okl. 241.

tation or fear of death or of serious bodily injury, then the law excuses or justifies such person in resorting to any means at his command to prevent his assailant from taking his life or from inflicting upon him any serious bodily injury, and it is not necessary that there should be actual danger, as a person has a right to defend his life and person from apparent danger as fully and to the same extent as he would had the danger been real, provided he acted upon a reasonable apprehension of danger as it appeared to him from his standpoint at the time; and in such case the party acting under such real or apparent danger is in no event bound to retreat in order to avoid the necessity of killing his assailant. If you believe that at the time defendant shot deceased (if he did) that deceased had made or was making an attack upon him with a knife in such manner that it reasonably appeared to defendant viewed from his standpoint that he was in danger of losing his life or suffering serious bodily injury at the hands of the deceased, and he fired the shot under such circumstances, he would be justified in so doing under the law of self-defense; and, if he commenced the assault upon deceased in his own self-defense, then you are instructed that he had the right to continue to act and use any means at his command as long as it reasonably appeared to him, as viewed from his standpoint, at the time, with all the facts and circumstances in his knowledge, that his life or person was in danger; and if you believe that, after shooting deceased (if he did), that defendant secured deceased's knife and stabbed him with it, thereby inflicting the mortal wound, and that, at the time he did it, it reasonably appeared to him, as viewed from his standpoint at the time, that he was in danger of losing his life or suffering serious bodily injury at the hands of deceased, then he would be justified under the law of self-defense whether he was actually in danger or not, provided he acted upon a reasonable apprehension of danger as it appeared to him, and if you so find the facts to be, or if you have a reasonable doubt thereof, you will acquit the defendant.[22]

You are instructed that every person is permitted by law to defend himself against any unlawful attack reasonably threatening injury to his person, and is justified in using all necessary and reasonable force to defend himself, but no more than the circumstances reasonably indicate to be necessary.[23]

§ 2985(12). Washington

The jury are instructed that a person attacked at a place where he has a right to remain need not retreat, but may repel force by force in defense of his person, against one who, at the time, is actu-

[22] Shed v. State, 153 S. W. 125, 68 Tex. Cr. R. 373.

[23] Munos v. State, 124 S. W. 941, 58 Tex. Cr. R. 147.

ally, or apparently, intending or endeavoring unlawfully to kill him, or inflict upon him great bodily harm, and in such defense the assailed may lawfully meet the attack made upon him in such a way, and with such force, as under all the circumstances he at the moment honestly believes, and has reasonable grounds to believe, are necessary to save his own life, or to protect himself from great bodily harm, and in such defense the assailed may lawfully kill the assailant, if at the time he is actually or apparently in imminent danger of death or great bodily harm at his assailant's hands, and, if under all the circumstances he honestly believes, and has reasonable grounds to believe, such killing to be necessary to save his own life, or protect him from great bodily harm.[24]

§ 2985(13). West Virginia

The court instructs the jury that a person has a right to repel force by force in the defense of his person, his family, or his habitation, and if, in so doing, he use only so much force as the necessity or apparent necessity of the case requires, he is not guilty of any offense, though he kill his assailant in so doing.[25]

§ 2986. Same—Continuing combat after disabling deceased

§ 2986(1). Arkansas

The court instructs the jury that if you believe from the evidence, beyond a reasonable doubt, that the first shot fired by the defendant did not produce death, and would not of itself have produced death, but rendered deceased incapable of doing defendant any serious bodily harm, and that defendant observed and knew the nature of the wound first inflicted, that it was not sufficient to produce death, and that deceased was no longer capable of doing him any serious bodily harm, and with this knowledge again fired into the body of deceased, killing him, then you should convict the defendant of some degree of crime charged in the indictment, as explained to you in these instructions.[26]

§ 2986(2). Texas

You are instructed that if defendant in the course of the fatal altercation fired a number of shots, then, if the first shot was fired under circumstances amounting to self-defense, the defendant had the right in self-defense to continue to shoot as long as it reasonably appeared to him that he was in danger. And if such first shot was fired in self-defense, and defendant fired other shots into the head or body of deceased, thereby producing or hastening the death of deceased, when it no longer reasonably appeared to him that he

[24] State v. Churchill, 100 P. 309, 52 Wash. 210.

[25] State v. Manns, 37 S. E. 613, 48 W. Va. 480.

[26] Lindsey v. State, 189 S. W. 163, 125 Ark. 542.

was in danger, then such later shots would not be in self-defense, but the offense in such case would be of no higher grade than manslaughter.[27]

The jury are instructed that if you believe from the evidence under the foregoing charges of the court upon the law of self-defense, that the defendant, or ———, was justified in firing the shot that killed the deceased, if any, then you are instructed that the subsequent shots fired by the defendant, if any, are immaterial, and that the defendant had the right to continue to fire so long as danger, real or apparent, considered from the defendant's standpoint, continued to exist.[28]

§ 2987. Right of pursuit in self-defense

§ 2987(1). California

You are instructed that, if you believe that the defendant was not a wrongdoer in seeking to get back his money, and the deceased met his death after such a demonstration as justified the defendant in believing the deceased was about to inflict great bodily harm upon him, and the assault is sudden, and the danger apparently great, then I charge you the defendant was justified in standing his ground, and in pursuing and slaying the deceased to win his own safety.[29]

§ 2987(2). Texas

The jury are instructed that, if defendant brought on a difficulty with B. by striking him with his fist, but with no intention of bringing on the difficulty for the purpose of killing him, and that such difficulty was ended by the withdrawal or departure of said B. from said difficulty, and if at that juncture the deceased made an attack on defendant with a knife or ax handle, if said attack produced in the mind of defendant a reasonable fear of great bodily injury, then the defendant would be justified in shooting and killing deceased. If, however, at that juncture, deceased fled and abandoned the conflict, and all danger, real or apparent, to defendant had ceased, he would not be justified in pursuing and killing deceased, unless defendant believed from the appearances, as presented to him, that deceased was only fleeing to gain a vantage ground from which he could renew the attack.[30]

§ 2988. Killing of one coming to assistance of another who is attacking defendant

The jury are instructed that, if you shall find that the defendant shot ——— in order to prevent said ——— from taking his life or

[27] Burnaman v. State, 159 S. W. 244, 70 Tex. Cr. R. 361, 46 L. R. A. (N. S.) 1001.

[28] Overcash v. State, 148 S. W. 701, 67 Tex. Cr. R. 181.

[29] People v. Grimes, 64 P. 101, 132 Cal. 30.

[30] Morgan v. State, 67 S. W. 420, 48 Tex. Cr. R. 543.

doing him some serious bodily injury, and that at the time he did so his life was in danger, or he was in danger of serious bodily injury, from the said ———, or from the standpoint of defendant it reasonably appeared to defendant that he was in such danger, and you further find that, up to the time of said shooting, deceased was not participating in the difficulty, and it did not so appear to defendant that he was so participating, yet if you find that after said shooting the deceased made an attack on defendant which indicated to the defendant's mind, from all the circumstances then surrounding him, that such was his purpose, and that his life was in danger, or serious bodily injury to himself was threatened, or if, from all the circumstances then surrounding the defendant, viewed from his (defendant's) standpoint, such an attack was about to be made on him by deceased, and, that when such attack or apparent attack was made on the defendant, he shot and killed the deceased, then the court charges you that in such an event he would have the right to do so in his own defense, and in that event you will acquit defendant.[31]

§ 2989. Commission of other offense as affecting right of self-defense

The jury are instructed that evidence has been introduced by the prosecution in this case tending to show that defendant, prior to the shooting, had had illicit intercourse with his daughter. I charge you that, although it should appear to you from the evidence that such a state of affairs existed, nevertheless the defendant would not for that reason be deprived of the right of self-defense, either in protection of his life or the prevention of great bodily injury, nor would he be deprived thereby of the right to the indulgence the law allows for a killing upon a sudden quarrel or in the heat of passion. Whether or not the defendant had at some previous time committed another crime different from that for which he is being tried cannot be taken into consideration by you as a reason for convicting him of the crime with which he is charged.[32]

§ 2990. Consistency of defenses of insanity and of self-defense

The jury are instructed that the law of self-defense is applicable alike to the insane as to the sane; that both defenses are consistent; and, if you find one or both of such defenses in favor of the defendant, you will return your verdict of not guilty.[33]

[31] Norris v. State, 61 S. W. 493, 42 Tex. Cr. R. 559.

[32] People v. Cook, 83 P. 43, 148 Cal. 334.

[33] State v. Wade, 61 S. W. 800, 161 Mo. 441; State v. Porter, 111 S. W. 529, 218 Mo. 48, 127 Am. St. Rep. 589.

5. *Killing in Defense of Another*

§ 2991. Right to kill in defense of another

§ 2991(1). Kentucky

The jury are instructed that, if you shall believe from the evidence that no conspiracy existed as defined in instruction No. ———, but do believe that at the time the defendant shot and killed ———, if he did so, or at the time he aided, encouraged, advised, or commanded ———, ———, ———, ———, or any one or more of them, to shoot and kill the deceased, if he did so do, as defined in instruction ———, he believed, and had reasonable grounds to believe, that he or the other defendants above named, or any one or more of them, was then and there in danger of death or the infliction of some great bodily harm at the hands of the said ———, and that it was necessray, or was believed by the defendant in the exercise of a reasonable judgment to be necessary, to shoot and kill the deceased, or to aid, advise, encourage, or command the other defendants, or one of them, so to do in order to avert that danger, real or to the defendant apparent, then you ought to acquit the defendant upon the ground of self-defense and apparent necessity therefor or the defense of another and apparent necessity therefor.[34]

The jury are instructed that, although the jury may believe from the evidence, beyond a reasonable doubt, that the defendant shot and killed ———, if they believe from the evidence that, when he did so, he had reasonable grounds to believe, and did believe, that deceased, or others of his party acting in concert with him, were then about to inflict upon defendant, ———, ———, ———, or any of them, death or great bodily harm, or it reasonably appeared to him that such was the case, and it further reasonably appeared to him that the only reasonably safe means of protecting himself, or them, against such danger, real or apparent, was to shoot the said ———, or others of his party acting in concert with him, and the shooting and killing of the former was done under these circumstances, the same was excusable on the ground of apparent necessity in the defense of himself or associates named, and the jury should acquit the defendant.[35]

The jury are instructed that, if you believe from the evidence that at the time defendant shot and killed M. (if you believe from the evidence beyond a reasonable doubt that he did so), he believed, and had reasonable grounds to believe, that he or A. were then and there in danger of death or the infliction of great bodily harm at the hands of M., or those acting in concert with him, and that it was

[34] Gambrell v. Commonwealth, 113 S. W. 476, 130 Ky. 513.

[35] Watkins v. Commonwealth, 87 S. W. 740, 123 Ky. 817.

necessary, or seemed to defendant, in the exercise of a reasonable judgment, to be necessary, to shoot and kill M. in order to protect himself or A. from death or the infliction of great bodily harm at the hands of said M. or those acting with him, then you will find defendant not guilty on the grounds of self-defense and apparent necessity.[36]

§ 2991(2). Nevada

You are instructed that the law makes it the duty of every one, who sees a felony attempted by violence, to prevent it, if possible, and allows him to use the necessary means to make his resistance effectual. One may kill in defense of another under the same circumstances that he would have the right to kill in defense of himself.[37]

§ 2991(3). Texas

You are instructed that if, from the evidence, you believe defendant killed ———, but at the time of so doing deceased had made or was making an attack on him (said defendant), or was making an attack on the said ———, which, from the manner and character of it, caused him to have a reasonable expectation or fear of death or serious bodily injury, either on his own account or on account of the said ———, and that, acting under such reasonable expectation or fear, the defendant killed deceased, you will acquit the defendant.[38]

You are instructed that, if you find from the evidence that at the time and place charged in the indictment defendant did kill the said ——— by shooting him with a gun or pistol, but that when he so shot ——— it reasonably appeared to defendant, judging from his standpoint alone, from some act then done by ——— or by him, and by any one or more of the posse with ———, or by any one or more of them, or by such act accompanied by words, that ——— or any of his posse was about to kill him, the defendant, or some other person with the defendant, or at the same place, or to do him some serious bodily injury, you will acquit the defendant; or if you have a reasonable doubt as to whether the defendant acted in self-defense, or in defense of another, from real or apparent danger from an unlawful attack, such as produced a reasonable expectation or fear of death or some serious bodily injury, you will acquit the defendant. If you should find that the said ——— was killed by the said B., and that B. acted in defense of himself or another, or if you have a reasonable doubt upon this point, you will acquit

[36] Wilson v. Commonwealth, 68 S. W. 121, 24 Ky. Law Rep. 185.

[37] State v. Hennessy, 90 P. 221, 29 Nev. 320, 13 Ann. Cas. 1122.

[38] Dickey v. State (Cr. App.) 98 S. W. 269.

defendant; and you will apply, in case you find that ——— was killed by B., the whole of this paragraph of the charge on the question of self-defense or defense of another as if B. were therein named instead of the defendant.[39]

§ 2992. Defense of relative or member of family

§ 2992(1). Arkansas

The jury are instructed that, if they believe from the evidence that the defendant honestly believed, without fault or carelessness on his part, that at the time he struck the blow that killed the deceased, that deceased was in the act of killing the father of defendant or of inflicting upon him great bodily injury, and that the danger appeared to the defendant to be urgent and pressing, then the defendant was justified in assaulting and striking the deceased to prevent his father from being killed or from receiving great bodily injury.[40]

The jury are instructed that the defendant would not be justified in assaulting and striking the deceased, unless it appeared that deceased was in the act of killing defendant's father or inflicting upon him great bodily injury. If deceased was in the act of assaulting and beating defendant's father, with no manifest intention of killing him or inflicting upon him great bodily injury, the defendant would be guilty of some degree of unlawful homicide; and this would be true, although deceased was in the wrong in his assault upon defendant's father.[41]

The jury are instructed that the defendant had as much right, under the law, to protect the life and body of his father, as he had to protect his own; and if you find from the evidence that the deceased was making an effort to either take the life of ———, the father of the defendant, or to do him some great bodily harm, and the defendant struck, honestly believing that such was the purpose of deceased, and without fault or carelessness, to prevent it, then he would not be guilty, and you will say so by your verdict.[42]

§ 2992(2). Kentucky

The jury are instructed that, although the jury may believe from the evidence beyond a reasonable doubt that the defendant cut with a knife, and thereby killed the deceased, in ——— county, state of ———, yet if it believes from the evidence, that at the time he so cut and killed the deceased he (defendant) in good faith believed, and had reasonable grounds for so believing, that he or his brother, ———, was then and there in danger of death or great bodily harm, at the hands of the deceased, and that there appeared to the de-

[39] Cortez v. State, 83 S. W. 812, 47 Tex. Cr. R. 10.

[40] Mabry v. State, 97 S. W. 285, 80 Ark. 345.

[41] Mabry v. State, 97 S. W. 285, 80 Ark. 345.

[42] Pratt v. State, 87 S. W. 651, 75 Ark. 350.

fendant, exercising a reasonable judgment, at the time, and under the circumstances, no safe way to avert said danger to himself or brother, real or to the defendant apparent, except to cut and kill the deceased, and in so doing he used no more force than was necessary or in the exercise of a reasonable judgment appeared to him, at the time, to be necessary to protect himself or his brother, ———, from the danger, at the hands of the deceased, real or to him apparent, it, the jury, will find him not guilty.[43]

You are instructed that, although you may believe from the evidence in this case beyond a reasonable doubt that the defendant L. did shoot and kill ——— at the time and place stated in instruction No. ——— herein, and that the defendant J. was present aiding, assisting, or encouraging said shooting and killing, yet if you shall further believe from the evidence in this case that, at the time said L. shot and killed the said ——— (if you shall believe from the evidence beyond a reasonable doubt he did shoot and kill him), said ——— had first assaulted the defendant L., or his father, J., or both, and that defendant L. then and there had reasonable grounds to believe, and did believe, that he or his said father was in immediate danger, or apparent danger, of losing his life, or of suffering great bodily harm, at the hands of said deceased, ———, and as it then appeared to him there was no other safe means, or apparent safe means, of avoiding said danger, except to shoot and kill the said ———, then he had a right to so shoot and kill said ———, and such shooting and killing would be in self-defense; and if you shall so believe from the evidence in this case, then the law is for each of the defendants, and you will find each of them not guilty.[44]

The jury are instructed that, although you may believe from the evidence beyond a reasonable doubt that the defendant shot and killed ———, yet if you believe from the evidence that at the time he did so, ——— commenced, or was commencing, a difficulty with defendant's brother, ———, by assaulting him with a deadly weapon and defendant believed, and had reasonable ground to believe, that his brother was in imminent danger of death or serious bodily harm at the hands of ———, or it reasonably appeared to defendant that his brother was then in such danger, real or apparent, and that it was necessary, or it reasonably appeared to him to be necessary, to kill ——— to protect the life or person of his brother from such danger or apparent danger, then the killing of ——— was excusable and the jury should acquit the defendant.[45]

[43] Biggs v. Commonwealth, 175 S. W. 379, 164 Ky. 223, Ann. Cas. 1916A, 1096.

[44] Futrell v. Commonwealth, 132 S. W. 555, 141 Ky. 310.

[45] McIntosh v. Commonwealth, 96 S. W. 917, 29 Ky. Law Rep. 1100.

The jury are instructed that if you believe from the evidence that, when the defendant shot and killed ———, if he did so, he had reasonable grounds to believe, either real or apparent, and did in good faith believe, that his son, ———, was then in immediate danger of loss of his life or of suffering great bodily harm at the hands of the deceased, and there were no other apparently safe means of escape by his son from the impending danger, then defendant had the right and it was lawful for him, in the exercise of a reasonable judgment, to use such force as was reasonably necessary to save and protect his son's life or his person from great bodily harm, even to the taking of the life of the said deceased. On such grounds and under such circumstances the defendant is excusable under the law of defense of another. The danger to one's life or of great bodily harm to his person, which would authorize defendant to act in his defense or in the defense of his son as herein indicated, may be real danger or apparent danger.[46]

The jury are instructed that, if you believe from the evidence that at the time defendant shot and killed the said ———, if he did shoot him, he believed and had reasonable grounds to believe that the said ——— was then and there about to take the life of his son, or inflict on his said son great bodily harm, and there appeared to him, the said defendant, in the exercise of a reasonable judgment, no other safe means to avert the then real, or to him apparent, danger, if any, to his said son, but to shoot said ———, then he had the right so to do, and you ought to acquit him on the ground of defending his said son from death or the infliction of great bodily harm at the hands of the said ———.[47]

§ 2992(3). Michigan

The jury are instructed that if you find from the proofs in the case, and have any reasonable doubt in your minds whether or not the respondent shot deceased for the reason that he believed at the time he fired the shots that his father was in danger of death, or great bodily harm at the hands of deceased, and fired the shots in defense of his father, then you should acquit him, and return a verdict of not guilty. The right to defend one's self against danger not of his own seeking is a right which the law guaranties to all men; and the same right which exists to protect one's self exists also for the protection of those dependent upon him such as members of his family. In this case defendant had the same right to protect his father that he would have had to protect himself in a like situation, though the danger was threatened to his father, and not

[46] Thacker v. Commonwealth, 71 S. W. 931, 24 Ky. Law Rep. 1584.

[47] Utterback v. Commonwealth, 59 S. W. 515, 22 Ky. Law Rep. 1011.

to himself. If, at the time the defendant shot the deceased, he had reasonable cause to apprehend on the part of the deceased a design to do his father great personal injury, and there was reasonable cause for him to apprehend immediate danger of such design being accomplished, and to avert such apprehended danger he shot, and at the time he did so he had reasonable cause to believe it necessary for him to shoot in the way he did to protect his father from such apprehended danger, then and in that case the shooting was not felonious, but was justifiable, and you ought to acquit him upon the ground of necessary self-defense. It is not necessary to this defense that the danger should have been actual or real, or that the danger should have been impending and immediately about to follow. All that is necessary is that the defendant had reasonable cause to believe and did believe these facts. But before you acquit on the ground of self-defense you ought to believe that defendant's cause of apprehension for his father was reasonable. You are to determine from all the evidence whether facts constituting such reasonable cause have been established; and, unless such facts constituting such reasonable cause have been established by the defense in this case, you cannot acquit on the ground of self-defense, but his actions and conduct are to be judged from the circumstances as they appeared to him at the time. He had the right to act under the circumstances as they appeared to him at the time, and if from all the evidence in the case there exists in your minds a reasonable doubt whether the respondent did not in fact kill deceased in defense of his father, honestly believing his father's life was in jeopardy, or that he was in danger of receiving serious bodily injury at the hands of deceased, then it would be your duty to render a verdict of not guilty.[48]

§ 2992(4). Oklahoma

You are instructed that if you believe from the evidence or have a reasonable doubt as to the fact that it reasonably appeared to the defendant A. situated as he then was, and that he honestly believed, that his brother, M., or himself, was in imminent danger of losing his life or receiving great bodily injury, and that he fired the shot to protect his brother from the threatened danger, then the shooting would be a lawful one, and it would be your duty to acquit the defendants, unless you shall believe from the evidence beyond a reasonable doubt that they entered voluntarily into the difficulty, one of them armed with a deadly weapon at the time.[49]

[48] People v. Tubbs, 110 N. W. 132, 147 Mich. 1.

[49] McDaniel v. State, 127 P. 358, 8 Okl. Cr. 209.

§ 2992(5). Texas

You are charged that the defendant had the same right to protect his son against death or serious bodily injury that he would have to protect his own person. You are therefore charged that the defendant had the right, if it reasonably appeared to him, viewed from his standpoint, that the deceased was about to make an assault upon his said son, to arm himself and come to the rescue and protection of his said son, and if the defendant, in preparing to protect his son, was assaulted by the deceased, or it reasonably appeared to defendant, from the words, coupled with the acts of the deceased, that defendant was in danger of death or serious bodily injury, and he fired and killed deceased. defendant would not be guilty, and you will so find. In case you have a reasonable doubt, find him not guilty.[50]

You are further charged that a reasonable apprehension of death or great bodily harm to a near relative of a person will excuse a party using all necessary force to protect the life or person of said near relative, and it is not necessary there should be actual danger, provided he acted upon a reasonable apprehension of danger as it appeared to him from his standpoint at the time.[51]

You are instructed that if, from the evidence, you believe the defendant killed said ———, but further believe that at the time of so doing the deceased had made an attack upon ———, a sister of defendant, which from the manner and character of it, and the relative strength and situation of the parties, caused defendant to have a reasonable expectation or fear of death or serious bodily injury to his said sister, and that acting on such reasonable expectation or fear the defendant killed the deceased, then you should acquit him.[52]

You are further charged that if you believe from the testimony that the deceased, at the time of the killing, was attempting to do serious bodily harm to the sister of defendant, and the defendant shot and killed the said deceased in order to prevent serious bodily harm to his said sister, you will find the defendant not guilty.[53]

The jury are instructed that, if you believe from the evidence that the defendant shot and killed ———, but further believe that at the time he did so the deceased was making an unlawful and violent attack upon defendant's brother, D., which then reasonably appeared to defendant to be of such a character that the said D. was in danger of losing his life or suffering serious bodily injury at the hands of the deceased, and that his said brother's danger was then imminent and pressing, viewing the whole matter from the

[50] Medford v. State, 216 S. W. 175, 86 Tex. Cr. R. 237.

[51] Thomas v. State, 210 S. W. 201, 85 Tex. Cr. R. 42.

[52] Thomas v. State, 210 S. W. 201, 85 Tex. Cr. R. 42.

defendant's standpoint alone, and, under such circumstances, he shot and killed the said ———, he would be justifiable; or, if you believe from the evidence that from the acts and words of the deceased at the time that the defendant had reasonable apprehension that the deceased was about to inflict death or serious bodily injury upon his brother, D., and that such danger, or apparent danger, was imminent and pressing, even though there was no real danger, but only apparent danger, viewing the matter from the defendant's standpoint alone at the time, and, to save his brother from such apparent danger to his life or person, the defendant shot and killed the deceased, he would be justifiable, and; in either or both events, if you so believe from the evidence, you will acquit.[54]

§ 2993. Defense of wife

§ 2993(1). Iowa

You are instructed that, if you believe that at the time of the attack, if any, of the deceased upon his wife, it reasonably appeared to the defendant, that the purpose of deceased was either to kill or do her serious bodily injury then, if you so believe, defendant would have the lawful right to defend her from such attack; and, if defendant commenced to shoot under such circumstances, you are instructed that he would have the right to continue shooting at deceased, until it reasonably appeared to him, from his standpoint, that she was out of danger from such unlawful attack.[55]

§ 2993(2). Oklahoma

The jury are instructed that, if the jury believe from the evidence in this case that when the defendant shot and killed ——— he had reasonable grounds to believe, and did believe in good faith, that his wife was in imminent danger of losing her life or suffering great bodily harm at the hands of the said ———, and that there were no other apparently safe means of escape by his said wife from the impending danger, then the defendant had the right, and it was lawful for him in the exercise of reasonable judgment, to use such force as was reasonably necessary or apparently necessary to save and protect his wife's life or her person from great bodily harm, even to the taking of the life of said ———. On such grounds, and under such circumstances, the defendant is justifiable under the law in the defense of his wife. The danger to one's life or of great bodily harm to his or her person by which the defendant pleads justification for his acts, as herein indicated, may

[53] Thomas v. State, 210 S. W. 201, 85 Tex. Cr. R. 42.

[54] Williams v. State, 148 S. W. 763, 67 Tex. Cr. R. 287.

[55] State v. Nicola, 151 N. W. 70, 169 Iowa, 171.

be real danger or apparent danger; but, before the jury can acquit the defendant on the ground of defense of his wife, three essential elements must concur: First, defendant and defendant's wife must be without fault in bringing on the difficulty, and must not be disregardful of the consequences in this respect of any wrongful word or act; second, there must have existed at the time either really, or so apparently as to lead a reasonable mind to the belief that there actually existed, a present imperious impending necessity to shoot in order to save himself or his wife from death or great bodily harm; third, there must have been no other reasonable mode of avoiding the necessity of taking the life of the deceased, apparent to the defendant as a person of ordinary prudence and courage.[56]

§ 2994. Defending against rape of female relative

The jury are instructed that, if you believe from the evidence that the defendants, or either of them, believed and had reasonable grounds for believing that at the time the deceased was shot and killed he was then and there about to take the life of, or inflict some great bodily harm upon their sister, or take forcible possession of her person for the purpose of having carnal knowledge of her, and there appeared to defendants, or either of them, in the exercise of a reasonable judgment, no other safe way to avert the then impending danger, or to the defendants, or either of them, apparent danger, to their sister, but to shoot and kill deceased, then they, or either of them, had the right to shoot and kill deceased, and the jury should acquit him.[57]

§ 2995. Killing by another in defense of defendant at advice of latter

You are instructed that, although you may believe from the evidence beyond a reasonable doubt that G. cut, stabbed, and wounded ———, from which cutting, stabbing, and wounding he then and there presently died, and that the defendant was then and there present, aiding, advising and counseling the said G. to cut, stab, and wound the said ———, yet, if you shall further believe from the evidence that at the time the said G. so cut, stabbed, and wounded the said ———, either the defendant or her son G., had reasonable grounds to believe, and in good faith did believe, that the said ——— was then and there about to take her life or inflict upon her some great bodily harm, then the said G. had the right to use any means at his command that were necessary, or to him apparently necessary, to protect the life of defendant, or to ward

[56] Atchison v. State, 105 P. 387, 3 Okl. Cr. 295.

[57] Combs v. Commonwealth, 112 S. W. 658, 33 Ky. Law Rep. 1058.

off the then impending, or to him apparently impending, danger, and the defendant, under such circumstances, had the right to advise and counsel her son G. to do so, and you should find the defendant not guilty on the ground of self-defense and apparent necessity.[58]

§ 2996. Killing by defendant pursuant to previously formed design

The court charges the jury that if they believe beyond a reasonable doubt that just prior to the difficulty between H. and B. the defendant had made up his mind and formed a design to strike the fatal blow in the event the difficulty did arise between B. and H., and that the defendant cut the deceased in pursuance of such previously formed intention and design, then you cannot acquit the defendant on the ground that he acted in the defense of B. in cutting the deceased, H.[59]

§ 2997. Necessity of reasonable apprehension of danger to person defended

The jury are instructed that the right of self-defense is allowed to the citizen as a shield, and not as a sword, and in the exercise of this right a person must act honestly and in good faith; and if you believe and find from the evidence that defendants sought or voluntarily entered into the difficulty with deceased for the purpose of wreaking vengeance upon him, or if you should find and believe that they killed the deceased at the time when they had, because of the acts of the deceased, no reasonable apprehension of immediate and impending injury to their father, and did so from a spirit of retaliation and revenge, for the purpose of punishing deceased for past injuries done their father, then the defendants cannot justify their acts under the law permitting themselves to defend their father.[60]

§ 2998. Matters considered in determining necessity of killing

You are instructed that you are to determine from the evidence the state of mind of the defendant when he shot and killed the deceased, if he did so, and in that connection you may consider threats, if any, made by the deceased against his wife, the reputation of the deceased, if such it was, as a violent and dangerous man, the defendant's personal knowledge, if such he had, that the deceased was a violent and dangerous man, the relative strength of deceased and the defendant, and all other facts in the case that may shed any light upon such state of mind.[61]

[58] Steely v. Commonwealth, 112 S. W. 655, 129 Ky. 524.

[59] Burkett v. State, 45 So. 682, 154 Ala. 19.

[60] Dempsey v. State, 102 S. W. 704, 83 Ark. 81.

[61] State v. Nicola, 151 N. W. 70, 169 Iowa, 171.

§ 2999. Same—Threats of deceased

You are instructed that, if you believe from the evidence that deceased made any threats against the life of ———, you may take into consideration such threats in determining whether defendant was justified in acting upon appearance when he killed deceased.[62]

You are instructed that, if you find from the evidence that the deceased, prior to the tragedy, made any threats against his wife, the mother of defendant, then such threat or threats, if any, should be considered by you as explaining the conduct or apprehension of said defendant, if any, at the time of such killing.[63]

You are instructed that you may consider, in determining as to whether the defendant had reasonable grounds for believing that his mother was in an imminent danger of death or great personal injury from the deceased, that the latter prior to the shooting had made threats to the said mother that he would kill or injure her.[64]

§ 3000. Assault provoked by person defended

Gentlemen of the jury, I charge you that the right of the defendant to defend his wife was as extensive with the right of the wife to defend herself, and he had not the right to take life to save his wife from the consequences of an assault he knew his wife had provoked and brought on.[65]

§ 3001. Duty to use no more force than necessary

The jury are instructed that the defendants had no right to strike or stab deceased because deceased had assaulted and stabbed their father, after deceased had ceased his assault upon their father; and if you find from the evidence that defendant slew deceased after deceased had ceased to assault their father, and had turned back from pursuing him, you will convict them of whatever degree of homicide the evidence may show they are guilty of.[66]

6. *Other Matters Excusing or Justifying Homicide*

§ 3002. Defense of home or dwelling house

§ 3002(1). Arkansas

You are instructed that, if defendant had reason to believe he or any one at his house would probably be attacked, then as a matter of law he had a perfect right to arm himself and prepare, not only for his own defense, but that of his home and all persons being therein at the time; and if deceased, either alone or with

[62] State v. Nicola, 151 N. W. 70, 169 Iowa, 171.

[63] State v. Nicola, 151 N. W. 70, 169 Iowa, 171.

[64] State v. Nicola, 151 N. W. 70, 169 Iowa, 171.

[65] Sherrill v. State, 35 So. 129, 138 Ala. 3.

[66] Dempsey v. State, 102 S. W. 704, 83 Ark. 81.

others acting with him, advanced upon defendant's home for the purpose of renewing a difficulty with or attacking any person therein, defendant would not be required to retreat, but may stand his ground and meet force with force, and if necessary to prevent either himself or any person in his home from receiving great bodily injury at the hands of the deceased, or him and those with him and acting with him, either or all of them, or if situated as he was, viewing the facts and circumstances as they appeared to him, and from his standpoint he had reason to believe and did believe he or any person at his house was in imminent and immediate danger of losing his life or receiving some great bodily injury at the hands of the deceased or him and those acting with him, any or either of them, and in good faith, without fault or negligence on his part, he shot and killed the deceased, then such killing would in law be justified, and you should acquit the defendant although you may believe such killing unnecessary or that such danger did not exist.[67]

§ 3002(2). Florida

You are instructed that a person's dwelling house is a castle of defense for himself and his family, and an assault upon it with intent to injure such person, or any of them, may be met in the same way as an assault upon himself, or any of them; and she may meet the assailant at the threshold, and use the force necessary for her or their protection against the threatened invasion and harm.[68]

§ 3002(3). Illinois

The jury are instructed that if the jury believe, from the evidence, that, just prior to his death, the deceased attempted, in a violent manner, to enter the dwelling of the defendant, for the purpose of assaulting or offering personal violence to the defendant, being in said dwelling, or any other person dwelling or being therein, and that the defendant, in reasonably resisting such attempt of the deceased, unintentionally and without malice killed the deceased, then the killing was justifiable or excusable, and the jury ought to acquit the defendant. The jury, in considering whether the killing was in defense of habitation, should consider the circumstances attending the killing, and the conduct of the parties at the time, and immediately previous thereto, and the means and force used, as bearing upon the question of whether the killing was in defense of habitation.[69]

[67] Hall v. State, 168 S. W. 1122, 113 Ark. 454. The specific objection to this instruction was that it did not expressly affirm the right of one to defend his home.

[68] Russell v. State, 54 So. 360, 61 Fla. 50.

[69] Greschia v. People, 53 Ill. 295.

§ 3002(4). Kentucky

The jury are instructed that, if you shall believe from the evidence that at the time the defendant fired the shot that took the life of ——— (if you shall believe from the evidence beyond a reasonable doubt that he did so do) he believed, and had reasonable grounds to believe, that deceased was then and there about to kill defendant, or any one assembled at his house, or was about to do him or them, or either of them, some great bodily harm, and that it was necessary, or was believed by defendant, in the exercise of a reasonable judgment, to be necessary, to shoot and wound deceased in order to avert said danger, real or to the defendant apparent, then you ought to find the defendant not guilty on the ground of self-defense and apparent necessity.[70]

§ 3002(5). Minnesota

The jury are instructed that the undisputed evidence is that the defendant was inside of his own house of abode at the time he killed ———, and, if said ——— was attempting to enter such house for the purpose of assaulting the defendant, the defendant was not bound to flee from the house. It is claimed on the part of the state here that there was no necessity for this killing; that the defendant could have made himself safe by closing the doors, which were provided with locks; and you are to consider that in relation to the propositions of law following. Did the deceased have any weapon, or anything with which he could demolish doors or break them down? Look at the nature of the door before him as an obstruction to the deceased. The state claims that there was a safe remedy for the defendant by shutting or locking his doors. And I say to you, gentlemen, as a matter of law, no one has a right to kill another in self-defense, unless such killing is apparently necessary to prevent some great personal injury to himself or to his home. We have always heard the old adage that a man's house was his castle, and that he had a right to defend it, which is true. But he must defend it in a reasonable manner, and upon this point I desire to say to you, as I have said upon the other, where one is assaulted in his own home, or the home is attacked, in the actual resistance of an attempt to commit a felony upon or in the dwelling or place of abode where he is, he may use such means as are necessary to repel the assailant from the home, or prevent his forcible entry or material injury to the home, even to the taking of life. But a homicide in such case would not be justifiable, unless the slayer, in a careful and proper use of his faculties, believes and has reasonable cause to believe that the

[70] Benge v. Commonwealth, 71 S. W. 648, 24 Ky. Law Rep. 1466.

killing is necessary to repel the assailant or prevent his forcible entry. Then, upon this clause of the statute, we might come right back to the fact that the jury must judge whether there was reasonable cause—whether the defendant had reasonable cause to believe the killing was necessary to repel the assailant or prevent his forcible entry.[71]

§ 3002(6). Missouri

The jury are instructed that A. had the right to go to the cabin of B. along with him and to stay all night with him; and that if, when A. had lain down on the bed, and B. had closed the door, the deceased came to the cabin and asked admittance, and the door was opened by B., and the deceased made an assault on B. with a knife, and cut and wounded him, and then and there B. attempted to defend himself with a pistol, but failed in his defense, and was obliged to retreat or fly from deceased, and ran from the door of the cabin, and immediately, or within a very short time thereafter, the deceased rushed again towards the door and assaulted A. with a knife and a pistol, or either of them, then A. had the right to defend himself the same as if he were in his own house, and if, in repelling said assault, A., in the necessary defense of his person, with a shotgun, shot at and killed the deceased, then A. was justifiable in his act of shooting, and neither of defendants is guilty, and the jury must so find in their verdict.[72]

§ 3002(7). South Carolina

You are instructed that one, being in his own house when he is assaulted, need not run, need not get out of the way. He is not called upon to avoid the necessity by any other means, because he can stand his ground on his own premises and defend himself in going forward. Whether it is necessary to defend himself or not, he could not be assumed to have brought on the difficulty, because a person's rights in his own home are higher than anywhere else, and the right of self-defense is not circumscribed and limited by the necessity of getting out of the way when one is on his own premises, because the law attempts to hold the house as the safe place of a person, for the reason that the home and the house is the unit of civilization and is sacred; and therefore the law throws around it a higher protection than any other place. So where one is assaulted on his own premises, he is not required to get out of the way, but, on the contrary, when one is intruding and is made aware that his presence is no longer wanted, then the owner may put him out by whatever force is necessary, even to the extent of killing him. A person cannot kill another because he does not

[71] State v. Touri, 112 N. W. 422, 101 Minn. 370.

[72] State v. Anderson, 86 Mo. 309.

get out, but he may use such force as is necessary to put him out, and if it is necessary to kill him, then no liability attaches to the person who kills under such circumstances.[73]

§ 3002(8). Texas

You are instructed that, if you believe from the evidence that defendant had the premises rented, on which the homicide occurred, and that deceased went into the inclosure on said premises without the consent of defendant, and after defendant had requested him not to come into said inclosure, and that he (deceased) continued to go into said inclosure and onto said premises after defendant had remonstrated with deceased against coming into said field and inclosure, and if you further believe from the evidence that such verbal remonstrances, if any, were of no avail, and that deceased on the occasion of the homicide went into said inclosure, and was approaching defendant in said inclosure, and from the acts of deceased, or from his words coupled with his acts, it reasonably appeared to defendant that his life was in danger or that he was in danger of serious bodily injury at the hands of deceased, and that while such danger, if any, was imminent and pending, defendant shot and killed deceased, then you will acquit defendant.[74]

You are instructed that, if deceased was in the act of forcibly ejecting defendant from said premises, and defendant, to avoid being driven off of said premises by force, shot and killed deceased, he was justifiable in so doing, provided he resorted to all other means to prevent being driven from said premises before killing, except that he was not bound to retreat in any event.[75]

You are instructed that, if you believe from the evidence that defendant was in the lawful, actual possession of the house and yard where deceased, ———, was killed, and that said house was the home of defendant, and that deceased went into said yard without the consent of defendant, and after defendant had told him not to come into said yard, and that he (deceased) continued to go into said yard, and to go in the direction of said house, after defendant had verbally remonstrated with him against coming into said yard, and if you further believe from the evidence that such verbal remonstrances were of no avail, and you further believe from the evidence that from the acts of deceased, or from his acts coupled with his words, it reasonably appeared to defendant that his life was in danger, or that he was in danger of serious bodily harm at the hands of deceased, and that, while such danger was

[73] State v. Hollis, 95 S. E. 74, 108 S. C. 442.

[74] Bearden v. State, 73 S. W. 17, 44 Tex. Cr. R. 578.

[75] Bearden v. State, 73 S. W. 17, 44 Tex. Cr. R. 578.

imminent and pending, the defendant shot and killed said ———, you will find defendant not guilty.[76]

§ 3002(9). Washington

You are instructed that the defendant, while on his own premises, outside of his dwelling house, was where he had a right to be, and, if you find that the deceased advanced upon him in a threatening manner, and the defendant at the time had reasonable grounds to believe, and in good faith did believe, that the deceased intended to take his life or do him great bodily harm, the defendant was not obliged to retreat, nor to consider whether he could safely retreat, but was entitled to stand his ground, and meet any attack made upon him, in such a way and with such force as, under all the circumstances, he at the moment honestly believed, and had reasonable grounds to believe, was necessary to save his own life or protect himself from great bodily injury.[77]

§ 3002(10). West Virginia

The court instructs the jury that if you believe from the evidence that the house in which defendant lived was assaulted by the deceased, and that the deceased shot at and into the said house, where the defendant and his family was at supper, and if you further believe from the evidence that the prisoner at the time had reasonable cause to believe that he, or any member of his family, were in danger of losing their lives or suffering great bodily harm at the hands of the deceased, then the defendant had a right to defend his house, even to the extent of taking the life of the deceased; and if you further believe from the evidence that the defendant killed the deceased, believing from the surrounding circumstances and the conduct of the deceased and the fierceness of the assault of the deceased that it was necessary so to do to protect his house and his family, then you should find the defendant not guilty.[78]

§ 3003. Same—What constitutes home or dwelling house

The jury are instructed that, if you believe from the evidence that the defendant was in the root house or outdoor cellar mentioned in the evidence, or in the door of it, and that the man killed attempted to enter against the protest and warning of defendant, then defendant was not obliged to flee therefrom, but was authorized to repel force by force, and protect himself and his house from intrusion, and if in the reasonable exercise of his rights of self-defense, as appeared to him at the time, he killed his assailant, the killing would be justifiable homicide. The burden of proof is

[76] McGlothlin v. State (Cr. App.) 53 S. W. 869.

[77] State v. Cushing, 45 P. 145, 14 Wash. 527, 53 Am. St. Rep. 883.

[78] State v. Manns, 37 S. E. 613, 48 W. Va. 480.

upon the prosecution to satisfy the jury, beyond a reasonable doubt, that the killing was not in self-defense, and that no reasonable belief existed in defendant's mind at the time that he was in great bodily danger, as the facts and circumstances then appeared to him.[79]

§ 3004. Killing in attempt to eject deceased from premises of defendant

§ 3004(1). Iowa

The jury are instructed that, if you find from the evidence that the two ——— were trespassers, as herein defined, upon the leased premises, then the defendant would have the right to order the ——— to leave the premises, and if after being so ordered, if they were so ordered, they refused to leave or did not leave, then the defendant would have the right to eject them from the premises, provided he should use no more force than was reasonably necessary therefor; but the defendant would not have the right to arm himself with a deadly weapon for that purpose, nor would he have the right to use a deadly weapon for that purpose.[80]

§ 3004(2). Texas

You are instructed that if the defendant, on arriving home on the evening of the homicide, was informed by his wife that the deceased had abused her and used insulting language toward her, or if ——— asked the defendant to protect him from an assault by the deceased, or by the deceased and others, then the defendant had the right to order the deceased off of his premises and to prevent the deceased from coming into his house, and, if the defendant anticipated an attack by the deceased, he had the right to arm himself with his shotgun to protect himself from such an attack, and he had the right to use all force that was necessary, but no more than was necessary, to force the deceased to leave his premises, and to prevent the deceased from entering his house. And if, under such circumstances, defendant ordered the deceased to leave his premises, and the deceased started to enter the house of defendant, defendant had a right to use all force necessary, even to the extent of taking his life, to prevent his entering his home, provided he first used every other means in his power. And if you believe that defendant did order him to leave, and the deceased started as if to enter the house, and made a demonstration as if to draw a pistol, and the defendant believed that his life was in

[79] People v. Coughlin, 35 N. W. 72, 67 Mich. 466.

[80] State v. Mitchell, 107 N. W. 804, 130 Iowa, 697. This instruction was criticized on the ground that it did not inform the jury of the right of the defendant to use a deadly weapon in case of an assault upon him, but in other instructions the court fully announced the law governing the question of self-defense.

danger, or he was in danger of serious bodily harm, and that he acted upon such belief when he shot and killed the deceased, you should acquit him.[81]

You are instructed that the defendant had the right to order the deceased off of his premises, or to order him not to come into his house, and to use all necessary force to cause the deceased to leave his premises, or to prevent the deceased from entering into his house, even to the extent of killing the deceased. But, before he would have had the right to kill deceased, he must have first resorted to every other means in his power at the time. In passing upon the issues of self-defense in this case you must view the situation from the standpoint of the defendant alone, and from no other standpoint.[82]

§ 3005. Killing in attempt to prevent commission of crime

The jury are instructed that the defendant had the legal right to prevent the attempted commission of a felony, even to the extent of inflicting death upon the one so attempting; or, if the one so attempting endeavored to escape with the proceeds of the felony, he also had the legal right to prevent such escape by any and all means, even to inflicting death; but, if the attempt or commission would only amount to a misdemeanor, then the defendant had no such right.[83]

The jury are instructed that a homicide committed in endeavoring to restrain the commission of a mere misdemeanor is not justifiable under the law.[84]

§ 3006. Killing to prevent theft

The jury are instructed that the theory of the defense is that the deceased was in the act of stealing, or had stolen, property from the barn of the defendant. If the deceased had a lawful right to enter the barn of the defendant, and, while in such barn committed a larceny or theft of the property of the defendant, and was outside the barn making off with it, then the defendant had no legal right to shoot him. There is no law that will justify the killing of one person by another for the crime of petit larceny. If you find from the evidence that deceased and the defendant had agreed that deceased should keep his horse in defendant's barn, then deceased at the time he was shot, was in a place where he had a right to be; and if you find that at the time deceased was stealing a small bundle of hay, and defendant knew that he had no other purpose, he was stealing by mere trespass, and, if the owner

[81] Jackson v. State, 180 S. W. 260, 78 Tex. Cr. R. 100.

[82] Jackson v. State, 180 S. W. 260, 78 Tex. Cr. R. 100.

[83] People v. Grimes, 64 P. 101, 132 Cal. 30.

[84] People v. Grimes, 64 P. 101, 132 Cal. 30.

of the property shot and killed him, he cannot avail himself of the defense that deceased was so stealing.[85]

§ 3007. Right to kill in defending against attempted rape

I charge you that any person, whether an officer of the law or not, has a right to kill another in the act of committing a felony, to wit, in the act of burning a house, or in the act of stealing property over the value of $———, or in the act of committing an assault with intent to rape. Assault with intent to rape is an attempt on the part of a man to have sexual intercourse with a woman without her consent. And it may not be shown that it was any great effort; but just the laying on of hands with the intention to have carnal intercourse with a woman against her will would be sufficient in law to make an assault with intent to ravish. The intent with which the attempt is made would be the gist of the offense. And if you find that the deceased attempted to commit a rape or ravish this woman, that is to say, to have carnal knowledge with her against her will and by force, she would have a right to take his life if it was necessary to do so to prevent the commission of that felony, and in such a case it makes no difference whether the woman is chaste or unchaste.[86]

§ 3008. Taking life in preservation of peace in place of business of defendant

The jury are instructed that, if the defendant was in charge and had control of the saloon in which the deceased lost his life, and during the time he had such control the deceased and any other person or persons, became engaged in an altercation, disturbance, or fight, the defendant had the right to demand peace in his place of business, and to use any lawful means to quiet such disturbance and to prevent the fight; but, in exercising his lawful right, he was not authorized to resort to the use of a deadly weapon to enforce his authority. If he was unable to preserve the peace in his place of business without resorting to the use of deadly weapons, then it was his duty to call upon the officers of the law to protect his rights and to take the combatants into custody. Or, when two or more persons are engaged in a fist fight, or combat, no third person has the right to kill one of such combatants to save the other from punishment or even death. A man is permitted, under proper conditions, to take human life in his own necessary self-defense, or in the defense of a member of his family, his parent, or servant; but he is not allowed such right in defense of a stranger, or one not related to him. One may also take the life of anoth-

[85] Bloom v. State, 58 N. E. 81, 155 Ind. 292.

[86] State v. Hollis, 93 S. E. 74, 108 S. C. 442.

er in attempt to prevent a forcible invasion of his dwelling house; but, if he is keeping a business place where the public have the right to go to patronize his business, he has no right to take human life in such a place except to preserve his own life or to prevent a felony being committed against his property in said place of business.[87]

§ 3009. Killing of deceased in resisting his attempt to enter home of another to see child of deceased

The court instructs the jury that, assuming that the deceased had a right to see the child, and had an equal right to its custody with the mother, he had no right to enforce his prerogatives with regard to the child by a violent intrusion into the house of another person. The law was open to him, and it would be very easy for him to have tested the right of possession, either by an attempt to remove his coguardian, if she were an improper person, or to let the court decide who, in regard to the best interests of the child, was the best person to have the custody of it.[88]

§ 3010. Killing to escape arrest

The jury are instructed that the question here is: Did defendant kill in defense of himself, to prevent his own life being taken, or to prevent great bodily harm arising to him by reason of the conduct of the officer in making the arrest, or did he do grave bodily injury with the intent of escaping arrest? To kill to escape arrest is not self-defense. The foundation of the right to take life by the way of self-defense is necessity. There must exist a necessity for resorting to violence for self-protection, and necessity for using the means that were used to secure the defense of the person. An accused is justified in using force to defend his person only when force is necessary to accomplish that end. If the injury apprehended could be otherwise avoided, the prisoner was bound to avoid the danger without resorting to violence; and, even if the circumstances be such as to require the use of force to repel the assault, he will be inexcusable if he carried his defense beyond the bounds of necessity. The danger must be immediate, and must be actual, or else apprehended on reasonable grounds, of which the jury is to judge. The accused could not make his judgment of the necessity of slaying the deceased in order to defend himself a justification of his act. Whether the necessity for taking life existed must be determined from the situation of the accused at the time, and it is the province and duty of the jury to determine that ques-

[87] Bance v. Territory, 105 P. 307, 3 Okl. Cr. 208.

[88] State v. Perkins, 91 A. 265, 88 Conn. 360, L. R. A. 1915A, 73.

tion. Now, the facts of the shooting are taken by you. Was the officer here, by any action of his own, in making this arrest, putting the life of the prisoner in danger, or doing that which would cause him great bodily injury, or was any of his acts in making the arrest such as to warrant an apprehension in the prisoner's mind that his life was in danger, or that grave bodily harm would come to him unless he used the pistol upon the officer, and which demanded of him the act of slaying the officer in order to protect his body from such danger? If the arrest was a lawful one, the officer had a right to use the force necessary to render the arrest effective; and if the prisoner, by his resistance to the arrest, brought violence upon himself, which put his body in danger, that cannot be made justification for killing the officer. His duty, the arrest being lawful, was to submit to arrest, if made with the use of no unnecessary force; and, if his resistance caused force to be applied, he cannot complain that sufficient force was used to render the arrest effective.[89]

§ 3011. Resistance by accused of arrest without warrant

§ 3011(1). Alabama

The jury are instructed that, if in this case the defendant knew and believed that the deceased and his party only intended to arrest him and carry him before ——— to answer the complaint to keep the peace, and to prevent this he killed the deceased, with what the law calls malice, as already explained to the jury, then he would be guilty of murder, notwithstanding such attempt of deceased to arrest defendant was unlawful, because not made under a warrant.[90]

§ 3011(2). West Virginia

The court further instructs the jury that if they believe from the evidence, beyond a reasonable doubt, that, at the time of the shooting of ——— by the accused, the said ——— was then and there a constable of ——— county, for ——— district, of said county, and that shortly before or at the time of said shooting the accused was in the presence of said ——— guilty of contending with angry words to the disturbance of the peace in said district, then such swearing was an offense under the laws of this state, which, if committed in the presence of such constables, was just legal cause for the arrest of the accused by said constable without a warrant.[91]

[89] Brown v. State, 42 A. 811, 62 N. J. Law, 666.

[90] Noles v. State, 26 Ala. 31, 62 Am. Dec. 711.

[91] State v. Clark, 63 S. E. 402, 64 W. Va. 625.

§ 3012. Killing in defense of property or in resisting attempted trespass by deceased

§ 3012(1). Mississippi

The court instructs the jury that if they believe from the evidence the sugar cane testified about was cane which had been banked on defendant's land by L. as the tenant of defendant, and that defendant forbade the said L. from removing said cane from the premises until such time as a settlement between the parties should be had, and that said L., together with the deceased, attempted to remove said cane from said premises without the consent of defendant, then such attempted removal amounted to a trespass, and defendant had the right to employ such reasonable force as might be necessary to prevent the trespass, and that in such case neither L. nor the deceased had the lawful right to resist such force. And if the jury believe that either L. or the deceased, or both, employed any means in resisting such force as was likely to produce death or to inflict great bodily harm on the defendant, then the defendant had the lawful right to meet such resistance; and if, in so doing, the defendant wounded the deceased by cutting him with a knife, from which wound the deceased died, such killing was justifiable, and the jury should find the defendant not guilty.[92]

§ 3012(2). Oklahoma

You are instructed that if you believe from the evidence, or have a reasonable doubt thereof, that the defendant was at the scene of the homicide and armed with a shotgun in pursuance of a lawful purpose of protecting his property, or was on his return from the performance of an act of protection to his property, then you are instructed that he had a lawful right to be there, and if under such circumstances he unexpectedly met up with the deceased at the place where the homicide occurred, and you further believe, or have a reasonable doubt thereof, that upon the approach of the deceased at the place that he, the deceased, without any act upon the part of the defendant showing a purpose to do bodily harm to the deceased did then and there, by some act upon his part then done, make it reasonably to appear to the defendant, judging from his standpoint, that it was the purpose and intent of the deceased to then and there kill the defendant or do him great personal injury, then the defendant under such circumstances had the right to shoot in his self-defense, and if he did so shoot and kill the deceased, under these circumstances, then you are instructed that the homicide is justifiable, and you should find him not guilty.[93]

[92] Boykin v. State, 38 So. 725, 86 Miss. 481.

[93] Turner v. State, 111 P. 988, 4 Okl. Cr. 164.

§ 3012(3). Texas

You are instructed that defendant had the right of possession to the dog as against every person except the true owner, and that even the true owner would not be authorized to go upon the premises of defendant's father and forcibly take away or remove the dog against the protest and remonstrances of defendant. In this case defendant had the legal possession of the dog, and had the right to use such force, and no more, as the surroundings show might have been necessary to repel the forcible seizure and removal of the property, and, if it became necessary, to slay the party or pretended owner making the seizure in order to prevent the removal of the dog, after all other means had failed, defendant would have had the right to do so, and if you should so believe you should acquit defendant.[94]

You are instructed that every person has the right to oppose force to force in the protection of property lawfully in his possession. And where one has property in his possession which he has raised as tenant on the land of another, under agreement to give to his landlord a portion thereof as rent, his possession thereof is lawful, and he has the right to defend his possession thereof against the landlord, opposing force to force for that purpose, unless such landlord be assisting a peace officer in taking the same, under authority of a writ of court or legal process. And a want of knowledge that the landlord is acting with the authority of such writ or process would, if the landlord attempted to take by force or violence the property from the possession of the tenant, excuse the tenant in opposing force to force to prevent the taking from his possession, and in slaying the landlord, if necessary, or if reasonably appearing necessary, in order to prevent the taking, or in protecting his own person from injury or death which reasonably appears to menace him as an accompaniment of the taking. But in every case where one acts in defending his possession of property, as distinguished from his protection of his life or of his person from great bodily injury, before the person in possession would be justified in killing the other or excused therefor, every other effort in his power must have been used to repel the aggression. However, one may, in the defense of his property, be placed in such position as to become himself in danger or apparent danger of death or serious bodily injury, in which case the rule stated in the previous section as to defense of person would apply to his case as though the question had been in the first instance a question of self-defense. So, if you believe from the evidence that defendant killed the said ———, but further believe that, from the standpoint of defendant, it ap-

[94] Weaver v. State (Cr. App.) 76 S. W. 564.

peared necessary at the time to kill the said ——— as the only means of protecting the possession of his property from a forcible taking, and that the defendant had no knowledge of the fact, if true, that deceased and his companion, or the latter of them, had legal process authorizing them to take forcible possession of said cotton, then you will acquit the defendant.[95]

You are instructed that, if you believe from the evidence that defendant agreed with deceased that at a future time he would deliver possession of the personal property then in his possession, and claimed by him and Mrs. ———, and the premises where he then resided, to deceased, as the agent of the said Mrs. ———, but, before the time appointed for such delivery of possession of such personal property and premises arrived, defendant, after taking legal advice, decided not to surrender such personal property and premises to deceased, and thereafter, and up to and at the time of the killing of deceased, remained in possession of said personal property and premises, his right to possession of such personal property and premises would not be impaired, and he would be regarded in law as still in the lawful, actual possession of same.[96]

You are instructed that, if you believe from the evidence that defendant was put into possession of the premises upon which deceased, ———, was killed, by Mrs. ———, who was, at the time of placing the said defendant in possession of same, in possession of same herself, as the survivor of the community estate of herself and her deceased husband, under a contract or agreement with the said defendant whereby the said defendant was to take charge of said premises and the stock thereon, and to cultivate the farm on said premises and to take care of the said stock, and to have the proceeds of said farm and the profits arising from said stock, in consideration of his taking care of and supporting her, the said Mrs. ———, during her lifetime, and that the said defendant took possession of said premises and stock under said contract, and remained in such possession of same up to and at the time of the killing of the said deceased, then defendant was in the lawful, actual possession of said premises at the time of the killing of said deceased; and if you believe from the evidence that said deceased undertook to go into the yard or house upon said premises without the consent of defendant, and against his remonstrances, and, after defendant had remonstrated with him against coming into said yard or house, drew a deadly weapon, and from the acts of deceased, or from such acts coupled with the words of deceased, it reasonably appeared to defendant that his life was in danger, or that he was in danger of serious bodily injury, viewed from defendant's standpoint,

[95] Howell v. State (Cr. App.) 60 S. W. 44.

[96] McGlothlin v. State (Cr. App.) 53 S. W. 869.

and no other, and that while such danger, actual or apparent, was imminent and pending, defendant shot and killed deceased, you will find defendant not guilty.[97]

You are further charged that deceased had no right to forcibly take, or attempt to take, the pistol in defendant's own house, and in the possession of defendant; and if you find from the evidence that he so attempted to take said pistol, if any, in the possession of defendant, then defendant had the right to use such force as necessary to prevent such forcible taking; and if, in such forcible taking by deceased, or attempt to take same, defendant (viewed from his own standpoint) believed he was in danger of serious bodily harm, and under this belief killed deceased, then you will acquit him.[98]

§ 3013. Homicide in defending rightful possession of land

The jury are instructed that, if the jury find from the evidence that the defendant had rented the stock field, referred to in the testimony, from ——— and ———, and was in possession of the same, then the deceased would not have the lawful right to eject the defendant therefrom by force of arms. And if you further find from the evidence that the deceased attempted to take the possession of said stock field from the defendant with force of arms, under such circumstances as reasonably indicated to defendant that it was the purpose of the deceased to use deadly weapons in obtaining possession of said stock field, then defendant had the legal right to meet force with force, and if the deceased by any act then done manifested an intention to kill defendant or to inflict serious bodily injury upon him, then the defendant had the legal right to kill the deceased; and if you so find, you will acquit the defendant. If the jury believes from the evidence that defendant was in his own field and on his own premises, and that he was advised that the deceased had threatened to take possession of his property by force, and in good faith believed, as a reasonable man, that deceased intended to kill him or do him great bodily injury in order to get possession of the field, and whilst so in his own field deceased came there and undertook to enter the field by tearing down the fence, and in a violent threatening manner reached for his pistol, and with said pistol partly drawn in a threatening manner undertook to enter the field where defendant was, and that defendant believed, as a reasonable man, that deceased intended to kill him or do him great bodily injury, and acting under the influence of said belief, whilst deceased was so endeavoring to enter the field, defendant killed him (deceased), the killing would be justifiable.[99]

[97] McGlothlin v. State (Cr. App.) 53 S. W. 869.

[98] Hopkins v. State (Cr. App.) 53 S. W. 619.

[99] Driggers v. United States, 95 P. 612, 21 Okl. 60. 129 Am. St. Rep. 823, 17 Ann. Cas. 66.

You are instructed that a man may use force to defend his real or personal property, in his actual possession, against one who endeavors to dispossess him without right, taking care that the force used does not exceed what reasonably appears to be necessary for the purpose of defense and prevention. But in the absence of an attempt to commit a felony, he cannot defend his property, except his habitation, to the extent of killing the aggressor for the purpose of preventing a trespass; and if he should do so, he would be guilty of a felonious homicide. Life is too valuable to be sacrificed solely for the protection of property. Rather than slay the aggressor to prevent a mere trespass, when no felony is attempted, he should yield, and appeal to the courts for redress. You are instructed that, although you may believe from the evidence that the deceased had rented the lands in controversy, and was entitled to the possession thereof, still he was not justified in driving his cattle thereon, or taking possession of the land by force, if the same was in the actual possession of the defendant. But the court would instruct you that an attempt of the deceased to drive his cattle on the premises would not of itself be a felony. If you believe from the evidence beyond a reasonable doubt that the defendant, either by himself, or acting with others, armed himself, and had others with him who were armed, for the purpose of going to the stock field in question and preventing the deceased from driving the cattle into said stock field, and that his purpose in being so armed was to prevent an entry into said stock field on the part of the deceased with said cattle, and if you further believe that it was his purpose and intention in being thus armed and present at said place to make an assault upon and kill the deceased, or otherwise attempt to injure him with a deadly weapon, if the deceased attempted to drive said cattle into said stock field, and in pursuance of said purpose he did shoot at and others acting with him did shoot and kill the deceased, then in such case such act upon the part of the defendant, if the deceased was thereby killed, is murder, although you may believe that the deceased was fired upon and his death ensued thereafter by reason of the fact that he may have attempted to pull down the fence for the purpose of entering the said cattle.[1]

§ 3014. Killing under erroneous belief that deceased is stealing property of defendant

You are instructed that homicide is permitted by law when inflicted for the purpose of preventing theft at night when the killing takes place under the following circumstances: It must reasonably

[1] Driggers v. United States, 95 P. 612, 21 Okl. 60, 129 Am. St. Rep. 823, 17 Ann. Cas. 66.

appear by the acts or by words coupled with the acts of the person killed that it was the purpose and intent of such person to commit the offense of theft at night. In cases of theft by night, the homicide is justifiable at any time, while the offender is at the place where the theft is committed, or is within reach of gunshot from such place. You are instructed that, if a person laboring under a mistake as to a particular fact shall do an act which would otherwise be criminal, he is guilty of an offense. The mistake as to fact which will excuse, as explained above, must be such that the person so acting under a mistake would have been excusable had his conjecture as to the fact been correct; and it must also be such mistake as does not arise from a want of proper care on the part of the person committing the offense. Now, bearing in mind the foregoing instructions, if you find from the evidence that the defendant believed that the deceased or some other person was stealing his corn at night, and he killed deceased while in reach of gunshot from the place where he believed his corn had been taken from, or while deceased or some other person had possession of such corn, and that such belief on the part of defendant did not arise from want of proper care on the part of defendant and you are satisfied that under such conditions the defendant shot with a gun and thereby killed ———, then, if you so find, you will return a verdict of not guilty. And, in connection with the foregoing paragraph of this charge, you are instructed that it would make no difference whether deceased or any other person had in fact stolen defendant's corn, if you find that defendant believed such to be the case, and you further find that such belief, if erroneous, did not arise from the want of proper care on the part of defendant to ascertain whether or not deceased or some other person had in fact stolen his corn, and was trying to carry it away at the time deceased was killed.[2]

§ 3015. Bad reputation of deceased or character of deceased for violence

§ 3015(1). Alabama

You are instructed that if the deceased was a violent, dangerous man, this did not authorize the defendant to kill him. If, at the time the fatal shot was fired, the deceased was going from the defendant, and was making no demonstration to injure the defendant, and if the defendant had no reasonable ground to believe the deceased was about to kill him, or seriously injure him, then such character offered the defendant no excuse for killing the deceased.[3]

[2] Joy v. State, 123 S. W. 584, 57 Tex. Cr. R. 93.

[3] Harrison v. State, 40 So. 568, 144 Ala. 20.

§ 3015(2). Georgia

You are instructed that proof of the violent and turbulent character of the deceased is admissible only when it is shown prima facie that the deceased was the assailant, that the accused had been assailed, and that the defendant or defendants were honestly seeking to defend himself or themselves. But if you find from the evidence that the defendants were the aggressors, and that the defendants overtook the deceased, and one of them began or entered into a difficulty with the deceased, with a preconceived intent of having a difficulty, or began the attack, without provocation from the deceased, if he was a bad character, then the bad character of the deceased would not offer the defendant any excuse for taking his life, if he or they took his life; for it is the same offense to kill a bad person as it is to kill a good person.[4]

§ 3015(3). Oklahoma

You are instructed that neither threats of themselves, nor the bad reputation of the deceased, if he had such a reputation, will justify the homicide in this case, if you believe beyond a reasonable doubt that the defendants, or either of them, were the agressors, or that they entered voluntarily into the conflict.[5]

§ 3016. Threats of deceased as justification for killing

§ 3016(1). Alabama

You are instructed that the fact, if it be a fact, that the deceased threatened to white-cap or whip the defendant is no excuse under the law, for the defendant, if you are satisfied that he unlawfully killed the deceased.[6]

The court charges the jury that the mere fact, if it be a fact, that the deceased made threats against the defendant, would not of itself be sufficient to justify the defendant in taking ———'s life.[7]

§ 3016(2). Missouri

You are instructed that threats alone will not justify an assault. But if you should believe from the evidence that the deceased had before the killing made threats against the defendant, and that the deceased renewed the difficulty after having once withdrawn therefrom, if he did so withdraw, and did any act or said anything which indicated a purpose on his part to then carry said threats into execution by killing the defendant or doing him some great bodily harm, then you may take such threats into consideration, together with all the other circumstances proven, in determining the purpose of the deceased, and the reasonableness of the

[4] Crawley v. State, 74 S. E. 537, 137 Ga. 777.

[5] McDaniel v. State, 127 P. 358, 8 Okl. Cr. 209.

[6] Gregory v. State, 37 So. 259, 140 Ala. 16.

[7] Gregory v. State, 42 So. 829, 148 Ala. 566; Gregory v. State, 37 So. 259, 140 Ala. 16.

defendant's apprehensions, if he had any, of his safety at the time of the killing. But the jury are further instructed that even if the deceased had made threats against the defendant, still he had the right at all times to be upon any public street or thoroughfare in the orderly transaction or conduct of his business; and if, while so conducting himself, he did not seek or bring on the difficulty which resulted in his death, but the defendant was the aggressor, then any threats made by deceased do not constitute any excuse or justification of the defendant for the killing of deceased.[8]

§ 3016(3). West Virginia

The jury are instructed that, if they believe from the evidence that the prisoner was seeking to slay his adversary, he was not justified therein by previous threats or acts of hostility, however violent they might be.[9]

§ 3017. Provocation as justifying or excusing homicide

You are instructed that no provocation whatever can render a homicide justifiable, or even excusable. The lowest grade to which it can reduce homicide is manslaughter, and, if the prisoner killed the deceased suddenly, without any, or without considerable, provocation, the law implies malice, and the killing is murder.[10]

§ 3018. Insulting words and conduct

§ 3018(1). Missouri

The court instructs the jury that no words, or epithets, however opprobrious or insulting, can justify the killing of the party who uses them.[11]

§ 3018(2). Nevada

You are instructed that no provocation can justify or excuse homicide, but may reduce the offense to manslaughter. Words or actions, or gestures, however grievous or provoking, unaccompanied by an assault, will not justify or excuse murder; and, when a deadly weapon is used, the provocation must be great to make the crime less than murder.[12]

§ 3018(3). Oklahoma

You are instructed that neither insulting words, nor insulting conduct or epithets, nor assaults previously made—that is, anterior to the actual time of the killing—had and done to the defendant at other and different places than at the scene of the homicide, nor insulting epithets, no matter how opprobrious, at the time of the killing, will justify or mitigate a homicide.[13]

[8] State v. Hudspeth, 60 S. W. 136, 159 Mo. 178.

[9] State v. Allen, 30 S. E. 209, 45 W. Va. 65.

[10] Hodges v. Commonwealth, 15 S. E. 513, 89 Va. 265.

[11] State v. Hudspeth, 60 S. W. 136, 159 Mo. 178.

[12] State v. Milosovich, 175 P. 139, 42 Nev. 263.

[13] Brantley v. State, 175 P. 51, 15 Okl. Cr. 6.

The court instructs the jury that words spoken, no matter how vile or opprobrious, unaccompanied by other demonstrations which would cause a reasonable belief in the mind of the defendant that the deceased was about to do him some great personal injury, would not justify the defendant in shooting the deceased or in inflicting on the deceased any personal injury.[14]

§ 3019. Unfaithfulness of deceased as wife of defendant

The court instructs the jury that the letters which have been introduced in evidence in this case do not furnish any lawful excuse or justification for the killing of the deceased. Nor would the fact, if it is a fact, that ——— had been unfaithful to the defendant, be any lawful excuse or justification for such killing. The letters are admitted in evidence as a circumstance bearing upon the issue as to the sanity of the defendant at the time of such killing.[15]

§ 3020. Justification on ground of duress

The jury are instructed that the law will not excuse a criminal act because committed under the influence of fear, unless it clearly appears that such fear was founded upon some reasonable ground. No duress will excuse from punishment, unless it be an actual compulsion by the use of force. The duress of compulsion must consist in such force exercised towards the person as puts him in present fear of death or great bodily harm. Threats of future injury will not excuse. A threat to take one's life at some future time, unless the person so threatened commit or aid in the commission of the felony, is quite insufficient to excuse the commission of a felony by the person so threatened. No man, from fear of some future consequences to himself, has the right to make himself a party to the commission of the crime of murder; and I charge you in this case, gentlemen, that, under the testimony of defendant and the evidence in this case, no such state of facts exists as to coercion or duress used as would justify defendant in participating in the commission of this crime. A mere threat that, if he did not go at a future time and aid in the commission of the murder there, he would be killed, would not be sufficient.[16]

1. Pleading and Proof

§ 3021. Proof of name of deceased as alleged

The court charges the jury that they must believe beyond a reasonable doubt that the deceased's name was ——— before you can convict the defendant.[17]

[14] Robinson v. Territory, 85 P. 451, 16 Okl. 241.

[15] People v. Casey, 83 N. E. 278, 231 Ill. 261.

[16] People v. Repke, 61 N. W. 861, 103 Mich. 459.

[17] Stallworth v. State, 41 So. 184, 146 Ala. 8.

§ 3022. Included offenses

§ 3022(1). Alabama

Under the instructions I have given you as to what constitutes murder in its several degrees and manslaughter in its several degrees, the defendant, if guilty at all, under the evidence in this case, would be guilty of either murder in the first degree, murder in the second degree, or manslaughter in the first degree, or guilty of nothing, as you may determine.[18]

§ 3022(2). Louisiana

The jury are instructed that, in all cases where the charge of murder is preferred, the jury can, under the law, return a verdict for manslaughter.[19]

The jury are instructed that the punishment denounced by law for murder in this state is death, but juries are permitted, when they see proper, to qualify their verdicts by saying that the punishment is reduced to imprisonment for life at hard labor. So there are four verdicts you might render in this case, viz.: "Guilty as charged," which means that the death penalty is imposed; "Guilty without capital punishment," which means that the prisoner would be imprisoned at hard labor for life; "Guilty of manslaughter," and "Not guilty." [20]

§ 3022(3). Nebraska

You are instructed that the crime of murder in the second degree and manslaughter are not included in the crime charged in the second count of the information. There are only one of two verdicts that can be rendered by the jury upon the second count, under the law and the evidence, to wit, that you find the defendant guilty of murder in the first degree, in manner and form as charged in the second count, or that you find the defendant not guilty.[21]

You are instructed that, in prosecutions on an information for murder in the first degree, if the evidence fails to sustain the charge of murder in the first degree the jury may, under such information, if the evidence shall justify and warrant it under the law now given you, find the defendant guilty of murder in the second degree, or manslaughter, as the case may be.[22]

§ 3022(4). Oregon

You are instructed that the jury is not restricted in this class of cases to the determination of whether or not the defendant is

[18] Thomas v. State, 86 So. 734, 139 Ala. 80.

[19] State v. Cook, 41 So. 434, 117 La. 114.

[20] State v. Thomas, 23 So. 250, 50 La. Ann. 148.

[21] Morgan v. State, 71 N. W. 788, 51 Neb. 672. The crime charged in the second count was murder in the perpetration of a rape.

[22] Davis v. State, 70 N. W. 984, 51 Neb. 301.

guilty of the crime charged in the indictment, but you must determine whether or not, if not guilty as charged, the defendant is guilty of any crime included in the crime charged. Therefore I instruct you that it is possible in this case for you to find one of four verdicts—murder in the first degree, murder in the second degree, manslaughter, or not guilty.[23]

J. EVIDENCE

§ 3023. Presumptions and burden of proof—Perpetrator of crime

You are instructed that it is not the duty of the defendant to prove himself innocent, nor is it necessary that he should show who killed ———. On the contrary, it is incumbent upon the state to prove beyond a reasonable doubt that the defendant was the person who did the killing; and, unless the state has so shown by the evidence beyond a reasonable doubt, you must acquit the defendant.[24]

You are instructed that if from a consideration of all the evidence in this case the jury entertains a reasonable doubt as to whether the killing of ——— was done by the defendant, or by some other person or persons without the knowledge of the defendant, then it is the duty of the jury to acquit the defendant.[25]

§ 3024. Presumptions with respect to intention and malice

The court instructs the jury that the intention of the accused at the time of the killing, is to be ascertained by the jury upon the evidence, and cannot be made the subject of legal presumption or inference.[26]

The court instructs the jury that malice is not a presumption of law, but a fact for the jury to determine from the evidence, under the instructions of the court.[27]

§ 3025. Presumption that one intends the usual and natural consequences of his acts

§ 3025(1). New York

The jury are instructed that, if the defendant, while in the possession of his faculties sufficiently to conceive a design, voluntarily and willfully did an act which had a direct tendency to destroy another's life, the jury would have the right to presume from that fact that he intended the natural consequences of his own act.[28]

[23] State v. Crockett, 65 P. 447, 39 Or. 76.

[24] Jenkins v. State, 134 P. 260, 22 Wyo. 34.

[25] Jenkins v. State, 134 P. 260, 22 Wyo. 34.

[26] Young v. People, 130 P. 1011, 54 Colo. 293.

[27] Young v. People, 130 P. 1011, 54 Colo. 293.

[28] People v. Fish, 26 N. E. 319, 125 N. Y. 136.

§ 3025(2). Ohio

The jury are instructed that the law presumes that a rational man, being free to choose and capable of choosing between right and wrong intends the natural consequences of his acts. The purpose and intent to kill in general, is proved by the circumstances, by what the party does and says, the manner of inflicting the wound, the instrument used, and its tendency to destroy life. If such instrument is palpably calculated to take life, it may be presumed that he so intended.[29]

§ 3025(3). Oklahoma

Upon the question of intent the court instructs the jury that the law presumes a person intends all the natural, probable, and usual consequences of his act; and this presumption of law will always prevail, unless from a consideration of all the evidence bearing upon the point the jury entertain a reasonable doubt whether such intention did exist.[30]

§ 3025(4). West Virginia

The court instructs the jury that a man is presumed to intend that which he does or which is the immediate or necessary consequence of his act.[31]

§ 3026. Presumption of intent or malice where killing by defendant is established or admitted

§ 3026(1). Alabama

You are instructed that malice is an inferential fact; that is, it may be inferred from facts and circumstances positively proven, but the measure of proof must be so full as to exclude every other reasonable hypothesis. It is the province of the jury to ascertain its existence. Whenever it is proven beyond a reasonable doubt that one person has taken the life of another with a deadly weapon, the law presumes that it was done with malice, and imposes upon the slayer the burden of rebutting this presumption, unless the evidence which proves the killing shows it to have been done without malice.[32]

§ 3026(2). Arizona

You are instructed that, if you find from the evidence that the defendant fired the fatal shot, then the burden of proving the circumstances of mitigation, or that justify or excuse the homicide, devolves upon the defendant, unless the proof upon the part of the prosecution tends to show that the crime committed only amounts

[29] Carr v. State, 21 Ohio Cir. Ct. R. 43.

[30] Wells v. Territory, 78 P. 124, 14 Okl. 436.

[31] State v. Dickey, 37 S. E. 695, 48 W. Va. 325.

[32] Murphy v. State, 71 So. 967, 14 Ala. App. 78.

to manslaughter, or that the defendant was justifiable or excusable.[33]

§ 3026(3). Arkansas

The court instructs the jury that, the killing being proven, the burden of proving circumstances of mitigation or circumstances that justify or excuse the homicide, devolves on the accused, unless by proof on the part of the prosecution it is sufficiently manifest that the offense only amounted to manslaughter, or that the accused was justified or excused in committing the homicide.[34]

§ 3026(4). California

You are instructed that, upon a trial for murder, if the commission of the homicide by the defendant is proved to a moral certainty and beyond a reasonable doubt, then it devolves upon the defendant to prove circumstances of mitigation or that justify or excuse the act, unless the proof on the part of the prosecution tends to show that the crime only amounts to manslaughter, or that the defendant was justifiable or excusable. This does not mean that he must prove such circumstances by a preponderance of the evidence. He is only bound under this rule to produce such evidence as will create in your minds a reasonable doubt as to whether there were circumstances of mitigation, or that justify or excuse the act.[35]

You are instructed that, upon a trial for murder, the commission of the homicide by the defendant being proved, the burden of proving circumstances of mitigation, or that justify or excuse it, devolves upon him, unless the proof on the part of the prosecution tends to show that the crime committed only amounts to manslaughter, or that the defendant was justifiable or excusable.[36]

§ 3026(5). Connecticut

You are instructed that, if you find the accused unlawfully killed ——— in the manner charged (that is, not in self-defense, as claimed), and you find there were then present at the time of the killing no circumstances reducing the crime to manslaughter, the law presumes malice, and that the crime committed was murder.[37]

§ 3026(6). Delaware

The court instructs the jury that whether there is any evidence in this case to satisfy you that there was malice, either express or

[33] Foster v. Territory, 56 P. 738, 6 Ariz. 240.

[34] Hines v. State, 215 S. W. 735, 140 Ark. 13; Scoggin v. State, 159 S. W. 211, 109 Ark. 510; Caughron v. State, 139 S. W. 315, 99 Ark. 462.

[35] People v. Wilt, 160 P. 561, 173 Cal. 477.

[36] People v. Grill, 91 P. 515, 151 Cal. 592. This instruction is applicable in any case where defendant offers evidence in mitigation of offense, or in justification or excuse.

[37] State v. Bailey, 65 A. 951, 79 Conn. 589.

implied, is one of the questions for you to determine. Malice is implied by law from every deliberate cruel act committed by one person against another, no matter how sudden such act may be; for the law considers that he who does a cruel act voluntarily does it maliciously. And whenever the act from which death ensues is proven by the prosecution, unaccompanied by circumstances of justification, excuse, or mitigation, the law presumes that the homicide was committed with malice; and it is thereupon incumbent upon the prisoner to show by evidence that the killing was not malicious and therefore does not amount to murder.[38]

§ 3026(7). Georgia

In cases of homicide, I charge you further that where the killing is shown to have been by the defendant on trial by the use of a deadly weapon, beyond a reasonable doubt, or is admitted, and all the evidence adduced to establish it shows neither mitigation nor justification nor excuse, it will be presumed that there was malice on the part of the slayer and that the killing was murder; but this presumption is a rebuttable one, and may be overcome by evidence of excuse, or alleviation, or justification. In other words, the law presumes every homicide resulting from the use of a deadly weapon to be felonious, until the contrary appears from circumstances of excuse or justification or alleviation; and it is incumbent upon the defendant to make out such circumstances to the satisfaction of the jury, unless they should arise out of the evidence produced against him.[39]

You are instructed that, when a homicide is proved, the presumption is that the killing is murder, and that it is for the defendant to show justification, or to reduce the offense to a lower grade; and it is incumbent on the prisoner to show this to the satisfaction of the jury, unless it is shown from the evidence produced against him.[40]

You are instructed that, when a homicide is proved (that is, a killing), the law presumes malice, and, unless the evidence should relieve the slayer, he would be guilty of murder.[41]

§ 3026(8). Idaho

You are instructed that in every crime or public offense there must exist a union or joint operation of act and intent or criminal negligence. When the act committed by the accused was of itself an unlawful act, the law, in the first instance, presumes the crim-

[38] State v. Lee, 74 A. 4, 1 Boyce, 18.

[39] McBride v. State, 102 S. E. 865, 150 Ga. 92.

[40] Fitzpatrick v. State, 99 S. E. 128, 149 Ga. 75. This instruction is proper, where there are two conflicting theories of fact, one based on circumstances indicating malice and the other negativing malice.

[41] Dorsey v. State, 35 S. E. 651, 110 Ga. 331.

inal intent, and the onus or burden of proof falls upon the defendant to show absence of criminal intent; and in this case, if you find from the evidence that the defendant shot the deceased, then the burden of proving circumstances of mitigation, or that justify or excuse the homicide, devolves upon the defendant, unless the proof on the part of the prosecution tends to show that the crime committed only amounts to manslaughter, or that the defendant was justifiable or excusable.[42]

§ 3026(9). Illinois

The court instructs you that, the killing being proved, the burden of producing sufficient evidence to raise in the minds of the jury a reasonable doubt in defendant's favor of the existence of facts or circumstances of mitigation, or that justify or excuse the homicide, will devolve on the accused, unless the proof on the part of the prosecution sufficiently manifests that the crime committed only amounts to manslaughter, or that the accused was justified or excused in committing the homicide.[43]

The jury are instructed that it is not necessary for the state to offer any direct evidence of the intent to kill in order to establish the crime of murder; that a sane person is presumed to intend the natural, ordinary, and probable results of all acts intentionally done, and that if the jury believe, from the evidence, beyond a reasonable doubt, that the defendant was sane at the time he made the assault, and he willfully and intentionally shot ———, and the shooting was without lawful excuse or justification, and she died as a result, then they might find that the accused intended to kill her.[44]

The jury are instructed that, the killing being proved, the burden of proving circumstances that justify or excuse the homicide will devolve upon the accused, unless the proof on the part of the prosecution sufficiently manifests that the accused was justified or excused in committing the homicide.[45]

§ 3026(10). Montana

The jury are instructed that, the killing being proved, the burden of proving circumstances of mitigation, or that justify or excuse the homicide, will devolve on the accused unless the proof on the part of the prosecution sufficiently manifest that the crime

[42] State v. Lyons, 64 P. 236, 7 Idaho, 530.

[43] People v. Casey, 83 N. E. 278, 231 Ill. 261. In this case the defense of insanity was interposed, and as against the objection that this instruction should not be given in such a case the court said that there was nothing in the instruction inconsistent with the principles that should govern and control when such a defense is set up. In other instructions the rule was laid down that if, upon the whole evidence, the jury had a reasonable doubt as to defendant's sanity, they must acquit him.

[44] People v. Casey, 83 N. E. 278, 231 Ill. 261.

[45] Duncan v. People, 24 N. E. 765, 134 Ill. 110.

committed only amounts to manslaughter, or that the accused was justified or excused in committing the homicide.[46]

§ 3026(11). North Carolina

You are instructed that when the killing is admitted by the prisoner, or shown by the state, it is incumbent upon the prisoner to satisfy the jury of facts and circumstances sufficient to mitigate the offense to manslaughter or to excuse the killing of the deceased, unless they arise out of the evidence against him. The court has already charged that there is not sufficient evidence of such mitigating or excusing circumstances; that is, that there is no evidence of manslaughter or self-defense.[47]

§ 3026(12). Oklahoma

You are instructed that the defendant in this case is presumed to be innocent of the crime charged in the indictment, and this is a presumption of law that remains with him and is thrown around him for his protection up to the moment when the killing is proved or admitted. When the killing is proved or admitted by defendant and the plea of self-defense is interposed, as in this case, it then devolves upon defendant to show any circumstances of mitigation to excuse or justify it by some proof strong enough to create in the minds of the jury a reasonable doubt of his guilt of the offense charged, unless the proof on the part of the state shows that the defendant was justified in doing the act.[48]

§ 3026(13). South Carolina

The jury are instructed that, if you could suppose a case where it was evident that one person had intentionally killed another, and no other fact about it was evident or known, the law would imply malice from the intentional killing.[49]

§ 3026(14). Washington

You are instructed that, if the killing of one human being by another is proven beyond a reasonable doubt, the presumption of law is that it is murder in the second degree. If the defendant seeks to justify the acts in such case, the burden is upon the defendant so to do.[50]

§ 3026(15). West Virginia

The court instructs the jury that, where a homicide is proven, the presumption is that it is murder in the second degree, and the burden is on the state of showing that it is murder in the first de-

[46] Territory v. Manton, 19 P. 387, 8 Mont. 95.

[47] State v. Cameron, 81 S. E. 748, 166 N. C. 379.

[48] Culpepper v. State, 111 P. 679, 4 Okl. Cr. 103, 31 L. R. A. (N. S.) 1166, 140 Am. St. Rep. 668.

[49] State v. McDaniel, 47 S. E. 384, 68 S. C. 304, 102 Am. St. Rep. 661.

[50] State v. Duncan, 172 P. 915, 101 Wash. 542.

gree, and upon the accused of showing that it was without malice, and is therefore only manslaughter, or that he acted lawfully, and is therefore not guilty, and in arriving at a verdict in this case the jury should take into consideration all the evidence and circumstances in the case that were given both for the state and the defendant.[51]

The court instructs the jury that a man is presumed to intend that which he does, or which is the immediate or necessary consequence of his act; and if the prisoner, with a deadly weapon in his possession, without any, or upon very slight, provocation, gives to another a mortal wound, the prisoner is prima facie guilty of willful, deliberate, and premeditated killing, and the necessity rests upon him of showing the extenuating circumstances, and unless he proves such extenuating circumstances, or the circumstances appear from the case made by the state, he is guilty of murder in the first degree.[52]

§ 3027. Presumption of intent from deliberate killing

Before coming to consider more directly the question of premeditation and deliberation, it is perhaps desirable, as leading up to that consideration, that we examine one or two other points which present themselves. Was there any design on the part of the defendant to kill this man, ———, and does the evidence in the case furnish any motive for such design on his part? It has been said, and very properly, in your hearing, that where a man, who is in possession of his faculties, deliberately takes the life of another, the law presumes that he intended the natural consequences of his act; and therefore, if you find that the defendant did take the life of ——— in such a manner and under such circumstances as to show deliberation, the presumption arises at once that he intended to take his life as he did. The law raises that presumption against the defendant, provided you shall find that he was in the possession of his faculties, and that he took the life of ——— with premeditation and deliberation.[53]

§ 3028. Presumption as to intent from character of weapon used

The jury are instructed that, if you believe that deceased attacked defendant with a knife in such manner as was reasonably calculated to produce death or serious bodily injury, then the law presumes, and you will presume, that deceased intended to kill or seriously injure the defendant.[54]

The jury are instructed that, if you believe from the evidence

[51] State v. Stewart, 60 S. E. 591, 63 W. Va. 597.

[52] State v. Welch, 15 S. E. 419, 36 W. Va. 690.

[53] People v. Fish, 26 N. E. 319, 125 N. Y. 136.

[54] Shed v. State, 153 S. W. 125, 68 Tex. Cr. R. 373.

beyond a reasonable doubt that the defendant killed ——— by striking him on the head with a baseball bat with his express malice aforethought, as defined in the ——— subdivision of this charge, and that the bat as used was likely to produce death or serious bodily injury, you will find him guilty of murder in the first degree, and assess his punishment at death or confinement in the penitentiary for life.[55]

You are instructed that the instrument or means by which a homicide is committed are to be taken into consideration in judging the intent of the party offending. If the instrument be one not likely to produce death, it is not to be presumed that death was designed, unless from the manner in which it was used such intention evidently appears.[56]

§ 3029. Presumption of intent or malice from use of deadly weapon

§ 3029(1). United States

You are instructed that defendant is held to have intended whatever consequences might have followed from the act as willfully done by him with the deadly weapon. You, in other words, to find intent, take the circumstances. You take the character of the act done, the manner in which it was executed, the weapon used in executing it, the part of the body upon which it was executed, the very result produced by that act upon that vital part of the body known as the head. These are all circumstances that it is your duty to take into consideration to find whether the party intended to kill deceased or not.[57]

§ 3029(2). Alabama

The jury are instructed that the law presumes malice from the use of a deadly weapon; that is, malice may be presumed from the use of a deadly weapon, unless the evidence which proves the killing rebuts that presumption of malice. If the killing is produced by a deadly weapon, such as a pistol, the law authorizes the jury to presume malice from the killing, unless the evidence which proves the killing shows also that it was done without malice.[58]

You are instructed that if, from the evidence in this case, you find beyond a reasonable doubt that defendant, in this county, before the finding of this indictment in this case, shot deceased with a pistol, and that this shooting was done wrongfully, without justification, and was done maliciously, and you further find that said wounds so inflicted contributed to the death of deceased, that is,

[55] Thomas v. State, 125 S. W. 35, 57 Tex. Cr. R. 452.

[56] Johnson v. State, 93 S. W. 735, 49 Tex. Cr. R. 429; Perrin v. State, 78 S. W. 930, 45 Tex. Cr. R. 560.

[57] Acers v. United States, 17 S. Ct. 91, 164 U. S. 388, 41 L. Ed. 481.

[58] Caldwell v. State, 84 So. 272, 203 Ala. 412.

by bringing about the condition that caused deceased to die, then defendant would be guilty of murder of deceased; and in determining whether the shooting was maliciously done I charge you that malice on the part of defendant towards the deceased may be inferred from the shooting of the pistol, unless the evidence which shows the shooting with a pistol shows it was used without malice, but the court instructs in this connection that such inference is a rebuttable one.[59]

You are instructed that in case of homicide the law presumes malice from the use of a deadly weapon, and casts on the defendant the onus of repelling the presumption, unless the evidence which proves the killing shows also that it was perpetrated without malice; and whenever malice is shown, and is unrebutted by the circumstances of the killing or by other facts in evidence, there can be no conviction for any less degree of homicide than murder.[60]

§ 3029(3). Arizona

You are instructed that, where it is shown that a homicide has been committed with a deadly weapon, and no circumstances of mitigation, justification, or excuse appear, the law implies malice. The malice thus implied is that malice aforethought which is necessary to sustain an indictment for murder.[61]

§ 3029(4). California

You are instructed that a person must be supposed to mean to do that which he actually, intentionally, and willfully does in fact do, and must also be presumed to intend all the probable and natural consequences of his voluntary act. Therefore, if you believe from the evidence beyond a reasonable doubt that defendant deliberately and intentionally fired a gun at deceased, it will be presumed that he did so willfully and with malice aforethought, and should such person thus shot at die from the wounds thereby inflicted within a year and a day thereafter, it would be murder, unless the evidence on the part of the prosecution tends to show that the crime committed amounted only to manslaughter, or the evidence in the case shows that the accused was legally justified or excusable in the commission of such homicide.[62]

The jury are instructed that a person must be presumed and is presumed to intend to do that which he voluntarily and willfully does in fact do, and must also be presumed to intend all the natural, probable and usual consequences of his own acts, and therefore,

[59] Murphy v. State, 71 So. 967, 14 Ala. App. 78.

[60] Watson v. State, 46 So. 232, 155 Ala. 9; Sherrill v. State, 35 So. 129, 138 Ala. 3; Jarvis v. State, 34 So. 1025, 138 Ala. 17; Bondurant v. State, 27 So. 775, 125 Ala. 31.

[61] Halderman v. Territory, 60 P. 876, 7 Ariz. 120.

[62] People v. Wong Hing, 151 P. 1159, 28 Cal. App. 230.

if one person assails another violently with a dangerous weapon likely to kill, and which does in fact destroy the life of the person assailed, the natural presumption is that such assailant intended death, or other great bodily harm. In the absence of evidence to the contrary this presumption must prevail.[63]

§ 3029(5). Colorado

The court instructs the jury, as to the question of intent, that it devolves upon the people to prove that intent to your satisfaction, beyond a reasonable doubt, but such intent need not be proved by direct and positive evidence. If a sane person uses upon the body of another a deadly and dangerous weapon from which death may result, you are at liberty to presume that death was intended, but such presumption is one of fact and not one of law.[64]

The jury are instructed that when the killing is done with a deadly weapon, or weapon calculated to produce, and actually producing death, malice may be legitimately inferred in the absence of proof that the act was done in necessary self-defense or upon sufficient provocation or cause, and the presumption in such case will be that the act was voluntary and committed with malice aforethought.[65]

§ 3029(6). Delaware

The court instructs the jury that the deliberate selection and use of a deadly weapon such as a pistol, knife or razor, is a circumstance which, in the absence of satisfactory evidence to the contrary, indicates the existence in the mind of the person committing the act of a deliberately formed design to kill.[66]

The court instructs the jury that, if death ensues from an unlawful and cruel act of violence on the part of the slayer, in the absence of adequate or sufficient provocation, the law implies that such act was done with malice. Where the killing is shown to have been done with a deadly weapon, it is presumed to have been done maliciously, in the absence of evidence to the contrary, and the burden of showing the contrary is on the accused.[67]

You are instructed that, where the killing is shown to have been done with a deadly weapon, such as a gun, it is presumed to have been done maliciously, in the absence of evidence to the contrary, and the burden of showing the contrary is on the accused, for the

[63] People v. Webster, 109 P. 637, 13 Cal. App. 348.

[64] Dillulo v. People, 138 P. 33, 56 Colo. 339.

[65] Young v. People, 130 P. 1011, 54 Colo. 293. This instruction leaves the question of malice to the jury on all the facts of the case, although to guard against any possible misapprehension on this account it may be well to also instruct that the question of malice is one of fact, for the jury to determine from the evidence under the instructions of the court.

[66] State v. Prettyman, 100 A. 476, 6 Boyce, 452.

[67] State v. Prettyman, 100 A. 476, 6 Boyce, 452.

usual and probable consequences of the act are presumed in law to have been intended by the person using the deadly weapon. If death is produced by the use of a deadly weapon, great must be the provocation to reduce the killing from murder to manslaughter.[68]

You are instructed that, when a man voluntarily selects a deadly weapon, as a sharp or heavy instrument or firearm, and willfully uses it against another in an unlawful manner, and in a way and under circumstances that directly tend to great bodily harm or that imperil human life, the jury may find that he intended murder, for it is a principle of law that every man is presumed to intend the natural and probable consequences of his own voluntary and willful acts.[69]

§ 3029(7). Georgia

You are instructed that, if you find in this case a homicide is proved to have been committed by the person charged, with an instrument which the jury find was, in the manner in which it was used on the occasion in question, a weapon likely to produce death, the law, from the use of such weapon in that manner, presumes malice and the intent to kill.[70]

The jury are instructed that, where a dangerous and deadly weapon is used with violence upon the person of another, and this has a direct tendency to destroy life or to do some great bodily harm to the person assailed, the intention to take life, or do some great bodily harm, is a necessary conclusion from the act.[71]

§ 3029(8). Indiana

You are instructed that, if you should find from all the evidence in the case beyond a reasonable doubt that the defendant did shoot and kill ———, using a deadly weapon in such manner as was likely to and did produce death, the purpose on the part of the defendant to kill may be inferred from the act itself; and if you should further find from all the evidence, beyond a reasonable doubt, that the killing was done purposely, without sufficient justification, legal excuse, or reasonable provocation, then malice may also be inferred from such act.[72]

The jury are instructed that a mortal wound given with a deadly weapon, in the previous possession of the slayer, without any or upon very slight provocation, is prima facie willful and premeditated.[73]

[68] State v. Naylor, 90 A. 880, 5 Boyce, 99.

[69] State v. De Paolo, 84 A. 213, 3 Boyce, 176.

[70] Flanagan v. State, 69 S. E. 171, 135 Ga. 221. This instruction is proper, where the evidence is sufficient to authorize the finding of the homicide, unaccompanied with circumstances of mitigation or exculpation.

[71] Vann v. State, 9 S. E. 945, 83 Ga. 44.

[72] Morgan v. State, 130 N. E. 528; Coolman v. State, 72 N. E. 568, 163 Ind. 503.

[73] Rigsby v. State, 91 N. E. 925, 174 Ind. 284.

§ 3029(9). Iowa

The jury are instructed that express malice may be shown by the exercise of such conduct in a transaction complained of as to indicate a wicked mind or malignant heart. Malice may be implied from the unlawful use of a deadly weapon in a manner calculated to take the life of another human being. A deadly weapon may be any instrument capable of producing death from the manner in which it is used in a given case.[74]

You are instructed that the intent with which an act is done is an act or emotion of the mind seldom, if ever, capable of direct and positive proof, but it is to be arrived at by such just and reasonable deductions or inferences from the acts and facts proved as the guarded judgment of a candid and cautious man would ordinarily draw therefrom. The law warrants the presumption, or inference, that a person intends the results or consequences to follow an act which he intentionally commits, which ordinarily do follow such acts. If a person make an assault on another with a deadly weapon and death ensues, the presumption is warranted that he intended to commit murder, if there is no evidence tending to show that he intended a lesser injury. If you find the defendant committed the assault, it will be your duty from the evidence to determine his intent in so doing by the surrounding circumstances and all the evidence in the case before you which tends to show the intent.[75]

§ 3029(10). Kansas

The jury are instructed that when the killing is done with a deadly weapon, or a weapon calculated to produce death, malice may be legitimately inferred, in the absence of proof that the act was done in necessary self-defense or upon sufficient provocation or cause; and the presumption in such case will be that the act was voluntarily committed with malice aforethought.[76]

§ 3029(11). Michigan

You are instructed that it is the law that death resulting from an assault, in the absence of any proof to the contrary, is presumed to be felonious, either murder or manslaughter. And where the death is shown to have resulted from the use of a deadly weapon, in the absence of any proof to the contrary, in the absence of any testimony in relation to that, the presumption is that the death was inflicted with malice, with malice aforethought in causing the death, in the assault.[77]

[74] State v. Christ, 177 N. W. 54.

[75] State v. Teale, 135 N. W. 408, 154 Iowa, 677.

[76] State v. Dull, 74 P. 235, 67 Kan. 793.

[77] People v. Collins, 131 N. W. 73, 166 Mich. 4.

§ 3029(12). Missouri

You are further instructed if you find from the evidence that the defendants, acting jointly with a common intent or either one acting alone, did assault and wound the said ——— with a deadly weapon, to wit, a weapon which as used was likely to produce death in a vital part of the body of the said ———, without just cause or provocation, then, unless the facts and circumstances in evidence satisfy you to the contrary, the law will presume and you should so find that the assault was made with malice aforethought and with intent to kill, by the defendants so acting jointly with a common intent, or by either one so acting alone. Whether the piece of wood as used was a deadly weapon, and whether such weapon was used in such a manner and with such intent by the defendants, or either of them, on the occasion under consideration, are matters to be determined by you from all the facts and circumstances in the case.[78]

The court further instructs the jury that he who willfully (that is, intentionally) uses upon another, at some vital part, a deadly weapon, as a loaded shotgun, must, in the absence of qualifying facts, be presumed to know that the effect is likely to be death, and, knowing this, must be presumed to intend the death which is the probable and ordinary consequence of such an act; and, if such deadly weapon is used without just cause or provocation, he must be presumed to do it wickedly or from a bad heart. If, therefore, the jury believe from the evidence that the defendant took the life of ——— by shooting him in a vital part with a shotgun loaded with gunpowder and leaden balls, with a manifest design to use such weapon upon him, and with sufficient time to deliberate and fully form the conscious purpose to kill, and without sufficient reason or cause or provocation, then such killing is murder in the first degree; and while it devolves upon the state to prove the willfulness, deliberation, premeditation, and malice aforethought, all of which are necessary to constitute murder in the first degree, yet these need not be proven by direct evidence, but may be deduced from all the facts and circumstances attending the killing, and, if the jury can satisfactorily and reasonably infer their existence from all the evidence, they will be warranted in finding the defendant guilty of murder in the first degree.[79]

You are instructed that willfully means intentionally, not accidentally. In the absence of qualifying facts and circumstances, the law presumes that a person intends the ordinary and probable result of his acts. If you believe from the evidence beyond a rea-

[78] State v. Wansong, 195 S. W. 999, 271 Mo. 50.

[79] State v. Hudspeth, 60 S. W. 136, 159 Mo. 178. See State v. Grant, 152 Mo. 57, 53 S. W. 432; State v. Reed, 23 S. W. 886, 117 Mo. 604.

sonable doubt that the defendant with a pistol, shot ——— in a vital part, and killed him, you will find that the defendant intended to kill him, unless the facts and circumstances given in the evidence show the contrary.[81]

The jury are instructed that, if you find from the evidence that the defendant intentionally killed ——— by hitting him over the head with the stick mentioned in evidence, and that such stick was a deadly weapon, then the law presumes that such killing was murder in the second degree, in the absence of evidence to the contrary.[82]

You are instructed that, in order to convict the defendant of murder in the first degree, you must believe and find from the evidence that defendant not only shot deceased, intentionally, but that he shot her intending to kill her. In this connection, however, you are instructed that in the absence of qualifying facts and circumstances a person is presumed to have intended the natural, ordinary, and probable result of his acts. Wherefore, if you believe from the evidence that defendant intentionally shot deceased in a vital part with a deadly weapon, to wit, a loaded pistol, from which death ensued, you will find that he intended to kill, unless the facts and circumstances given in evidence show to the contrary.[83]

§ 3029(13). Nebraska

The jury are instructed that, if you find from the evidence beyond a reasonable doubt that the defendant while sane, intentionally assaulted his wife with a deadly weapon, in such manner and at such places upon her body as would have a natural and probable tendency to cause her death, then the presumption would be that defendant intended the natural and probable consequences of his acts.[84]

§ 3029(14). New Jersey

You are instructed that the intention to take life may be presumed from the use of a deadly weapon, a weapon calculated to extinguish life. It is to be presumed that the person who uses the weapon intended to execute the work which the weapon was calculated to accomplish.[85]

§ 3029(15). Ohio

The jury are instructed that a man shall be taken to intend that which he does, or which is the immediate or necessary consequence of his act, and if the jury believe from the evidence in this case that the defendant, with a deadly weapon in his possession, without

[81] State v. Silk, 44 S. W. 764, 46 S. W. 959, 145 Mo. 240.

[82] State v. May, 43 S. W. 637, 142 Mo. 135.

[83] State v. Langford, 8 S. W. 237, 95 Mo. 97, 6 Am. St. Rep. 26.

[84] Philbrick v. State, 179 N. W. 398.

[85] State v. Maioni, 74 A. 526, 78 N. J. Law, 339, 20 Ann. Cas. 204.

any, or upon very slight, provocation, gave to the deceased a mortal wound, then said defendant is prima facie guilty of willful, deliberate, and premeditated killing, and the burden then rests upon defendant to show extenuating circumstances, and unless defendant has proved such extenuating circumstances, or unless such circumstances appear from the case made by the state, the jury must find defendant guilty of murder in the first degree.[86]

§ 3029(16). Oregon

I instruct you that if, after a consideration of the evidence and the instructions of the court, you believe beyond a reasonable doubt that the defendant committed the acts charged in the indictment, no specific intent need be proved other than such as may be embraced in the act of making an assault with a dangerous weapon.[87]

§ 3029(17). Pennsylvania

You are instructed that, if the evidence clearly establishes the killing of the deceased purposely with a deadly weapon, an illegal homicide of some kind is established, and the burden then falls on the prisoner, and not on the commonwealth, to show that it was excusable. If, then, his extenuation is in doubt, he cannot be acquitted of all crime, but must be convicted of homicide in some one of its grades.[88]

§ 3029(18). South Carolina

You are instructed that malice may be implied from an unlawful use of a deadly weapon—not from the mere circumstance that a deadly weapon is used, because a man may use it in self-defense; but it is the unlawful use of a deadly weapon, whereby life is taken, from which the law presumes malice. Therefore, the law presumes malice from the unlawful use of a deadly weapon, whereby life is taken.[89]

§ 3029(19). Virginia

You are instructed that a mortal wound given with a deadly weapon in the previous possession of the slayer, without any or upon slight provocation, is prima facie willful, deliberate, and premeditated killing, and throws upon the defendant the necessity of proving extenuating circumstances.[90]

§ 3029(20). West Virginia

The court instructs the jury that although you may believe from the evidence in this case that the defendant gave to the deceased

[86] Carr v. State, 21 Ohio Cir. Ct. R. 43.

[87] State v. Selby, 144 P. 657, 73 Or. 378.

[88] Commonwealth v. Calhoun, 86 A. 472, 238 Pa. 474.

[89] State v. Foster, 45 S. E. 1, 66 S. C. 469.

[90] Stapleton v. Commonwealth, 96 S. E. 801, 123 Va. 825; Horton v. Commonwealth, 38 S. E. 184, 99 Va. 848; Longley v. Commonwealth, 37 S. E. 339, 99 Va. 807.

the knife wound that caused his death, and though you further believe that it was done with a dangerous and deadly weapon, yet if you also believe from the evidence that he, the defendant, acted from sudden passion brought about by being assaulted, struck and beaten by the deceased without fault on the part of defendant, and after he had declined to engage in a fight with deceased, and that the defendant in so wounding the deceased was not actuated by antecedent malice, then you cannot presume malice from the mere fact alone that the killing was done with a deadly weapon.[91]

§ 3029(21). Wisconsin

The jury are instructed that, on the question of design or intention, the law presumes that a reasonable person intends all the natural, probable, and usual consequences of his act; that when one person assaults another violently with a dangerous weapon likely to kill, not in self-defense and not in sudden heat of passion caused by provocation apparently sufficient to make passion irresistible or involuntary, and the life of the party thus assaulted is actually taken in consequence of such assault, then the legal and natural presumption is that death or great bodily harm was intended, and in such case the law implies malice, and such killing would be murder.[92]

§ 3030. Same—Direction of weapon against a vital part

§ 3030(1). Indiana

The jury are instructed that a man is presumed, in law, to intend the natural and probable consequences of his own unlawful act, and therefore, if one purposely shoots another with a deadly weapon, at or near a vital part, and in such a manner that death would probably ensue, the jury would be justified in believing or finding that the defendant intended to kill the prosecuting witness; that is, they may so believe or find, even though death did not ensue, and the defendant stated that he did not intend to kill him.[93]

§ 3030(2). Missouri

You are further instructed that if one person intentionally uses upon another a deadly weapon (that is, a weapon which, as used, is likely to produce death) at a vital part of the body, and in such a manner that death is likely to result, he is presumed by such use to have intended to kill, and if he so uses such weapon without just cause or provocation he is presumed to have acted with malice aforethought. Whether the said revolver pistol was a deadly weapon and whether such weapon was used in such a manner and

[91] State v. Donahue, 90 S. E. 834, 79 W. Va. 260.

[92] Anderson v. State, 114 N. W. 112, 133 Wis. 601.

[93] Newport v. State, 39 N. E. 926, 140 Ind. 299.

with such intent by the defendant on the occasion under consideration, are matters to be determined by you from all the facts and circumstances in the case.[94]

The jury are instructed that, if the jury believe from the evidence that the defendant intentionally struck and mortally wounded ——— in a vital part with billiard cues, and that said billiard cues were dangerous and deadly weapons, the law presumes that the killing was murder in the second degree, in the absence of proof to the contrary, and it devolves upon the defendant to adduce evidence to meet or repel that presumption, unless the same has been met and overcome by evidence introduced by the state.[95]

The court instructs the jury that the law presumes that a person intends the natural and probable consequences of his acts, and if you believe from the evidence in the case that the defendant assaulted with a deadly weapon, a loaded pistol, ———, in a vital part of the body, the law presumes that defendant intended to kill him.[96]

The jury are instructed that, if the jury believe from the evidence that the defendant willfully, that is intentionally, used upon said ———, at some vital part, a deadly weapon, as a loaded revolver or pistol, in the absence of qualifying facts, defendant must be presumed to know that the effect is likely to be deadly, and knowing this must be presumed to intend death, which is the probable and ordinary consequence of such an act, and if such deadly weapon is used without just cause or provocation he must be presumed to do it wickedly, or from a bad heart; and if the jury believe that defendant took the life of ———, by shooting him in a vital part with a revolver or pistol with a manifest design to use such weapon upon him, and with sufficient time to deliberate and fully form the conscious purpose to kill, and without sufficient reason, or cause, or extenuation, then such killing is murder in the first degree, and whilst it devolves on the state to prove the willfulness, deliberation, and malice aforethought, all of which are necessary to constitute murder in the first degree, yet these need not be proved by direct evidence, but may be deduced from all the facts and circumstances attending the killing, and if the jury are satisfied and reasonably infer their existence from all the evidence, they will be warranted in finding defendant guilty of murder in the first degree.[97]

§ 3030(3). Nebraska

You are instructed that, in case of homicide, the law presumes malice from the unlawful use of a deadly weapon upon a vital part; and when the fact of unlawful killing or shooting, causing death,

[94] State v. Wilson, 103 S. W. 110, 126 Mo. App. 302.

[95] State v. Smith, 65 S. W. 270, 164 Mo. 567.

[96] State v. Grant, 45 S. W. 1102, 144 Mo. 56.

[97] State v. Wisdom, 84 Mo. 177.

is proved, and no evidence tends to show express malice, on the one hand, or any justification, mitigation, or excuse, on the other, the law implies malice, and the offense is then murder in the second degree. You are instructed that in law a loaded gun is a deadly weapon, and if you believe from the evidence, beyond a reasonable doubt, that defendant wantonly and cruelly, and without justification or excuse, shot and caused the death of ——— with a deadly weapon, then the law presumes such shooting was done maliciously, unless you believe from the evidence it was done without malice.[98]

§ 3030(4). Pennsylvania

You are instructed that the intent to kill can be found from the acts and declarations and the conduct of the slayer at or just immediately before the commission of the offense, and the character of the weapon used, and the part of the body on which the wound was inflicted. One who uses, upon the person of another at some vital point of the body, with a manifest intention to use it, a deadly weapon such as a gun, must, in the absence of qualifying facts, be presumed to intend the death of that person, which is the ordinary result or consequence of the use of discharging of such a weapon upon the body of another.[99]

You are instructed that when a man uses a gun loaded with powder and shot and aimed at a vital part of the body of another and discharges it, he must be presumed to know that death is likely to follow.[1]

§ 3031. Presumption and burden of proof as to degree of offense where homicide by defendant established

§ 3031(1). United States

The jury are instructed that the law says we have no power to ascertain the certain condition of a man's mind. The best we can do is to infer it more or less satisfactorily from his acts. A person is presumed to intend what he does. A man who performs an act which it is known will produce a particular result is, from our common experience, presumed to have anticipated that result, and to have intended it. Therefore we have a right to say, and the law says, that when a homicide is committed by weapons indicating design, that it is not necessary to prove that such design existed for any definite period before the fatal blow was struck. From the very fact of a blow being struck, from the very fact that a fatal bullet was fired, we have the right to infer as a presumption of

[98] Kastner v. State, 79 N. W. 713, 58 Neb. 767.

[99] Commonwealth v. Knox, 105 A. 634, 262 Pa. 428.

[1] Commonwealth v. Knox, 105 A. 634, 262 Pa. 428.

fact that the blow was intended prior to the striking, although at a period of time inappreciably distant.[2]

§ 3031(2). Florida

You are instructed that the law presumes a sober man to intend what he does, but the law does not presume a killing with a premeditated design. This, like every other element of murder in the first degree, is to be inferred by the jury from the facts proved beyond a reasonable doubt.[3]

§ 3031(3). Montana

The jury are instructed that, upon a trial for murder, the commission of the homicide being proved, the burden of proving circumstances of mitigation, or that justify or excuse it, devolves upon defendant, unless the evidence of the prosecution tends to show that the crime committed, if there was one, only amounts to manslaughter, or that the defendant was justifiable or excusable.[4]

§ 3031(4). New Jersey

The jury are instructed that the presumption in all cases of criminal homicide is that it is murder in the second degree. The burden is on the defendant to show facts in mitigation which might reduce it down to manslaughter, and there is nothing in the case of the kind. The reason for it is perfectly evident, because the defendant denies that he was guilty of setting fire to deceased. They have not offered any evidence to reduce or mitigate such action, because they deny that it was done, so you do not have to consider that part of it at all. The manslaughter feature of the case is not here concerned in the least. If you find that this man set the fire himself, it would be murder of the one degree or the other.[5]

§ 3031(5). North Carolina

You are instructed where the killing is admitted or proved, nothing else appearing, no presumption is raised that it is murder in the first degree; and, unless the circumstances show beyond a reasonable doubt that there was a deliberate, premeditated, preconceived design to take life, it is murder in the second degree.[6]

The jury are instructed that, if the jury are not satisfied beyond a reasonable doubt that the killing was done willfully, deliberately, and with premeditation, then you will inquire whether the killing is murder in the second degree. In this case, if the jury are satisfied beyond a reasonable doubt that the defendant killed the deceas-

[2] Allen v. U. S., 17 S. Ct. 154, 164 U. S. 492, 41 L. Ed. 528.

[3] Cook v. State, 35 So. 665, 46 Fla. 20.

[4] State v. Bess, 199 P. 426.

[5] State v. Leo, 77 A. 523, 80 N. J. Law, 21.

[6] State v. Hicks, 34 S. E. 247, 125 N. C. 636.

ed by burning, then the burden is shifted to the defendant to show that it is not murder in the second degree.[7]

§ 3031(6). Pennsylvania

You are instructed that, if you find that the defendant killed ———, the presumption against him rises no higher than murder of the second degree, until it is shown by the commonwealth, beyond a reasonable doubt, to be murder of the first degree. It therefore lies on the commonwealth to satisfy the jury of these facts and circumstances which indicate the deliberate intention to kill and the cool depravity of heart and conscious purpose which constitute, as before stated, the crime of murder of the first degree.[8]

§ 3031(7). Virginia

You are instructed that every homicide in this state is presumed in law to be murder in the second degree, and, in order to elevate the offense to murder in the first degree, the burden of proof is on the commonwealth, and to reduce the offense to manslaughter the burden of proof is on the prisoner.[9]

§ 3031(8). Washington

The court instructs you as a matter of law that if a homicide—that is, the killing of one human being by another—is proved beyond a reasonable doubt, as explained to you, the presumption of the law is that it is murder in the second degree; and, if the state would elevate it to that of murder in the first degree, it must establish all the statutory characteristics of murder in the first degree from the evidence and beyond a reasonable doubt; that, on the other hand, if the defendant would reduce it to manslaughter, or justify it, the burden is upon the defendant so to do. This burden on the defendant is sustained, if, from all the evidence in the case, or want of evidence in the case, you entertain a reasonable doubt as to the defendant's guilt.[10]

§ 3031(9). West Virginia

The court instructs the jury that where a homicide is proved, the presumption is that it is murder in the second degree, and the burden is on the state of showing that it is murder in the first degree, and upon the accused of showing that it was without malice, and is, therefore, only manslaughter, or that he acted lawfully and is therefore not guilty, and in arriving at a verdict in this case as to the degree of guilt, if any, the jury should take into consideration all the evidence, both that for the state and defense.[11]

[7] State v. Hicks, 34 S. E. 247, 125 N. C. 636.

[8] Commonwealth v. Morrison, 109 A. 878, 266 Pa. 223.

[9] Longley v. Commonwealth, 37 S. E. 340, 99 Va. 807; Hodges v. Commonwealth, 15 S. E. 513, 89 Va. 265.

[10] State v. Totten, 121 P. 70, 67 Wash. 192.

[11] State v. Gravely, 66 S. E. 503, 66

The jury are instructed that, where a homicide is proved, the presumption is that it is murder in the second degree. If the state would elevate it to murder in the first degree she must establish the characteristics of that crime, and if the defendant would reduce it to manslaughter the burden is on him to do so.[12]

§ 3032. Presumption that fresh provocation influenced defendant rather than old grudge

§ 3032(1). Indian Territory

The jury are instructed that, although the evidence may show that at some time previous to the killing of ——— the defendant had malice towards the deceased, yet if it further appears from the evidence that subsequently to such time the said malice on the part of the defendant was abandoned by him, and friendly relations between the deceased and the defendant, as far as defendant was concerned, were established, then the law will not presume that the killing of the deceased by the defendant was upon former malice, and the jury will in that event determine the guilt of the defendant without reference to such preconceived malice of the defendant.[13]

§ 3032(2). West Virginia

The court instructs the jury that where a homicide has been committed, and it appears from the evidence that there was an old grudge existing between the parties, but that at the time of the homicide there was a fresh and sudden provocation given by the deceased to the defendant, then the law presumes that such killing was caused by such fresh provocation and not due to the old grudge.[14]

§ 3033. Burden of proof with respect to issue of self-defense

§ 3033(1). Alabama

The jury are instructed that it is not necessary under the evidence in this case that defendant should have been actually in danger of death or great bodily harm at the time he killed deceased, or that retreating would have really increased his peril in order for him to have been justified in shooting deceased; he had the right to act on the appearance of things. If the circumstances attending the killing are such as to justify a reasonable belief that defendant was in danger of great bodily harm or death, and that he could not have retreated without adding to his peril, and he honestly believed such to be the case, then he had a right to shoot deceased in his own defense, although, as a matter of fact, he was not in actual danger, and retreat would not have endangered his personal safety.

W. Va. 375; State v. Trail, 53 S. E. 17, 59 W. Va. 175.

[12] State v. Cain, 20 W. Va. 679.

[13] Watkins v. United States, 41 S. W. 1044, 1 Ind. T. 364.

[14] State v. Manns, 37 S. E. 613, 48 W. Va. 480.

And if the jury believe that defendant acted under such conditions and circumstances as above set out, the burden of showing that he was not free from fault in bringing on the difficulty is on the state, and, if not shown, they should acquit defendant.[15]

You are instructed that the burden is upon the defendant to show that she was in danger or apparent danger of losing her life or suffering great bodily harm, and that she had no reasonable mode of escape at the time she killed ———. If she proves these two elements, the burden is then on the state to show that she was at fault in bringing on the difficulty.[16]

The court charges the jury that, when the defendant sets up self-defense in justification or excuse for a killing, the burden of proof is on him to show the jury by the evidence to the reasonable satisfaction of the jury that there was a present, impending danger, real or apparent, to life or limb, or of grievous bodily harm, from which there was no other reasonable means of escape, unless the evidence which proves the homicide proves also the excuse or justification.[17]

§ 3033(2). California

You are instructed that, up to the moment when the killing is proved, the prosecution must make out its case beyond any reasonable doubt. When the killing is proved, it devolves upon the defendant to show any circumstances in mitigation to excuse or justify the homicide by evidence on his part; that is, the killing being proved, the defendant must make out his case in mitigation, or to excuse or justify it by some proof strong enough to create in the minds of the jury a reasonable doubt of his guilt of the offense charged, unless, as before stated, the proof on the part of the prosecution tends to show the crime committed only amounts to manslaughter, or that the defendant was justified or excused in doing the act.[18]

§ 3033(3). Delaware

You are instructed that the burden of establishing self-defense to the satisfaction of the jury rests with the accused.[19]

§ 3033(4). Iowa

You are instructed that, in determining whether or not the defendant in doing what he did acted in self-defense, you will remember that the burden of proof is upon the state to prove, beyond

[15] O'Rear v. State, 66 So. 81, 188 Ala. 71.

[16] James v. State, 52 So. 840, 167 Ala. 14.

[17] Monteith v. State, 49 So. 777, 161 Ala. 18; Bluett v. State, 44 So. 84, 151 Ala. 41.

[18] People v. Matthai, 67 P. 694, 135 Cal. 442.

[19] State v. Cephus, 67 A. 150, 6 Pennewill, 160.

a reasonable doubt, that in doing what he did he was not acting in self-defense. If after considering all the evidence introduced in this case a reasonable doubt arises in your minds as to whether or not the defendant in doing what he did was acting in self-defense, then the state has not proved the defendant guilty beyond a reasonable doubt.[20]

The jury are instructed that the burden is upon the prosecution to show, beyond a reasonable doubt, not only that the defendant committed the act complained of and inflicted the injury upon the said ——— which caused his death, as charged in the indictment, but also the further fact, beyond a reasonable doubt, that said injury was not inflicted in necessary self-defense.[21]

§ 3033(5). Mississippi

The court instructs the jury for the defendant that in this case the state must make out her case to a moral certainty, and it is not until she has done so that the accused is required to do anything, and then he need only from the whole body of the evidence adduced for him and against him raise a reasonable doubt of his guilt to entitle him to acquittal; and it is not true that, if no excuse or justification of the killing is shown by the state's evidence, the defendant is guilty of murder, unless he has by his evidence proved the excuse or justification.[22]

The court instructs the jury, for defendant, that the law presumes the defendant innocent, and that the burden of proving beyond all reasonable doubt every material allegation necessary to establish defendant's guilt rests upon the state throughout the trial, and that the burden of proof never shifts to the defendant, and that the law does not require the defendant to prove by his evidence excuse or justification; but if from all the evidence the jury entertains a reasonable doubt as to whether the killing was done in the heat of passion, or proceeded from the principle of self-defense, they will find the defendant not guilty.[23]

§ 3033(6). Missouri

The jury are instructed that, if you believe from the evidence that the defendant with a pistol willfully shot and killed the deceased, as charged in the indictment, then before such killing can be justified on the ground of self-defense it must appear to the reasonable satisfaction of the jury from the whole of the evidence that defendant, at the time of the shooting, had reasonable cause to believe and did believe that deceased was about then to kill him, the defendant, or do him some great bodily harm, and that defendant

[20] State v. Dyer, 124 N. W. 629, 147 Iowa, 217, 29 L. R. A. (N. S.) 459.

[21] State v. Thomas, 132 N. W. 51, 151 Iowa, 572.

[22] Cumberland v. State, 70 So. 695, 110 Miss. 521.

[23] Blalock v. State, 31 So. 105, 79 Miss. 517.

had reasonable cause to believe and did believe that there was immediate danger of such design on the part of deceased being accomplished, and that defendant did shoot and kill deceased to prevent such immediate harm to himself, and not to gratify a grudge.[24]

§ 3033(7). New Jersey

The jury are instructed that taking life in the course of the necessary defense of one's person is a legal defense upon an indictment of this kind. But the law, from the highest considerations of public policy, circumscribes the right of one person to take the life of another within narrow limits, and allows it to be exercised only under extraordinary circumstances. The burden of proof of self-defense is upon the prisoner. He must show to the satisfaction of the jury a situation and circumstances under which that right may be lawfully exercised; and, before his defense is complete, those facts and circumstances must appear to bring the act done by the prisoner within the prescribed limits. The weapon that was used here was one capable of producing either death or grave bodily harm. The shots were delivered upon a vital part of the officer's body, and resulted in immediate death. The question for the decision of the jury is, upon this matter, whether this act of the prisoner was an act in the lawful defense of his person. To make his defense available, the justification must be coextensive with the act intended to be done; and the character of the weapon used, the place where the shot was delivered, the circumstances under which it was delivered, are all to be borne in mind in passing judgment upon the defense of self-defense set up in this case.[25]

§ 3033(8). North Dakota

The jury are instructed that, if the state has proved to your satisfaction beyond a reasonable doubt that the defendant killed ——— at the time and place specified in the information in this case, then the burden devolves upon the defendant to prove circumstances that justified the killing in order to entitle defendant to be acquitted on the ground of self-defense, unless the proof on the part of the prosecution tends to show circumstances creating a reasonable doubt as to whether or not such killing was justified, and, if upon the whole evidence you have a reasonable doubt as to whether or not the defendant acted in self-defense, it is your duty to find the defendant not guilty.[26]

§ 3033(9). Oregon

The court instructs the jury that it is incumbent upon the prosecutor to prove to you beyond a reasonable doubt that the killing

[24] State v. Jones, 78 Mo. 278.

[25] Brown v. State, 42 A. 811, 62 N. J. Law, 666.

[26] State v. Woods, 139 N. W. 321, 24 N. D. 156. This instruction is proper in the absence of evidence tending in any manner to mitigate or excuse the homicide.

was not done in self-defense, and if, from the evidence offered in the trial of this case, you find that the prosecution has not proved beyond a reasonable doubt that the killing was not done in self-defense, you should find a verdict for the defendant.[27]

§ 3033(10). South Dakota

The court instructs you that, if you believe from the evidence offered by the state that at the time of the homicide the deceased was armed with an ax and a pistol, and that deceased first assaulted the defendant with an ax, in such manner as led the defendant to honestly believe he was in imminent danger of being killed, or suffering great bodily injury, and under such belief defendant shot the deceased, and the deceased continued the conflict by drawing a pistol and firing at the defendant, then I charge you that the evidence upon the part of the state tends to show that the defendant was justifiable, and the burden of proof remains upon the state to establish by the evidence, beyond a reasonable doubt, every element of the offense charged in the information, and if the state has failed to so establish every material element of the offense you should find the defendant not guilty.[28]

§ 3034. Presumption from character of weapon used by deceased as to his intent

You are instructed that if deceased was armed with a knife at the time he was killed, and was making an attack upon the defendant, and at the time considering the manner of its use was reasonably calculated to produce death or serious bodily injury, then the law presumes that deceased intended to murder or intended to inflict serious bodily injury upon the defendant.[29]

The court instructs the jury that if you find and believe from the evidence that at the time the defendant cut the deceased the deceased was armed with a pistol, and if you find that he made any assault upon the defendant with said weapon, or any gesture showing an immediate intention to use said weapon against said defendant, then the law will presume that he intended to kill or inflict serious bodily injury upon the defendant with said weapon.[30]

You are instructed that, when a homicide takes place to prevent murder, maiming, or disfiguring, if the weapon or means used by the party attempting or committing such murder, maiming, or disfiguring are such as would have been calculated to produce that

[27] State v. Butler, 186 P. 55, 96 Or. 219.

[28] State v. Stumbaugh, 132 N. W. 666, 28 S. D. 50.

[29] Bivens v. State, 198 S. W. 962, 82 Tex. Cr. R. 278.

[30] Roberts v. State, 168 S. W. 100, 74 Tex. Cr. R. 150.

result, it is presumed that the person so using them designed to inflict the injury.[31]

§ 3035. Presumption from absence of motive for alleged acts of deceased

The court instructs the jury that, when the evidence fails to show any motive to make an assault or commit a crime, this is a circumstance in favor of the innocence of the party accused. And in this case, if the jury find, upon a careful examination of all evidence, that it fails to show any motive, cause, or reason on the part of ——— to assault and murder the defendant, then you should consider this fact in determining the truth or falsity of the claim made by the defendant that his wife first shot him and then killed herself.[32]

§ 3036. Burden of proof where killing alleged to be accidental

§ 3036(1). Oklahoma

The jury are instructed that the defendant in this case is presumed to be innocent of the crime charged in the information, and this is a presumption of law that remains with her and is thrown around her for her protection up to the moment when the killing is proved or admitted. When the killing is proved or admitted by the defendant, and the plea of accidental killing is interposed, as in this case, it then devolves upon the defendant to show any circumstances of mitigation to excuse or justify it by some proof strong enough to create in your minds a reasonable doubt of her guilt of the offense charged, unless the proof on the part of the state shows that the defendant was excusable in committing the act.[33]

§ 3036(2). West Virginia

The court instructs the jury that accidental killing is not such a matter of defense as throws upon the prisoner the burden of proving it by a preponderance of the evidence; that it is the duty of the state to allege and prove in this case that the prisoner killed ——— intentionally or willfully; and, if the evidence in the case, taken all together, raises in the minds of the jury a reasonable doubt as to whether the prisoner killed ——— intentionally or accidentally, they should not find the prisoner guilty of anything higher than involuntary manslaughter, or assault and battery.[34]

§ 3037. Presumptions and burden of proof on issue of sanity

§ 3037(1). Alabama

You are instructed that in the trial of a homicide case, where the plea of not guilty and the statutory plea, not guilty by

[31] Polk v. State, 132 S. W. 767, 60 Tex. Cr. R. 499.

[32] Smith v. State, 85 N. W. 49, 61 Neb. 296.

[33] Palmer v. State (Cr. App.) 187 P. 502.

[34] State v. Dodds, 46 S. E. 228, 54 W. Va. 289.

reason of insanity, are both interposed, the burden of proof as to the first plea is upon the state to satisfy the jury beyond a reasonable doubt of the guilt of defendant; but, as to the second plea, the burden of proof is upon defendant to establish the plea of not guilty by reason of insanity to the reasonable satisfaction of the jury by a preponderance of the evidence, and a reasonable doubt is not sufficient to acquit the defendant under this plea. Hence it will be seen that, under these two pleas and issues, the burden of proof in the one case is upon the state and in the other upon the defendant. The weight and sufficiency of the evidence as to the one plea is that the state must satisfy the jury beyond a reasonable doubt; whereas, as to the other plea, the defendant must reasonably satisfy the jury by a preponderance of the evidence.[35]

§ 3037(2). Florida

The jury are instructed that, as the law presumes every one sane and responsible, the question is, what is there in this case to show to the contrary as to this defendant's mental condition on the ——— day of ——— last? You are instructed that you are not warranted, as a jury, in inferring that a man is insane from the mere fact alone of his committing a crime, or from the enormity of the crime, or from the mere absence of adequate motives for its commission.[36]

§ 3037(3). Georgia

The jury are instructed that these are the rules for determining the question of insanity and the degree and nature of irresponsibility to the law. The law presumes every man of sound mind till the contrary appears. The burden of proof is on the defendant to show that, at the time of the commission of the act, he was not of sound mind, and it ought to be made to appear to a reasonable certainty to your satisfaction that, at the time of the commission of the act, the party did not know the nature and quality of the act, or, if he did, did not know that the act was wrong; and it devolves upon you to decide whether the defendant has, by proof, rebutted this legal presumption of sanity. If, after mature deliberation, you are satisfied beyond a doubt that the prisoner is guilty, you will find him so; if not, you will find him not guilty.[37]

§ 3037(4). Illinois

You are instructed that it is true the law presumes every man to be sane and responsible for his acts until the contrary appears from evidence. Still, if there is evidence in the case tending to

[35] Jones v. State, 61 So. 434, 181 Ala. 63.

[36] Davis v. State, 32 So. 822, 44 Fla. 32.

[37] Humphreys v. State, 45 Ga. 190.

rebut the presumption, sufficient to raise a reasonable doubt upon the issue of sanity, then the jury will find the prisoner not guilty.[38]

§ 3037(5). Kentucky

The court instructs the jury that the law presumes every man sane until the contrary is shown by the evidence; and, before the defendant can be excused on the ground of insanity, the jury must believe from the evidence that the defendant was, at the time of the killing, without sufficient reason to know right from wrong, or that, as a result of mental unsoundness, he had not then sufficient will power to govern his actions, by reason of some insane impulse which he could not resist or control.[39]

§ 3037(6). Missouri

The jury are instructed that every man is presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proven, and where insanity or mental incapacity or imbecility is interposed as a defense, as in this case, the law requires the defendant to prove it to the reasonable satisfaction of the jury; and, to establish such defense, it must be proven, to the reasonable satisfaction of the jury, that at the time of committing the act the defendant was laboring under such defect of reason, from natural deficiency or disease of the mind, as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know he was doing what was wrong.[40]

You are instructed that the law presumes every person who has reached the years of discretion to be of sound mind, and this presumption continues until the contrary is shown. So that when, as in this case, insanity is pleaded as a defense to a criminal charge, the fact of the existence of such insanity at the time of the commission of the homicide charged must, before you can acquit on that ground, be established by the evidence to your reasonable satisfaction, and the burden of proving this fact rests with the defendant. To establish the insanity of the defendant, positive and direct proof of it is not required. To entitle him to an acquittal by reason of his insanity, circumstantial evidence which reasonably satisfies your mind of its existence is sufficient. As the law presumes the defendant innocent, the burden of proving him guilty rests with the state, and, before you should convict him, his guilt must be established beyond a reasonable doubt. On the other hand,

[38] Dacey v. People, 6 N. E. 165, 116 Ill. 555.

[39] Miracle v. Commonwealth, 146 S. W. 1136, 148 Ky. 453.

[40] State v. Palmer, 61 S. W. 651, 161 Mo. 152.

to entitle the defendant to a verdict of not guilty, by reason of his insanity, the law requires him to prove it—not, however, beyond a reasonable doubt, but only to your reasonable satisfaction. From all this it follows that, although you may believe and find that the defendant did the killing alleged, yet if, from the evidence, you further find that at the time he did it he was in such an insane condition of mind that he did not know he was doing wrong, and did not comprehend the nature and character of the act, then such shooting was not, in law or in fact, malicious or felonious, and you ought to acquit him on the grounds of insanity, and by your verdict so say.[41]

§ 3037(7). New Jersey

You are instructed that every man is presumed to be sane until the contrary is shown, and, therefore, the burden rests upon the defense to convince you, by a preponderance of testimony, that the mind of the defendant was deranged, and so deranged as to make him irresponsible for his act.[42]

§ 3037(8). Oklahoma

Gentlemen of the jury, you are instructed that the defendant has interposed as one of his defenses in this case the plea of insanity. When that defense is interposed, the burden of proof is upon the defendant to introduce sufficient evidence to raise in your minds a reasonable doubt of his sanity. It is not required that the defendant shall prove his insanity to the satisfaction of the minds of the jury by competent evidence beyond a reasonable doubt, or by a preponderance of the evidence. It is sufficient if he only introduces sufficient evidence to raise in your minds a reasonable doubt of his sanity, and when this is done you are instructed that the burden of proof is upon the state to prove the sanity of the defendant by competent evidence, beyond a reasonable doubt, before you would be justified in convicting the defendant as charged in the indictment, and then the burden of proving the sanity of the defendant rests upon the state, like that of proving any other material allegation of the indictment; and if you believe that the state has failed to prove by competent evidence, beyond a reasonable doubt, the sanity of the defendant, and if from all the evidence in the case there is a reasonable doubt in your minds as to the sanity of the defendant, you will return a verdict of not guilty and acquit the defendant.[43]

[41] State v. Duestrow, 38 S. W. 554, 137 Mo. 44.

[42] State v. Maloni, 74 A. 526, 78 N. J. Law, 339, 20 Ann. Cas. 204.

[43] Hodges v. State, 182 P. 260; Adair v. State, 118 P. 416, 6 Okl. Cr. 284, 44 L. R. A. (N. S.) 119.

§ 3037(9). Virginia

The jury are instructed that every man is presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary is proved to your satisfaction.[44]

§ 3038. Presumption of insanity from lack of motive for killing

§ 3038(1). California

You are instructed that it has been urged for the prisoner that you should acquit him on the ground that, it being impossible to assign any reason for the perpetration of the offense, he must have been acting under what is called a "powerful and irresistible influence, or homicidal tendency." But I must remark, as to that, that the circumstance of an act being apparently motiveless is not a ground from which you can safely infer the existence of such an influence. Motives exist, unknown and innumerable, which might prompt the act. A morbid and restless (but irresistible) thirst for blood would itself be a motive urging to such a deed for its own relief.[45]

§ 3038(2). Wisconsin

The jury are instructed that you are not to infer that a man is insane from the mere fact of his committing a crime, or from the enormity of the crime, or the absence of adequate motive.[46]

§ 3039. Presumption as to continuance of insanity

The jury are further instructed, as a matter of law in this case, that if, from a careful consideration of the facts and circumstances shown in this case by the evidence, you believe that the defendant was insane and of unsound mind on the ——— day of ——— last, as late as ——— o'clock on that day, or thereabouts, then the presumption of law is that that condition of mind continued up until after the shooting between ——— and ——— o'clock of that evening, as complained of in the indictment, unless you shall further believe from the evidence in the case, beyond all reasonable doubt, that he recovered from such insane condition of mind prior to said shooting.[47]

§ 3040. Presumption raised by former adjudication of insanity

You are instructed that the verdict, judgment, and record of the county court of ——— county, state of ———, which have been introduced in evidence before you, finding that the defendant was insane at the time he was tried in said court, establishes the fact that he was insane at the very time he was tried in said court, and raises the presumption that he was insane at the time he shot and

[44] Boswell's Case, 20 Grat. 860.

[45] People v. McCarthy, 46 P. 1073, 115 Cal. 255.

[46] Lowe v. State, 96 N. W. 417, 118 Wis. 641.

[47] Dacey v. People, 6 N. E. 165, 116 Ill. 555.

killed ———, if he did shoot and kill her; but whether he was sane or insane at the very time the fatal shots were fired is a question which it is your exclusive province to determine from all the facts and circumstances which are in evidence before you.[48]

You are further instructed that the burden of proof is on the state to show by the evidence beyond a reasonable doubt that the defendant was sane at the time he shot and killed ———, if he did shoot and kill her, and responsible for his acts. In other words, in ordinary cases when insanity is interposed as a defense for the commission of crime on the part of the defendant, the presumption is that he was sane when the crime was committed, until the contrary is shown, and the burden of proof is on the defendant to show that he was insane; whereas, in the case before you the presumption is that this defendant was insane at the time he shot and killed ———, if he did shoot and kill her, and the burden of proof is on the state to show by the evidence beyond a reasonable doubt that the defendant was sane at the time of said shooting.[49]

You are instructed that the burden of proof is on the state to prove by a preponderance of the evidence and beyond a reasonable doubt that, at the time of said act, the defendant's mental condition was such that he did know the character of his act, and its consequences, and had sufficient will power to refrain therefrom, and if it has failed to do so, you will return a verdict of not guilty.[50]

You are instructed that the burden is on the state to prove beyond a reasonable doubt that the defendant was, at the very time he committed the act charged, sufficiently sane and free from mental diseases, and delusions as to render him amenable to the law.[51]

§ 3041. Burden of proof with respect to fact of intoxication

The jury are instructed that the burden of establishing that defendant was so intoxicated at the time of the killing the deceased that he was incapable of entertaining any design to kill him is upon the defendant.[52]

§ 3042. Matters considered in determining question of malice or intention of defendant

§ 3042(1). California

The court instructs the jury that, in determining the intention of the defendant at the time of the transaction complained of, it is important to consider the means used to accomplish the killing. The intent or intention is manifested by the circumstances con-

[48] Witty v. State, 171 S. W. 229, 75 Tex. Cr. R. 440.

[49] Witty v. State, 171 S. W. 229, 75 Tex. Cr. R. 440.

[50] Witty v. State, 171 S. W. 229, 75 Tex. Cr. R. 440.

[51] Witty v. State, 171 S. W. 229, 75 Tex. Cr. R. 440.

[52] State v. Corrivau, 100 N. W. 638, 93 Minn. 38.

nected with the offense and the sound mind and discretion of the accused.[53]

§ 3042(2). Colorado

You are instructed that material inquiries in determining these questions are: What prompted the fatal blow? Was it passion or malice? Was it an involuntary impulse, or a voluntary act of the will, prompted by a desire for revenge? Did the prisoner act under great excitement, or did he act deliberately? The situation of the parties and their attitudes with respect to each other at the time of the killing, and the words spoken, if any, are to be considered, with all other facts and circumstances in proof, in ascertaining whether the prisoner acted from malice or passion; and, in determining the character of the offense, if you find that the prisoner acted under sufficient provocation, the degree of guilt is manslaughter; otherwise, murder.[54]

§ 3043. Evidence considered in determining whether defendant grossly careless in handling firearms

You are instructed that negligence is the lack of such care as an ordinarily careful man would exercise under like circumstances. It is a relative term, and whether or not an act is negligent depends upon all the circumstances and conditions surrounding and attending the act. In determining whether or not the defendant was negligent in his use of the gun in question, you should consider all the facts and circumstances surrounding him at the time; where he aimed or pointed the gun, and how close to the deceased the same was aimed or pointed; whether, to his knowledge, the deceased was aware he was about to discharge the gun; whether he should, in the exercise of ordinary care, have anticipated that deceased might move or come in range of said gun; his skill or lack of skill with fire arms; the character of the gun in question as known to him, and the familiarity of defendant with said gun or his lack of it; his condition as to intoxication or otherwise; and any and all other facts and circumstances in evidence that may aid you in determining the question, bearing in mind that he was bound to exercise such degree of care as an ordinarily careful and prudent man would exercise in like circumstances, and no more.[55]

§ 3044. Matters considered in determining question of premeditation and deliberation

You are instructed that, in determining the question of premeditation and deliberation, it is competent for the jury to take into

[53] People v. Hadley, 165 P. 442, 175 Cal. 118.

[54] May v. People, 6 P. 816, 8 Colo. 210.

[55] State v. Warner, 137 N. W. 466, 157 Iowa, 111.

their consideration the conduct of the prisoner before and after, as well as at the time of, the homicide, and all the circumstances connected with the homicide.[56]

§ 3045. Consideration of threats of defendant on question of malice

You are instructed that threats made by the defendant, if any, and all declarations of personal hostility of the defendant, if any, against the deceased, are proper for your consideration, to determine the question of malice or criminal intent of the defendant, if any, at time of the fatal difficulty; but if you find from the facts and circumstances in evidence in the case that the defendant and deceased, after any such threats or declarations of hostility, if any, made up good friends, and each forgave the other all past differences and animosities, and then such threats or hostilities could not be considered, by the jury as evidence of malice; but if the jury believes from the evidence beyond a reasonable doubt that the defendant had not in good faith forgiven deceased, and made up good friends, prior to the fatal difficulty, then the jury has the right to consider the past threats or expressions of hostility of the defendant, if any there were, for the purpose, with the other evidence in the cause, of determining the question of malice.[57]

You are instructed that evidence has been offered before you for the purpose of showing that prior to the time of the homicide the defendant had made threats of a violent nature towards the deceased. If you believe that such threats had been made, you will consider this fact in connection with the other proof in the case for the purpose of ascertaining whether or not the defendants were the aggressors, or entered voluntarily into the difficulty.[58]

§ 3046. Failure of defendant to demand an inquest

You are instructed, gentlemen of the jury, that, under the laws of the state of ———, it is the duty of the county coroner to hold an inquest only when there shall exist reasonable grounds for the belief that the death of the person has been caused by unlawful means at the hands of another, and the cause of the death of such person is unknown. If the cause of the death of such person is known to the coroner, no duty would devolve upon him to hold such inquest. The defendant accused of the crime of killing a person has no right, under the law, to demand the holding of such an inquest.[59]

[56] State v. Exum, 50 S. E. 283, 138 N. C. 599.

[57] Knight v. State (Okl. Cr. App.) 182 P. 734.

[58] McDaniel v. State, 127 P. 358, 8 Okl. Cr. 209.

[59] State v. Howard, 74 P. 382, 33 Wash. 250.

§ 3047. Dying declarations

§ 3047(1). Georgia

In regard to dying declarations I charge you this: You are instructed, gentlemen, that it is for the court in the first instance to determine whether the preliminary proof is sufficient to admit dying declarations; but this rule is not binding upon you, for you must be satisfied that such statements were actually made by the deceased, and that she made them when she was in the article of death, and was conscious of her condition at the time of making such declarations, if they were made. It is not necessary that the person whose statement is sought to be introduced should express himself as believing he is in a dying condition. Consciousness of his condition may be inferred from the nature of the wound, or other circumstances. Dying declarations, made by any person in the article of death, who is conscious of his condition, as to the cause of his death and the person who killed him, are admissible in evidence in the prosecution of the homicide. The admission of such statements is founded on the necessity of the case, and the reason is that, being made in view of impending death and judgment, when the hope of life is extinct, and when the retributions of eternity are at hand, they stand upon the same plane of solemnity as statements made under oath. I charge you, gentlemen, that great caution is necessary in the use of dying declarations. The court has admitted this evidence, leaving you to determine whether the statements were or were not made by the deceased, and also whether the statements, if made by her, were made at a time when she was in the article of death, and whether she was conscious of her condition. If you believe the deceased made the statements, and you believe that she was at the time in the article of death, in a dying condition, and also believe she was conscious of her condition, then you should consider the statements along with all other evidence in the case. If you do not believe that she was in the article of death, in a dying condition, or if you do not believe that she was conscious of her condition, or if you do not believe that she made the statements, you should not consider them at all.[60]

You are instructed that there is certain testimony before you touching certain declarations made by the deceased prior to his death, claimed by the state to be dying declarations. It is proper that I should call your attention as to what constitutes dying declarations. In order to make this evidence at all for your consideration, you must be satisfied beyond a reasonable doubt that these declarations were made while the person was in a dying condition; and you must be satisfied, further, that these declarations were

[60] Josey v. State, 74 S. E. 282, 137 Ga. 769.

made by the person knowing at the time that he was in a dying condition. If those conditions exist, they become what the law terms "dying declarations," and if any declarations were made under such conditions as that, it is testimony to be considered with all the other testimony in the case. If either one of these do not exist, it would not be testimony to be considered at all.[61]

The jury are instructed that it is for the court, in the first instance, to determine whether the preliminary proof was sufficient to admit dying declarations, but that this ruling is not binding upon them, and that they must be satisfied that the statement was actually made by the deceased, and that he was in the article of death and conscious of his condition at the time of making such declaration.[62]

§ 3047(2). Iowa

The jury are instructed that, if you find by the evidence and beyond a reasonable doubt that at the office of ——— in ———, on the night of ———, the decedent ——— was in a dying condition, that he was suffering from a mortal wound, which upon that night had been inflicted upon him, and that he was at the time fully conscious that he was suffering from a mortal wound and was in a dying condition, and that he then and there made the declarations and statements attributed to him by various witnesses upon the witness stand before you, and that such declarations and statements were then and there made by said ———, under solemn conviction of impending dissolution, and that they were made relative to the encounter between him and the defendant, in which encounter he received a mortal wound, then you are instructed that you should consider such declarations and statements as testimony in the case, and give them the same weight, and weigh and consider them by the same rules, as though made by ——— in person on the witness stand under oath before you.[63]

§ 3047(3). Nebraska

You are instructed that in prosecutions for murder or homicide the dying statements or declarations of the person with whose murder the accused stands charged, when material, and made under the sense of impending death, are admissible in evidence. Such declarations are made when the party making them is at the point of death, and when every hope of the world is gone, and when every motive for falsehood is silenced, and the mind is induced by the most powerful considerations to speak the truth. The situation, in law, is considered as creating an obligation equal to that which

[61] Findley v. State, 54 S. E. 106, 125 Ga. 579.

[62] Smith v. State, 44 S. E. 817, 118 Ga. 61.

[63] State v. Johns, 132 N. W. 832, 152 Iowa, 383.

is imposed by an oath administered in a court of justice. You are instructed that the declarations of ——— offered in evidence in this case through certain witnesses were admitted under such rule of law. But the truth or falsity of such declarations of ———, and the degree of accuracy or inaccuracy in the recital thereof by the witnesses, are matters for you to weigh under the same tests as apply to other witnesses, considering all of the circumstances in evidence surrounding each case and each witness.[64]

§ 3047(4). Wisconsin

You are instructed that the mere fact that these statements have been admitted in evidence by the court is not in any way binding on you in your deliberations. You are at liberty, and it is your duty, to determine for yourselves whether the necessary facts have been established, beyond a reasonable doubt, by the evidence in this case, which are a foundation for the consideration of these statements in evidence by you. These necessary facts are: First, that the statement was made voluntarily, at a time when ——— knew and was fully conscious of the fact that she was in a dying condition. Second, that such statements were made at a time when she was fully conscious of all that transpired, and fully understood the meaning and import of the questions and answers, and that her mind at that time was in such a condition that she was in such possession of her reasoning faculties as to entitle her declarations to credit at your hands, and that she fully understood and comprehended all of the facts, circumstances, and transactions dealt with in those statements. Third, that at the time the statements were made she was under no duress or compulsion, but that the statements were made freely and voluntarily by her. Fourth, that the statements were hers, and not the statements of any other party. If you should find that any of these necessary facts just set forth are lacking, you will disregard entirely those declarations. The mere fact that the declarations have been admitted in evidence by the court does not in any manner determine for the jury anything as to the weight or credibility of these statements. You are the sole judges as to the weight and credibility to be given to these dying declarations under the rules that have just been stated; and if you find from the evidence that at the time said statements or declarations were alleged to have been made ——— was in such a mental condition as to not comprehend and understand all of the answers and the questions or the import of the answers and questions, or if you find at that time she did not have such possession of her reasoning faculties as to entitle her declaration to credit, or if you find that such declarations were not freely and voluntarily

[64] Kastner v. State, 79 N. W. 713, 58 Neb. 767.

given, but were given under coercion or compulsion, you are to disregard these declarations in arriving at your verdict. In arriving at a determination of this question, you will take into consideration all the surrounding facts and circumstances as disclosed to you by the evidence in this case. In determining the weight of credibility to be given to these dying declarations, less weight and less credibility should be given to a declaration obtained from a person in extremis by means of leading questions than to a statement which is voluntarily made by the same person in narrative form. In considering these declarations, you should take into consideration the manner in which the statements were obtained, whether they were narrative statements of facts, or whether the statements were elicited by means of questions, and you should also take into consideration the form and nature of these questions as disclosed to you by the testimony; and if from the testimony you believe that the declarations are in reality statements of some one else, put into the mouth of ——— by other parties, and not the statements of ——— freely and voluntarily made, then you should disregard these statements in arriving at your verdict. It must appear with a great degree of certainty that the statements attributed to ——— are in fact the statements made by her, and not those of some other person. In determining what weight you will give to these dying declarations, you must consider whether these declarations were induced by fear, or because of the fact that Dr. ——— had said to ———, on the morning of the day that the statements were made, that he would not treat her, unless she made a full and complete statement to him; if these matters were in the mind of ———, and if they influenced her at the time of making these declarations to such a degree as to operate as a compelling force or reason for making these declarations, so that these declarations were not made freely and voluntarily, but were made under coercion, if that be your findings, you should wholly disregard these declarations in arriving at your verdict. On the other hand, if you are satisfied, beyond a reasonable doubt, that these statements were made voluntarily, not under any duress or coercion or compulsion, when ——— was fully conscious that she was in a dying condition, and when she was in such mental condition that she fully understood the meaning and import of the questions and answers, and that her mind was in such a condition at that time that she fully understood and comprehended all the facts, circumstances, and transactions relating to her condition and to the events which had taken place during the past week, and that these statements were her statements, and not those of some other person, then you will give consideration to these dying declarations and give them such

weight as you believe them entitled to receive, after considering all the facts and circumstances in the case.[65]

§ 3048. Same—Sense of impending death

§ 3048(1). California

You are instructed that you have the right, in considering whether or not you shall accept the declaration as a correct statement, to determine for yourselves whether the declarations were made under a sense of impending death, and whether the declarant was fully convinced of that fact when making the declarations, and you must disregard the declarations, or any of them, if you are not satisfied that they were made under a sense of impending death.[66]

§ 3048(2). Iowa

You are instructed that certain testimony has been offered and submitted to you upon the trial of this case tending to show the condition of ———, deceased, covering a time about ———, up to and including ———, the day on which the wounds of which he died were inflicted upon him. This evidence is proper for you to consider in connection with all of the other facts and circumstances in so far as it may throw light upon the attitude of the deceased at the time he received the fatal shot, but it would not be proper for you to consider said evidence so offered and submitted to you upon this trial for any other purpose whatever. Certain evidence has also been offered and submitted to you upon the trial of this case with reference to statements or declarations claimed to have been made by said ——— on the day following the evening he received the fatal shot. This testimony is proper for your consideration in the determination of this case only in the event that it is shown by the evidence offered upon the trial of the case that at the time said alleged statements or declarations were made by said ———, if you find they were made by him, that said ——— made same under the belief that the wounds which had been inflicted upon him were fatal, and that he could not recover from the effects thereof. You are further instructed that unless you find from the evidence in this case that at the time said ——— made any statements or declarations with reference to the matter of his being shot, they were made under the belief that he would not get well, but that he would die from the effects of such wounds, it will not be proper for you in the determination of this case to consider or give weight to any of the statements or declarations claimed to

[65] State v. Law, 136 N. W. 803, 150 Wis. 313.

[66] People v. Rulia Singh, 188 P. 987, 182 Cal. 457. This instruction is not open to the objection that it leads the jury to understand that, if they find the deceased to have had a sense of impending death at the time of his declaration, it must be accepted as true.

have been made by said ——— as testified to by the witnesses upon the trial of this case. If, however, you find from the evidence in this case that at the time said ——— made any statements or declarations with reference to the transactions in controversy in this case he had been advised that he could not get well, and that at said time he entertained no hope of recovering from the effects of said wounds, then it will be proper for you to determine from the evidence offered upon the trial of this case what he in fact said with reference to said transactions, and, having thus determined what he in fact said with reference thereto, you may consider it in connection with all of the other facts and circumstances disclosed by the proof, and give same such credit and weight as you believe under all of the circumstances it is fairly and reasonably entitled to. In determining whether said ———, at the time he made the statement or declarations testified to by the witnesses upon the trial of this case, believed that he would not get well, but that he would die from the effects of the wounds inflicted upon him, it will be proper for you to take into consideration the fact, if it be a fact, that the attending physician informed him that he could not recover from the effects of said wounds, the nature and character of the wounds themselves that were inflicted upon him, together with all of the other facts and circumstances shown by the evidence that may throw light upon the question of whether or not said ———, at the time he made the statements or declarations as claimed by the witnesses who have testified upon this trial, thought or believed that he would not get well. It will not be proper, however, for you to give any weight to any mere opinion that may have been expressed by ———; but you should consider only such statements as he is shown by the evidence to have made as to the circumstances under which he was shot, and as to what occurred at said time.[67]

§ 3049. Same—Declarations made in spirit of ill will to defendant

The court instructs the jury for the defendant that, if they believe that ———, at the time he is alleged to have made a dying declaration, or statement, to any witness who has testified in this case, was in the frame of mind revengeful against the defendant, desiring to seek revenge, and to that end made the statements, or if from all the evidence in the minds of the jury such dying declarations evinced upon the part of the deceased, ———, malice, hatred, or ill will towards the defendant, they shall disregard the testimony of each and every witness who has testified to anything that the deceased, ———, said to such witnesses.[68]

[67] State v. Towne, 160 N. W. 10, 180 Iowa, 339.

[68] Marley v. State, 69 So. 210, 109 Miss. 717.

§ 3050. Same—Value and weight as evidence

§ 3050(1). Mississippi

The court instructs the jury that the dying declarations of the deceased, made to his wife, are not entitled to the same credit and force as if the deceased was still alive and testifying in the presence of the jury, under oath; that it is a species of hearsay evidence, and is intrinsically weaker than if the declarant was present and subject to cross-examination; and the jury alone are the judges of its weight and force.[69]

§ 3050(2). Missouri

The court instructs the jury that the statement read to you as the dying declaration of ——— should be received by you as such declaration; but because it is a dying declaration you are not necessarily bound to believe it, but you will give it that weight which you think it ought to have, when considered in connection with all the other facts and circumstances in evidence.[70]

§ 3050(3). Wisconsin

You are instructed that in considering the statements made by ——— on the day of her death, you should consider the fact that dying declarations constitute an exception to the general rules of evidence. They are in the nature of hearsay or secondhand evidence, and, although for reasons of public policy, as well as because of the difficulty of obtaining better proof of the fact, they are under certain circumstances admitted in evidence, they do not have all the guaranty which surround evidence given under oath in a court of justice. It is assumed that, being made in extremity, when the party is at the point of death and believes that all hope of the world is gone, they have some guaranty of their truth, in view of the solemnity of the occasion, or such as an oath in court would have. But it is clear that their value as evidence rests upon an assumption; and hence it is that, while the law recognizes the necessity of admitting such proof on a par with an oath in a court of justice, it does not and cannot regard it as of the same value and weight as the evidence of a witness given in a court of justice under all the tests and safeguards which are there afforded for discovering the truth; for the accused has the opportunity in court of more fully investigating the truth of the evidence by means of cross-examination, which the defendant is denied in the case of a dying declaration, and the jury have the opportunity of observing the demeanor

[69] Lipscomb v. State, 23 So. 210, 75 Miss. 559. This instruction was considered by Judge Magruder to be on the weight of the evidence, and undoubtedly would be so regarded in some jurisdictions. See Vol. I, § 50.

[70] State v. Forsha, 88 S. W. 740, 190 Mo. 296, 4 L. R. A. (N. S.) 576; State v. Parker, 72 S. W. 650, 172 Mo. 191.

of the person while the testimony is being given from the stand. The power of cross-examination is quite as essential to the process of eliciting the truth as is the obligation of an oath; and where the life or liberty of the defendant is at stake the absence of the opportunity for cross-examination is a serious deprivation, which differentiates in nature and degree the evidence of a dying declaration from that which is direct and given upon the witness stand. The jury should not receive the impression that, however admissible in evidence the dying statement is, it is as valuable or as authoritative for the purpose of proving the defendant's guilt as though this same evidence had been given by a witness in a court of justice, with every opportunity to the defendant to investigate its truth by means of cross-examination.[71]

§ 3051. Acts or declarations of co-conspirator as evidence against defendant

You are instructed that if you believe from the evidence, beyond a reasonable doubt, that the defendant and J. agreed between themselves, or conspired together, to kill ———, and that in pursuance thereof defendant killed him, then I charge you that any act or declaration of J. in furtherance of said common purpose done or said by him in the absence of the defendant, and which may have been introduced in evidence in this case, is legal evidence in this case against defendant, and may be considered by you in finding your verdict; but, if the evidence fails to satisfy you, beyond a reasonable doubt, that such agreement or conspiracy existed, then such acts or declarations of J., done or said in the absence of the defendant, are not legal evidence in this case against the defendant, and you will give them no consideration whatever, but will wholly disregard them in finding your verdict in this case.[72]

You are instructed to disregard and not to consider for any purpose the testimony of the witness ——— as to the alleged statements made by C. to said witness in the store of the said C.; the testimony of the said witness showing that the defendant was not present at the time said alleged statement was made, unless you should find and believe from the evidence beyond a reasonable doubt that the defendant and C. or defendant and C. and others, had entered into an agreement to kill deceased.[73]

§ 3052. Matters considered on question of assault with intent to kill or murder

The court instructs the jury, for the defendant, that if they believe the evidence in this case shows that defendant had another

[71] State v. Law, 136 N. W. 803, 150 Wis. 313.

[72] Kinney v. State, 144 S. W. 257, 65 Tex. Cr. R. 251.

[73] Banks v. State, 108 S. W. 693, 52 Tex. Cr. R. 480.

load in his gun, and could have used it, and killed said ———, if he had so desired, but did not do so because he did not want to kill him, the jury should take this into consideration, along with all the other facts and circumstances in the case, in determining whether the defendant did intend to kill and murder ———, and if, from all the facts and circumstances in evidence, they have a reasonable doubt as to whether he really meant to murder, they cannot lawfully convict him of assault and battery with intent to kill and murder.[74]

§ 3053. Matters considered on issue of self-defense

§ 3053(1). Arkansas

The court instructs the jury that, if you believe from the evidence that the first shot fired by this defendant killed ———, and that it was fired by the defendant in apparently necessary self-defense, then the defendant should be acquitted; and the further fact, if proven, that he afterwards fired several shots into the deceased's dead body, should not be considered by you.[75]

§ 3053(2). Illinois

The jury are instructed that if the jury believe, from the evidence, that the defendant inflicted the fatal blow upon deceased in self-defense, while the deceased was manifestly intending and endeavoring, in a violent manner, to enter the habitation of the defendant, for the purpose of assaulting or offering personal violence to the defendant, being therein, then the killing was justifiable, and the jury ought to acquit the defendant. But the jury, in considering whether the killing was justifiable, on the ground that the killing was in self-defense, while the deceased was endeavoring, in a violent manner, to enter the prisoner's habitation, should consider the circumstances attending the killing, and the conduct of the parties at the time and immediately previous thereto, and the means used, and the degree of force used by the prisoner in making what is claimed to be this self-defense, as bearing upon the question, whether the blows given were actually given in self-defense, or whether they were given in carrying out an unlawful purpose. If the force used was unreasonable in amount and character, and such as a reasonable mind would have so considered under the circumstances, it is proper for the jury to consider that fact in determining whether the killing was in self-defense.[76]

§ 3053(3). Kentucky

The jury are instructed that in determining whether or not the defendant had reasonable grounds to believe that ———, at the

[74] McCaa v. State (Miss.) 38 So. 228.

[75] Lindsey v. State, 189 S. W. 163, 125 Ark. 542.

[76] Greschia v. People, 53 Ill. 295.

time he was killed, was then and there about to cut, stab, or do the defendant great bodily harm, they are not confined to the facts and circumstances proved to have transpired and existing at the time of the killing, but they may, and should, take into consideration all the evidence in the case.[77]

§ 3053(4). New York

The jury are instructed that you may take into consideration the fact that defendant remained at the scene of the homicide and did not run away.[78]

§ 3053(5). Texas

You are instructed that in determining the existence of actual or apparent danger, you are to view the facts of the case from the standpoint of the defendant, at the time of the killing, taking into consideration the threats made by deceased, against defendant, if any were made, the general reputation of the deceased for violence, if such has been proved, and the language of the deceased just before, and at the time of, the homicide, if such be in proof in determining the guilt or innocence of the defendant.[79]

§ 3054. Same—Uncommunicated threats of deceased as bearing on his intent to provoke difficulty

§ 3054(1). Missouri

The court instructs the jury, if they shall find and believe from the evidence that ——— made any threats against the life of defendant which were not communicated to him, such threats should be considered by the jury for the purpose of determining the intention of ——— at the time he provoked and entered into the difficulty with the defendant, provided the jury believe from the evidence that ——— did provoke and enter into the difficulty with the defendant.[80]

§ 3054(2). South Dakota

You are instructed that, if you have a reasonable doubt as to whether the defendant or the deceased made the first overt act, then you should take into consideration the evidence of threats made by the deceased, if any, against the defendant, though they had not been communicated to the defendant before the shooting, for such evidence is competent to show that at the time of the shooting the deceased began the affray, thereby attempting to fulfill his threats.[81]

[77] Commonwealth v. Thomas, 104 S. W. 326, 31 Ky. Law Rep. 899.

[78] People v. Childs, 90 App. Div. 58, 85 N. Y. S. 627.

[79] Marshall v. State, 189 S. W. 499, 80 Tex. Cr. R. 235.

[80] State v. Smith, 65 S. W. 270, 164 Mo. 567.

[81] State v. Stumbaugh, 132 N. W. 666, 28 S. D. 50.

§ 3054(3). Texas

You are instructed that the law provides that threats made by the deceased may be given in evidence and considered by the jury for the purpose of explaining the acts and conduct of the deceased at the time of the homicide, whether the same had been communicated to the defendant or not. Now, if you find from the evidence in this case that the deceased made threats against the defendant, and you further find that such threats were not communicated to the defendant, then you may consider said threats for the purpose of explaining if they do the acts and conduct of the deceased at the time of the homicide.[82]

§ 3055. Same—Good character of defendant

You are instructed that there has been some evidence introduced bearing upon the good character of the defendant prior to the killing which you should consider in making up your verdict, but you are instructed that good reputation prior to the commission of the crime is no defense, and the evidence is introduced for the purpose of throwing light upon the question as to who was the probable aggressor; and if you are convinced by the evidence beyond a reasonable doubt that the defendant committed the crime as charged, the fact that his reputation was good prior to that time would be no defense.[83]

§ 3056. Effect of previous reputation of defendant as a man of peace

§ 3056(1). Georgia

The jury are instructed that any evidence offered by the accused for the purpose of establishing his character for peace should be considered by the jury in connection with the other evidence in the case in passing upon the guilt or innocence of the defendant.[84]

§ 3056(2). Missouri

You are instructed that in determining as to the guilt or innocence of the defendant, you should take into account the testimony in relation to his character as a peaceable, quiet citizen, and you should give to such testimony such weight as you deem proper; but if, from all the evidence before you, you are satisfied, beyond a reasonable doubt, as defined in these instructions, that the defendant is guilty, then his previous good character, if shown, cannot justify, excuse, palliate, or mitigate the offense, and you cannot acquit him merely because you may believe he has been a person of good repute.[85]

[82] Harper v. State, 170 S. W. 721, 75 Tex. Cr. R. 124.

[83] Whitley v. State, 169 S. W. 952, 114 Ark. 243.

[84] Nelms v. State, 51 S. E. 588, 123 Ga. 575.

[85] State v. Brown, 70 S. W. 1111, 181 Mo. 192.

§ 3056(3). Oregon

There has been testimony offered in this case upon the question of the reputation of the defendant as a quiet, peaceable, and law-abiding citizen. The defendant has a right to show his previous good character as a circumstance tending to show the improbability of his guilt, or that he would commit such a crime. If, however, you believe from all of the evidence beyond a reasonable doubt that the defendant committed the crime in question as charged in the indictment, then it would be your duty to find the defendant guilty, even though the evidence satisfied your minds that the defendant previous to the crime in question had borne a good reputation as a quiet, peaceable, and law-abiding citizen; also even though you should find from the evidence that the defendant's reputation as a quiet, peaceable, and law-abiding citizen is bad, you should not find him guilty unless you are satisfied of his guilt from the evidence before you beyond a reasonable doubt.[86]

The jury are instructed that the defendant in this case has offered evidence tending to show his character as a peaceable, law-abiding citizen. The defendant has a right to show his previous good character as a circumstance tending to show the improbability of his guilt, or that he would commit such a crime. If, however, you believe from the evidence beyond a reasonable doubt that the defendant committed the crime in question as charged in the indictment, then it would be your duty to find the defendant guilty, even though the evidence satisfied your minds that defendant, previous to the commission of the alleged crime, had sustained a good reputation as a peaceable and law-abiding citizen.[87]

§ 3057. Character of deceased for violence

The jury are instructed that evidence has been introduced before you of the character of the deceased, and tending to show that he was a violent, quarrelsome, and dangerous man. This was not admitted as tending in any way to justify his slaying by the defendant. A party has no more right to slay a bad man than a good one. Both are equally protected under the law. The unwarranted slaying of either is equally a crime. The evidence of bad character is to be considered by the jury only as a circumstance illustrating the facts of the homicide, and indicating the aggressor and the nature of the aggression; it being more probable that a man of violent and dangerous character would make an unprovoked and deadly assault than that a quiet and peaceable man would do so.[88]

[86] State v. Selby, 144 P. 657, 73 Or. 378.

[87] State v. Porter, 49 P. 964, 32 Or. 135.

[88] People v. Young (Cal.) 63 P. 837.

§ 3058. Good character of deceased for peace

The jury are instructed that, although the jury may find from the evidence that the state has proved the good character of the deceased for peace and quiet in the neighborhood in which he resided they cannot consider this evidence in considering the guilt or innocence of defendant.[89]

§ 3059. Matters considered in determining issue of sanity

§ 3059(1). Arkansas

You are instructed that, on the question of sanity or insanity of the defendant, you will consider all the evidence offered in the case, the homicide itself, the manner in which it was committed, and the attending circumstances, the life, habits, and conduct of the defendant, as well as his mental capacity or perverseness, if any, from his birth up to the present time, to determine whether or not the defendant was of sound or unsound mind at the time of the commission of the crime charged.[90]

§ 3059(2). California

You are instructed that, in determining the question whether the defendant was insane at the time of the alleged commission of the act, the jury are to consider all his acts at the time of, before, and since the alleged commission of the act, as such acts and conduct have been shown by the evidence, and the jury have the right to consider the defendant's appearance and actions during the trial as a circumstance in determining his insanity at the time of the homicide.[91]

§ 3059(3). Michigan

The jury are instructed that every person is presumed to be sane until the contrary is shown. If no evidence of insanity had been given, then you would presume the respondent to be responsible for her acts. When evidence is introduced upon that question, then the question of whether or not the respondent is responsible for her act becomes a question for you to determine from all the evidence bearing upon it; and if, after carefully considering all of such evidence, there should remain any reasonable doubt as to whether or not she was responsible, then your verdict should be "Not guilty, because of insanity." If, on the other hand, you find beyond a reasonable doubt that the children were killed and murdered by poison by the respondent, and the evidence convinces your mind so that you have no reasonable doubt that she was responsible for her act, under the rules I have given you, then your verdict should be,

[89] Jimmerson v. State, 32 So. 141, 133 Ala. 18.

[90] Diggs v. State, 190 S. W. 448, 126 Ark. 455.

[91] People v. Donlan, 67 P. 761, 135 Cal. 489.

"Guilty of murder in the first degree." In determining this question, consider carefully all the facts bearing in any manner upon it. Did she inherit insanity from her ancestors? If so, what was the nature of such insanity? What has been her life and habits and surroundings, as disclosed by the evidence? What has been her physical condition, and how has that been affected by her life and habits? Consider what her friends and neighbors have discovered in regard to her actions as tending to show whether or not she is sane or insane. Consider the testimony of the doctors who have examined her, and their opinions on the subject. What opportunity did the doctor have to obtain knowledge upon which to base an opinion? Consider carefully her actions just before and at the time of the committing of the crime. Did she do any act preparatory to the committing of the crime? If so, look carefully to see what it was. How was it committed? Did she make any statement in writing during that ——— night? If so, look into it. Does it indicate that she was at that time irresponsible, or does it indicate to the contrary? Consider her statements the next morning, if she made any, and all her statements and conduct since her arrest, so far as they are disclosed by the evidence; and from all these, and any other evidence that I have not referred to, touching the question determine whether or not on that ——— night the respondent was such a woman as should be held responsible for the crime with which she is charged.[92]

§ 3059(4). Missouri

The court instructs the jury that, on the question of the sanity or insanity of the defendant, you will consider all the evidence offered in the case; the homicide itself, and the attending circumstances; the life, habits, and conduct of the defendant, as well as his mental capacity or perverseness, if any, from his birth up to the present time; and also the habits and conduct of his parents—to determine whether or not the defendant was of sound or unsound mind at the time of the commission of the crime charged. If you find that the defendant was insane and irresponsible, from any disease or disorder of mind, as explained in these instructions, when he committed the homicide, then you will find him not guilty; but if you find that at the time of the shooting he was not insane, but responsible for his act, as explained in these instructions, and that he committed the crime as charged, then you will find him guilty, even though you may find that he has become insane since the homicide, or that he is now insane.[93]

[92] People v. Quimby, 96 N. W. 1061, 134 Mich. 625.

[93] State v. Duestrow, 38 S. W. 554, 137 Mo. 44.

§ 3059(5). Texas

You are instructed that sanity and insanity are terms applicable to the mode of operation of the mind as judged by some accepted standard of normality. The mode of operation of the mind is ascertainable from the conduct of the person in question, i. e., from the effect produced by his surroundings on his mind when responding by action to those surroundings. Virtually, then, the mind is one, while the surroundings are multifold; and the mode of operation cannot be ascertained to be normal or abnormal except by watching the effects through a multifold series of causes. On the one hand, no single act can be of itself decisive; while, on the other hand, any act whatever may be significant to some extent. The first and fundamental rule, then, will be that any and all conduct of the person is admissible in evidence. There is no restriction as to the kind of conduct. There can be none; for, if a specific act does not indicate insanity, it may indicate sanity. It will certainly throw light one way or the other upon the issue. "Upon this I believe that no difference of opinion will be found to exist," said Mr. Justice Patteson, in a celebrated case, "as to the principle on which such evidence is admissible. Every act of the party's life is relevant to the issue." There can be no escape from this consequence. There is no distinction in kind (whatever there may be in degree) between one or another piece of conduct as evidence to be considered; some inference is always possible.[94]

You are instructed that the suggestion that the government, in attempting to rebut the testimony offered by the prisoner on this point (of insanity), should have been limited to the explanation or denial of the particular transactions, acts, conduct, and declarations introduced by the prisoner to make out his defense, cannot be sustained. Most men in the course of their lives, in times of excitement produced by disease or otherwise, do many strange and peculiar acts, and oftentimes give utterance to eccentric or unusual language; and it is obvious that if a person accused of crime may select and offer in evidence all the dark spots of his life, or every peculiar and unusual act and declaration, and be allowed to exclude all the rest, that many guilty offenders must escape, and justice often be defeated, because the means of ascertaining the truth are excluded from the jury. Whenever the accused has offered his acts, conduct, and declarations, before and after the homicide, the government may offer evidence of other acts, conduct, and declarations of the accused within the same period to show that he was sane, and to rebut the evidence introduced for the defense.[95]

[94] Witty v. State, 171 S. W. 229, 75 Tex. Cr. R. 440.

[95] Witty v. State, 171 S. W. 229, 75 Tex. Cr. R. 440.

§ 3060. Weight of expert testimony on issue of sanity

§ 3060(1). Indiana

The jury are instructed that the opinions of medical experts are to be considered by you, in connection with all the other evidence in the case; but you are not bound to act upon them, to the entire exclusion of other testimony. Taking into consideration these opinions, and giving them just weight, you are to determine for yourselves, from the whole evidence, whether the accused was or was not of sound mind, yielding him the benefit of a reasonable doubt, if such arises from the evidence.[96]

§ 3060(2). Missouri

The jury are instructed that the testimony given by the physicians and experts who testified in this case is to be taken and considered by the jury like the evidence of other witnesses who testified in the cause; and the opinions on questions of insanity which have been given by medical experts are proper testimony before you, subject to the same rule of credit or discredit as the testimony of other witnesses, and are not conclusive on the jury. These opinions neither establish nor tend to establish the truth of the facts upon which they are based. Whether the matters testified to by the witnesses in the cause as facts are true or false is to be determined by the jury alone, and you must also determine whether the facts and matters stated and submitted to the experts in the hypothetical question are true in fact, and have been proven in the case.[97]

§ 3061. Same—As dependent on truth of assumptions in hypothetical questions

The jury are instructed that you are not to take for granted that the statements contained in the hypothetical questions which have been propounded to the witnesses are true. Upon the contrary, you are to carefully scrutinize the evidence, and from that determine what, if any, of the averments, are true, and what, if any, are not true. Should you find from the evidence that some of the material statements therein contained are not correct, and that they are of such a character as to entirely destroy the reliability of opinions based upon the hypothesis stated, you may attach no weight whatever to the opinions based thereon. You are to determine, from all the evidence, what the real facts are, and whether they are correctly, or not, stated in the hypothetical question or questions. I need hardly remind you (for it will suggest itself to your own

[96] Guetig v. State, 66 Ind. 94, 32 Am. Rep. 99.

[97] State v. Crane, 100 S. W. 422, 202 Mo. 54; State v. Duestrow, 38 S. W. 554, 137 Mo. 44.

minds) that an opinion based upon an hypothesis wholly incorrectly assumed, or incorrect in its material facts, and to such an extent as to impair the value of the opinion, is of little or no weight. Upon the matters stated in these hypothetical questions, and which are involved in this investigation, you are to give the defendant the benefit of all reasonable doubt, if any there should be, and, where there is a reasonable doubt as to the truth of any one of the material facts stated, resolve it in the defendant's favor.[98]

§ 3062. Effect of former adjudication

§ 3062(1). Missouri

It having appeared in evidence that there has been a former trial of this case, you are instructed that you cannot consider in any way the result of such former trial, and you will try this case as if there never had been any former trial whatever. You must consider only the evidence produced in the present trial, and be governed solely by the law as now declared to you by the court.[99]

§ 3062(2). Oklahoma

The jury are instructed that it is disclosed by the record and the testimony in this case that the defendant at the time and place charged in the indictment, and during the altercation, shot and killed P. W. C., father of F. C. The defendant was indicted for killing P. W. C., charged with the crime of murder. To this charge he entered a plea of not guilty, and defended said charge upon the grounds that he fired the shot at F. C. which caused the death of P. W. C. and that he fired said shot in his own necessary self-defense, and against the assault of F. C., with a deadly weapon. Upon the trial of that cause in this court he was by the judgment of the court acquitted. By that judgment the issues necessarily tried and determined are conclusive in this cause, and cannot be again retried. By that judgment it was determined that, in firing the shots from the shotgun which caused the death of P. W. C., the defendant was justifiable, and that at that time he was not the aggressor, and had reasonable grounds to apprehend a design on the part of F. C. to take his life or do him some great personal injury, and that he fired the shots from the shotgun in self-defense. These findings in the former case, to the extent set out above, are binding on you in this case, and you are required, in your considerations and deliberations, to treat said findings as facts, and not open to question or inquiry.[1]

[98] Guetig v. State, 66 Ind. 94, 32 Am. Rep. 99.

[99] State v. Hudspeth, 60 S. W. 136, 159 Mo. 178.

[1] Morris v. Territory, 99 P. 760, 1 Okl. Cr. 617.

§ 3063. Limiting effect of evidence

§ 3063(1). Kentucky

You are to take and receive all the evidence which the court permitted you to hear about the alleged shooting of G. by B. for the purpose only, and in so far only, as it may in your judgment tend to show motive for the acts and conduct of the parties to the difficulty in which J. was killed, if in your judgment it does so show or tend to show motive. The word "motive," as used in these instructions by the court, means inducement, reason, cause, or incentive to do the acts and things charged in the indictment herein, if they or any of them were done.[2]

§ 3063(2). Oklahoma

You are instructed that the proof with reference to the first encounter before defendant procured the shotgun can only be considered by you in connection with the other proof in the case for the purpose of ascertaining the state of mind of the respective parties at the time of the homicide, and for the reason of ascertaining who probably began the difficulty and whether the defendant reasonably and in good faith believed that he or his brother, or both, were in danger of losing their lives or receiving great bodily injury at the time of the subsequent difficulty in which the deceased was slain.[3]

§ 3064. Same—Evidence as to insanity

The jury are instructed that you cannot and must not consider the evidence as to the defendant having assaulted his father, or his son-in-law, or his son, or as to his slapping his grown daughter, as any incriminating circumstance against the defendant in this case; but it was only admitted, and can be considered by you only, on the issue as to the sanity or insanity of the defendant, and can be considered by you for no other purpose; and as to whether it tends to show whether he was sane or insane is a question altogether for your consideration.[4]

Evidence has been introduced before you tending to show that immediately following, and for some time after the occurrence in which the deceased was shot and killed, the defendant was of unsound mind. You are instructed that you are to consider such evidence in determining whether, at the time of the shooting, defendant was of unsound mind and for no other purpose.[5]

[2] Gambrell v. Commonwealth, 113 S. W. 476, 130 Ky. 513.

[3] McDaniel v. State, 127 P. 358, 8 Okl. Cr. 209.

[4] Leary v. State, 117 S. W. 822, 55 Tex. Cr. R. 547.

[5] Sartin v. State, 103 S. W. 875, 51 Tex. Cr. R. 571.

§ 3065. Same—Prior difficulties

I instruct you that if you believe from the testimony in this cause that said defendant and the prosecuting witness, prior to ———, had certain difficulties and troubles, then, in that event, you are only to consider such testimony for the sole purpose of determining the state of mind of said defendant and said prosecuting witness, at the time of the alleged assault, if any there was, and for the further purpose of showing malice, if any, the defendant had at such time.[6]

§ 3066. Same—Threats of deceased

The court instructs the jury that threats of deceased towards defendant (if you believe and find from the evidence that such threats were made) were admitted solely for the purpose of showing the attitude of said deceased towards defendant, and you are instructed that you cannot consider such threats (if you believe from the evidence that they were made) for any other purpose.[7]

§ 3067. Limiting effect of evidence as to contradictory statements of witness

The jury are instructed that, when a witness testifies for one side it is competent for the other side to introduce another witness to swear that on a particular occasion that witness made statements different from the statements that he made on the stand, and that is done for the purpose of impeaching or tending to impeach the particular witness' veracity before the jury. That is the purpose of introducing Mr. D. here. The defendant claims that this particular witness (L. J.) made statements to Mr. D. different from the statements he testified to here, and that is done for the purpose of tending to show (and it is for you to give the evidence such weight as it is entitled to) he is not worthy of credit, and that is the purpose for which it was introduced. That, however, does not show in any manner that what he told Mr. D. was true or untrue; in other words, what he told Mr. D. is a declaration made by him outside of the court, and that itself is not original evidence in this case. It is evidence tending to show that this witness made contradictory statements about this case.[8]

§ 3068. Sufficiency of evidence

§ 3068(1). Alabama

The jury are instructed that, if they have a reasonable doubt, growing out of the evidence, as to whether the killing was done

[6] People v. Bradfield, 159 P. 443, 30 Cal. App. 721.

[7] State v. Greaves, 147 S. W. 973, 243 Mo. 540.

[8] Bondurant v. State, 27 So. 775, 125 Ala. 31.

deliberately, or as to whether it was done premeditatedly, then they cannot find the defendant guilty of murder in the first degree; and if they have a reasonable doubt, growing out of the evidence, as to whether the killing was done out of malice, then they cannot find the defendant guilty of murder in either degree, but only of manslaughter, at the most; and if, after considering all the evidence, the jury have a reasonable doubt as to the defendant's guilt of manslaughter, arising out of any part of the evidence, then they should find the defendant not guilty.[9]

§ 3068(2). Indiana

The jury are instructed that a reasonable doubt is not excluded from the mind of a juror, unless he is so convinced by the evidence of the defendant's guilt that he would act on that conviction in matters of the highest concern and import to his own interest. and his conviction from the evidence as to the truth of defendant's guilt must be such that a prudent man would feel safe to act upon it under any circumstances, when there was no compulsion resting upon him to act at all. This reasonable doubt may arise upon the issue as to whether the state has made out her case or not or upon the question as to whether the defendant acted in self-defense or not, or it may be created by the evidence in relation to the character of the defendant, or remain after a due consideration of all the evidence in this cause.[10]

The jury are instructed that before the jury would in this case be warranted in finding the defendant guilty, the state must prove beyond a reasonable doubt that the defendant struck the deceased with some instrument which caused his death, or contributed thereto, and, if this is not so proved beyond a reasonable doubt, you should find the defendant not guilty.[11]

§ 3068(3). Missouri

The jury are instructed that, while it devolves upon the state to prove the willfulness, deliberation, premeditation, and malice aforethought, all of which are necessary to constitute murder in the first degree, yet, these need not be proved by direct evidence, but may be deduced from all the facts and circumstances attending the killing; and, if you can satisfactorily and reasonably infer their existence from the evidence, you will be warranted in finding the defendant guilty of murder in the first degree.[12]

The jury are instructed, if they have a reasonable doubt that the defendant committed the homicide alleged in the indictment, or

[9] Hunt v. State, 33 So. 329, 135 Ala. 1.

[10] Knight v. State, 70 Ind. 375.

[11] Waybright v. State, 56 Ind. 122.

[12] State v. Brown, 87 S. W. 519, 188 Mo. 451.

was present at the time said homicide is alleged to have been committed, they will find a verdict acquitting defendant.[13]

§ 3068(4). Oklahoma

The court instructs the jury that if, after a consideration of all of the evidence in the case they believe the defendant was justifiable or excusable in his acts, or if they entertain a reasonable doubt upon this subject, they should find him not guilty.[14]

§ 3068(5). West Virginia

The court instructs the jury that although, upon a trial for murder, where the defendant relies upon self-defense in justification of the killing, the burden is upon the defendant, yet this in no wise relieves the state from proving all the elements of murder, if it seeks a conviction, beyond a reasonable doubt, and to the exclusion of every other reasonable hypothesis; and if, in the case on trial, the burden is upon the prisoner to prove that he was acting in self-defense, by a preponderance of the evidence, yet this in no wise relieves the state, if it seeks a conviction, from proving the prisoner guilty beyond every reasonable doubt, and to the exclusion of every reasonable hypothesis, and that if the state does not so prove the defendant guilty beyond every reasonable doubt, and to the exclusion of every other hypothesis, they must find the defendant not guilty.[15]

§ 3068(6). Wyoming

You are instructed that it is the law that every one of these facts essential to the conclusion reached must be established to the same degree of certainty as the main fact. Also it is necessary that the proof should be not only consistent with the prisoner's guilt, but inconsistent with his innocence, for if a single material circumstance remains unproven or if proven is inconsistent with the theory of guilt, the crime is not proven with that certainty which the law requires and which the law demands.[16]

§ 3069. Same—Proof of corpus delicti

The jury are instructed that the absence of the infant, unaccounted for, does not prove that it is dead.[17]

§ 3070. Same—As to identity of perpetrator of crime

§ 3070(1). Alabama

The court charges the jury a probability that some other person may have done the shooting is sufficient to create a reasonable doubt of the guilt of the defendant, and therefore for his acquittal.[18]

[13] State v. Howell, 23 S. W. 263, 117 Mo. 307.

[14] Williams v. State, 131 P. 179, 9 Okl. Cr. 206.

[15] State v. Manns, 37 S. E. 613, 48 W. Va. 480.

[16] Jenkins v. State, 134 P. 260, 22 Wyo. 34.

[17] Haynes v. State (Miss.) 27 So. 601.

[18] Spraggins v. State, 35 So. 1000, 139 Ala. 93.

§ 3070(2). Illinois

The jury are instructed that, if you should find from the evidence that the deceased was killed at the time and in the manner mentioned in the indictment, and that the shot which caused his death was fired by either ———, ———, or the defendant, but are unable, from the evidence, to ascertain by which of said persons said shot was fired, then you ought to decide the case precisely as if it had been proved that such shot was fired by ——— or ———.[19]

The jury are instructed that, if it is uncertain from the evidence in the minds of the jury which one of two or more persons inflicted the wound which caused the death of the deceased, then you should acquit the defendant, unless you believe from the evidence beyond a reasonable doubt that defendant aided or abetted the act which resulted in the death of deceased.[20]

§ 3070(3). West Virginia

The jury are hereby instructed that if they believe from the evidence, beyond a reasonable doubt, that ——— came to his death as charged in the indictment, at the hands of either defendant or ———, and if they further believe from the evidence that both were not present at the time of the killing of ———, as charged in the indictment, and if the jury have a reasonable doubt from all the evidence in the case as to which of the said parties took the life of said ———, as charged in the said indictment, then the jury must find the defendant not guilty.[21]

§ 3071. Same—Of intent to kill

§ 3071(1). Arkansas

You are instructed that, while it is necessary that the proof should show a specific intent to take life, in order to constitute the crime of assault with intent to kill, it is not necessary that this intent should be shown by direct and positive evidence, but it may be shown by facts and circumstances, and, in determining whether such intent existed, you will take into consideration the manner of the assault, the nature of the weapon used, the manner in which it was used, defendant's statements, if any, and all other facts and circumstances tending to show the state of her mind.[22]

§ 3071(2). Washington

I charge you that, in order to prove the crime of assault with intent to commit the crime of murder in this case, it is necessary for the state to prove beyond a reasonable doubt that the defendant,

[19] Kennedy v. People, 40 Ill. 488.

[20] Campbell v. People, 16 Ill. 17, 61 Am. Dec. 49.

[21] State v. Cremeans, 57 S. E. 405, 62 W. Va. 134.

[22] Davis v. State, 173 S. W. 829, 115 Ark. 566.

at the time and place, and in the manner and form charged in the information, cut ——— with a razor or other sharp instrument purposely and maliciously, intending to take his life; and that, in order to prove the crime of assault with a deadly weapon with intent to inflict bodily injury in this case, it is necessary for the state to prove beyond a reasonable doubt that at the time and place mentioned in the information the defendant purposely and unlawfully cut ——— with a knife or other sharp instrument, without any considerable provocation, with the intention of inflicting great bodily injury upon the person of said ———. But I charge you that such intent need not be proved by direct and positive testimony, but may be inferred by the jury from the facts and circumstances presented as evidence in this case, provided they are sufficient to satisfy you beyond a reasonable doubt of the existence of such intent; and I further charge you that every sane person is presumed to intend the natural and ordinary consequences of his voluntary act.[23]

§ 3072. Sufficiency of evidence of intent in prosecution for assault with intent to commit murder

See, also, ante, § 3071(2).

§ 3072(1). Delaware

We have endeavored to tell you in simple language what is meant by malice. It is not necessary to tell you what is meant by the expression "intent to murder." It means of course just what the language imports, and you understand that as well as we do. We do say that the intent to murder must be proved as fully and convincingly as any other essential element of the charge. But inasmuch as such intent cannot ordinarily be proved by direct evidence, such as the confession or declaration of the accused, it must ordinarily be proved, if proved at all, by indirect or circumstantial evidence. It is, therefore, the duty of the jury to carefully consider all the fact and circumstances proved in the case in order to determine whether such intent existed or not. For this purpose the jury may consider the character of the assault, the kind of weapon used, the danger of producing death, and any other acts which show the condition of the assailant's mind at the time the alleged crime was committed.[24]

You are instructed that the intent to commit murder is an essential ingredient of the crime, and is the element that distinguishes it from assaults of other grades. Being entirely a mental opera-

[23] State v. Romano, 86 P. 1, 41 Wash. 241. The last clause in the above instruction refers to an assault with intent to do great bodily harm, which was also included in the information, and as to this offense is proper.

[24] State v. Lichter, 102 A. 529, 7 Boyce, 119; State v. Rothwell, 92 A. 859, 5 Boyce, 312.

tion, or rather a design or determination wholly within the mind, the intent to murder, when not disclosed by the words of the assailant, may be gathered and inferred from his acts and conduct.[25]

The court instructs the jury that the intent to commit murder is an essential ingredient of this charge, and it must be proved to your satisfaction, just as any other material fact in the case is proved. The intent to commit murder may be shown by direct evidence of the intent; that is, by the express confession or declaration of the accused that he committed the alleged assault with the intent to murder. But the intent to commit murder may also be proved by the acts and conduct of the accused, and other circumstances from which the jury may naturally and reasonably infer the intent charged. For instance, it is a principle of law that every man must be presumed to intend the natural and probable consequences of his own voluntary and willful act, so that from the use of a deadly weapon against another the jury may infer the intent to commit murder, unless the circumstances of the case satisfy you to the contrary; such intent, as we have said, being provable by and inferable from the voluntary, unlawful use, in a manner or under circumstances perilous to human life, or directly tending to great bodily harm, of a loaded gun, of an ax, or other weapon which the law considers a deadly weapon, or of any other instrument or missile reasonably likely to take human life when so used.[26]

§ 3072(2). Illinois

You are instructed that, to constitute the offense charged in this case, the intent alleged in the indictment is necessary to be shown, but direct and positive testimony is not necessary to prove the intent. It may be inferred from the facts and circumstances shown by the evidence; and if you believe from the evidence, beyond a reasonable doubt, that the shooting, as alleged in the indictment, was done deliberately, and was likely to be attended with dangerous consequences, the malice or intent requisite to make out this case as charged will be presumed.[27]

§ 3073. Sufficiency of evidence to show malice aforethought

The jury are instructed that, if you believe the story as narrated by the two ——— boys, who testified as witnesses, is true—that is, that the defendant went up the fence with his pistol; that he went through the wire fence, and went out in the wheat field, where ——— was, and met him, first hallooed at him, placed his pistol upon the fence, and stopped the boys, and then went through the wire fence, and went out to where he was, and struck him first in

[25] State v. De Paolo, 84 A. 213, 3 Boyce, 176.

[26] State v. Lee, 74 A. 4, 1 Boyce, 18.

[27] Conn v. People, 6 N. E. 463, 116 Ill. 458.

the mouth with his left fist, and at the same time undertook to fire upon him and that that firing was prevented by the action of ——— in taking hold of the pistol, and it went off into the ground, and then he fired at him, and struck him in the side, and then he fired at him and struck him in the back—you have a state of facts which would authorize you to say that the killing was done willfully; and, not only that, but to say that it was done with malice aforethought, because that state of case, if that be true, would show the doing of a wrongful act, an illegal act, without just cause or excuse, and in the absence of mitigating facts to reduce the grade of the crime.[28]

§ 3074. Sufficiency of evidence of conspiracy to murder

§ 3074(1). Texas

You are instructed that, if you should believe from the evidence that there was a conspiracy to commit a robbery, as before explained, and that the same was so undertaken, and that said ——— was killed, yet if you have a reasonable doubt whether such general purpose was contemplated and assented to by defendant, or whether it was done (if at all) with his knowledge, and in furtherance of a comon design to commit said offense; or if you have a reasonable doubt of defendant's identity as one of the persons engaged in such robbery, if any, or if you have a reasonable doubt of the presence of defendant at the robbery (if any) at the time thereof—in either event you will find him not guilty.[29]

§ 3074(2). Washington

The jury are instructed that if you believe from the evidence that the state has proved a conspiracy between all the defendants to take the life of the deceased, and that they did so take the life of the deceased, then you are charged that, in considering the guilt or innocence of the defendants, you may take into consideration every act and declaration of each member of the conspiracy in pursuance of the original concerted plan, and with reference to the common object which has been given in evidence before you. You are instructed, as a matter of law, that the evidence and proof of conspiracy will, in general, be circumstantial; and, although common design is the essence of the conspiracy, it is not necessary to prove that the defendants came together, and actually agreed in terms to have that design, and precede it by common consent.[30]

[28] Allen v. U. S., 17 S. Ct. 154, 164 U. S. 492, 41 L. Ed. 528.

[29] Nite v. State, 54 S. W. 763, 41 Tex. Cr. R. 340.

[30] State v. McCann, 47 P. 443, 16 Wash. 249.

§ 3075. Sufficiency of evidence on question of self-defense

§ 3075(1). California

The jury are instructed that the defendant is entitled to a verdict of acquittal even if you find he was not in a dazed condition of mind when he shot ———, but was in full possession of his reason and judgment, if you also find from the evidence that he shot defendant under an honest belief that he was then in danger of great bodily injury from said ———; and defendant would be entitled also to a verdict of not guilty, if the evidence creates a reasonable doubt in your minds as to whether the defendant did or did not, from the circumstances and the situation in which he then was, really believe that he was then in danger of great bodily injury from said ——— at the time he shot him.[31]

§ 3075(2). Oklahoma

You are further instructed that when the taking of a life is sought to be justified on the grounds of self-defense it is not incumbent upon the accused to satisfy the jury that the killing was justifiable, but if the evidence on that question is sufficient to raise a reasonable doubt in the minds of the jury as to whether the defendant was justifiable, then the defendant is entitled to an acquittal, and you should so say by your verdict.[32]

§ 3075(3). South Dakota

The court instructs you that if from the evidence in the case you believe that the defendant shot and killed the deceased, and that at the time of the shooting the deceased had an ax or other deadly weapon, and a conflict took place between the deceased and the defendant, and you have a reasonable doubt as to whether the deceased or the defendant was the aggressor—that is, the first to do an overt act towards the other—you should give the defendant the benefit of that doubt.[33]

§ 3075(4). Utah

The jury are instructed that the statute provides that upon a trial for murder, the commission of the homicide being proved, the burden of showing circumstances of mitigation, or that justify or excuse it, shall devolve upon defendant, unless the proof on the part of the prosecution tends to show that the crime committed, if there was one, amounts only to manslaughter, or that the defendant was justifiable or excusable. But by such language the statute does not mean that, to avail himself of the defense of self-defense, the defendant is required to establish such defense by a

[31] People v. Shears, 65 P. 295, 133 Cal. 154.

[32] Horn v. State, 164 P. 683, 13 Okl. Cr. 354.

[33] State v. Stumbaugh, 132 N. W. 666, 28 S. D. 50.

preponderance of the evidence, or the greater weight of the evidence. It means that, if the evidence on the part of the state does not tend to show it, then the defendant, to avail himself of such defense and to have it considered, is required to bring forward some evidence which tends to show self-defense. If he has done that, and if such evidence of self-defense, when considered in connection with all the other evidence in the case, but raises a reasonable doubt as to defendant's guilt, or if it but raises a reasonable doubt of whether the defendant did or did not act in self-defense, then you should acquit him.[34]

§ 3076. Sufficiency of evidence as to whether killing accidental

You are instructed that if you entertain in your minds a doubt, reasonable as in these instructions defined, as to whether or not the killing of deceased was accidental or occasioned by misfortune in the doing of a lawful act by lawful means with usual and ordinary care and caution and without any unlawful intent, then it is your duty to resolve said doubt in favor of the defendant, and return a verdict of not guilty.[36]

§ 3077. Sufficiency of evidence on issue of insanity of accused

§ 3077(1). Illinois

The jury are instructed that to warrant a conviction in this case it is incumbent on the people to establish by evidence, to the satisfaction of the jury, beyond all reasonable doubt, the existence of every element necessary to constitute the crime charged. And if, after a careful and impartial examination of all the evidence in the case bearing upon the question of sanity or insanity, the jury entertain any reasonable doubt of the sanity of the defendant at the time of the alleged offense, they should give the defendant the benefit of that doubt, and acquit him.[37]

The court instructs the jury, as a matter of law in this case, that in all criminal cases, before conviction can be had, the jury must be satisfied from the evidence, beyond a reasonable doubt, that the defendant is guilty in manner and form as charged in the indictment; and in order to sustain the defense of insanity it is not necessary that the insanity of the accused be established by a preponderance of evidence. If, upon the whole evidence, they entertain a reasonable doubt as to the sanity of the accused, they must give him the benefit of such doubt and acquit him.[38]

[34] State v. Harris, 199 P. 145.

[36] Kent v. State, 126 P. 1040, 8 Okl. Cr. 188.

[37] Dacey v. People, 6 N. E. 165, 116 Ill. 555.

[38] Dacey v. People, 6 N. E. 165, 116 Ill. 555.

§ 3077(2). Indiana

The jury are instructed that the law presumes that a man is of sound mind until there is some evidence to the contrary. In prosecutions for offenses against the Criminal Code, an accused is entitled to an acquittal, if the evidence engenders a reasonable doubt as to his mental capacity at the time the alleged offense is charged to have been committed. Evidence rebutting or tending to rebut the presumption of sanity need not, to entitle the defendant to an acquittal, preponderate in favor of the accused. It will be sufficient if it raise in your minds a reasonable doubt.[39]

§ 3077(3). Louisiana

The jury are instructed that where insanity is set up as a defense for homicide, it must be established by the defendant to the satisfaction of the jury. In order to overcome the presumption of sanity, and shield the defendant from legal responsibility, when he relies upon his insanity as an excuse for his criminal act, he must establish such insanity to the satisfaction of the jury, by a preponderance of the whole evidence in the case.[40]

§ 3077(4). Michigan

The jury are instructed that it is incumbent upon the people to prove beyond a reasonable doubt the criminal intent with which the fatal shot was fired, and the respondent's mental capacity for forming an intent to commit the alleged crime. If, from all the evidence in the case, you cannot say you have a moral certainty that on the night of the shooting the respondent's mind and discretion was sufficient for him to form a rational intent to kill, then respondent's guilt has not been proved to you beyond a reasonable doubt, and you should acquit.[41]

The jury are instructed that if, from all the evidence in this case, you are not convinced beyond a reasonable doubt that on the night of the shooting the respondent was of sound mind and discretion, and was capable of forming a criminal intent, you should acquit.[42]

§ 3077(5). Missouri

You are instructed that, to establish insanity as a defense, positive or direct testimony is not required, nor is it necessary to establish this defense beyond a reasonable doubt. It is sufficient if the jury is reasonably satisfied by the weight or preponderance of the testimony that the accused was, at the time he committed the act, incapable of distinguishing between right and wrong.[43]

[39] Guetig v. State, 66 Ind. 94, 32 Am. Rep. 99.

[40] State v. Lyons, 37 So. 890, 113 La. 959.

[41] People v. Muste, 100 N. W. 455, 137 Mich. 216.

[42] People v. Muste, 100 N. W. 455, 137 Mich. 216.

[43] State v. Porter, 111 S. W. 529, 213 Mo. 43, 127 Am. St. Rep. 539.

The jury are instructed that the plea of insanity or imbecility of mind is a lawful one in this case, and, to establish the insanity or imbecility of the defendant, positive and direct proof of it is not required by law, and to entitle him to an acquittal by reason of his mental insanity or imbecility of any character circumstantial evidence which reasonably satisfies your minds of its existence is sufficient.[44]

§ 3077(6). Oklahoma

You are instructed that the defendant has interposed as one of her defenses in this case the defense of insanity. When that defense is interposed, the burden of proof is upon the defendant, unless the evidence on the part of the state be sufficient for that purpose, to introduce sufficient evidence to raise in your minds a reasonable doubt of her sanity. It is not required that the defendant shall prove her insanity to the satisfaction of the jury by competent evidence beyond a reasonable doubt, or by a preponderance of the evidence. It is sufficient if she introduce sufficient evidence to raise in your minds a reasonable doubt of her sanity, and when this is done you are instructed that the burden of proof is upon the state to prove such a state of sanity on the part of the defendant as would make her criminally liable by competent evidence, beyond a reasonable doubt, before you would be justified in convicting the defendant of the crime charged in the information.[45]

§ 3078. Effect of confession

§ 3078(1). Arkansas

You are instructed that, although you may find from the evidence that the defendant admitted to the officers and others that she intended to kill ——— when she shot at him, still you cannot convict her of assault with intent to kill on this confession, unless you further find it is accompanied with other proof that such offense was committed.[46]

§ 3078(2). Florida

The jury are instructed that the corpus delicti can be established by circumstantial evidence, provided it is sufficient to convince the jury to the exclusion of every reasonable doubt, but it cannot be proved by the confession standing alone. But if the confession, taken in connection with all the circumstances in the case, convinces you, to the exclusion of every reasonable doubt, that ——— is dead; that he died by criminal violence; that the defendant unlawfully killed him, from a premeditated design to effect the said ———'s death; that it was done in

[44] State v. Palmer, 61 S. W. 651, 161 Mo. 152.

[45] Roe v. State (Cr. App.) 191 P. 1048.

[46] Davis v. State, 173 S. W. 829, 115 Ark. 566.

said county or ——— before the finding of the indictment herein—then it would be your duty to find the defendant guilty of murder in the first degree, as charged in the indictment in this case.[47]

§ 3079. Circumstantial evidence

You are instructed that the prosecution claim that the evidence in this case is made up of a chain of circumstances and facts, or links, so connected together that they lead up with all reasonable certainty to the defendant's guilt. Gentlemen, I charge you that, in order to convict the defendant upon this class of evidence, you must be satisfied beyond a reasonable doubt that each material fact, or necessary link, in the chain, has been proven, and, if you have any reasonable doubt about any one of the material facts, or links, constituting the chain of circumstances, then you should acquit the defendant. To illustrate, the first material fact or link is death. That is not disputed. Second, death by violence by the hands of some person. That is disputed. Third, death by violence by the hand of the defendant. That is denied by the defendant. If you have any doubt of whether or not the defendant inflicted any blow on the deceased, then it is your duty to acquit him. If you have any doubt that the blow claimed to have been inflicted by the defendant was the sole cause of the death of the deceased, it is still your duty to acquit him.[48]

§ 3080. Effect of reasonable doubt as to degree of offense or character of admitted or established homicide

§ 3080(1). Colorado

The court instructs the jury that if they have a reasonable doubt as to whether the defendant is guilty of manslaughter, or whether he struck the blow in self-defense, the defendant has the right to the benefit of such doubt, and the jury should acquit.[49]

§ 3080(2). Kentucky

The jury are instructed that, if the jury believe from the evidence beyond a reasonable doubt that defendant is guilty of murder as set out in instruction No. ———, or No. ———, or is guilty of manslaughter, as set out in instructions No. ———, or No. ———, but have a reasonable doubt of which offense he is guilty, murder or manslaughter, it will find him guilty of the lesser offense, manslaughter, and fix his punishment as directed in instruction No. ———.[50]

You are instructed that, if you shall believe from the evidence

[47] Holland v. State, 22 So. 298, 39 Fla. 178.

[48] People v. McArron, 79 N. W. 944, 121 Mich. 1. See People v. Stewart (Mich.) 42 N. W. 662.

[49] May v. People, 6 P. 816, 8 Colo. 210.

[50] Biggs v. Commonwealth, 175 S. W. 379, 164 Ky. 223, Ann. Cas. 1916A, 1096.

beyond a reasonable doubt that the defendant has been proven guilty either of willful murder as defined by instruction No. ——— above, or of voluntary manslaughter as defined by instruction No. ——— above, but shall have a reasonable doubt from all the evidence as to whether the defendant be guilty of willful murder or of voluntary manslaughter, then you ought to find him guilty of the lower offense, voluntary manslaughter.[51]

You are instructed that if you believe from the evidence, beyond a reasonable doubt, that the defendant has been proven guilty under instruction No. ——— or No. ———, yet entertain a reasonable doubt as to the degree of the offense, then you will find him guilty of voluntary manslaughter, and fix his punishment at confinement in the penitentiary for a term of not less than ——— nor more than ——— years.[52]

You are instructed that, if you have a reasonable doubt from the evidence of the defendant having been proven guilty, you will find him not guilty. Or, if you believe from the evidence beyond a reasonable doubt that he has been proved guilty, but have a reasonable doubt from the evidence as to whether he has been proved guilty of willful murder as charged in the indictment herein, or of the lower offense, voluntary manslaughter, included in the indictment herein, you will find him guilty of such lower offense, voluntary manslaughter, and fix his punishment as stated in instruction No. ——— above, for voluntary manslaughter.[53]

You are instructed that, although the jury may believe from the evidence beyond a reasonable doubt that the defendant shot and killed deceased, yet if you have a reasonable doubt as to whether the defendant has been proved guilty of willful murder, as defined in instruction No. ———, or voluntary manslaughter, as defined in instruction No. ———, you should find the defendant guilty of the crime of voluntary manslaughter and fix his punishment as defined in instruction No. ———.[54]

You are instructed that, although you may believe from the evidence beyond a reasonable doubt that the defendant has been proved guilty, yet, if you entertain a doubt as to the degree of her guilt, you should give her the benefit of the doubt, and find her guilty of voluntary manslaughter, as defined in instruction No. ———.[55]

The jury are instructed that, if the jury believe from the evidence beyond a reasonable doubt that the defendant has been proved

[51] Carnes v. Commonwealth, 142 S. W. 728, 146 Ky. 425.

[52] Gordon v. Commonwealth, 124 S. W. 806, 136 Ky. 508.

[53] Burns v. Commonwealth, 124 S. W. 409, 136 Ky. 468. See Gambrell v. Commonwealth, 113 S. W. 476, 130 Ky. 513.

[54] Keeton v. Commonwealth, 108 S. W. 315.

[55] Steely v. Commonwealth, 112 S. W. 655, 129 Ky. 524.

guilty of murder or voluntary manslaughter, but have from the evidence a reasonable doubt as to which of said crimes, if either, he is guilty of, they should, in that event, find him guilty of voluntary manslaughter.[56]

§ 3080(3). Mississippi

The court instructs the jury that although they may believe from the evidence, beyond a reasonable doubt, that defendant did willfully kill deceased, not in necessary self-defense, yet if a reasonable doubt arises from the evidence whether the killing was pursuant to a premeditated design or from sudden heat of passion aroused by defendant being shot at by deceased, then the jury should only find defendant guilty of manslaughter, and not murder.[57]

§ 3080(4). Missouri

The jury are instructed that, if you believe from all the evidence in the case beyond a reasonable doubt that the defendant is guilty of murder in the first degree or second degree, as these offenses have been defined in these instructions, but have a doubt as to the degree of offense of which the defendant is guilty, the jury will give him the benefit of such doubt and find him guilty of the lesser offense.[58]

§ 3080(5). Oklahoma

You are instructed that if from the evidence you are satisfied beyond a reasonable doubt that the defendant is guilty of murder or of manslaughter in the first degree, but have a reasonable doubt as to which of said offenses he is guilty, then you must give him the benefit of the doubt, and not find him guilty of a higher offense than manslaughter in the first degree.[59]

§ 3080(6). Texas

You are instructed that if you have a reasonable doubt as to whether the killing was accidental or not, you will give the defendant the benefit of such doubt and acquit him. If you believe that the defendant killed the deceased, but have a reasonable doubt as to whether or not he intended to kill him, or whether the defendant knew at the time that he drew the gun on the deceased, if he did so, that the gun was loaded, or that the gun was cocked, you will give the defendant the benefit of such doubt and acquit him.[60]

You are instructed that if you have in your minds a reasonable doubt as to whether the defendant is guilty of murder in the first degree, you will find him not guilty of that offense. Then, if you

[56] Watkins v. Commonwealth, 97 S. W. 740, 123 Ky. 817.

[57] Beasley v. State, 8 So. 234, 64 Miss. 518.

[58] State v. Anderson, 86 Mo. 309.

[59] Brantley v. State, 175 P. 51, 15 Okl. Cr. 6.

[60] Windham v. State, 173 S. W. 661, 76 Tex. Cr. R. 209.

have in your minds a reasonable doubt as to whether he is guilty of murder in the second degree, you will find him not guilty of that offense. And if you have in your minds a reasonable doubt as to whether or not he is guilty of negligent homicide in the first degree, or negligent homicide in the second degree, then you will acquit him and say by your verdict, "Not guilty."[61]

You are instructed that if, from the evidence you believe beyond a reasonable doubt that the defendant is guilty of some degree of murder, but have a reasonable doubt as to whether the killing was committed upon express or implied malice, then you must give the defendant the benefit of the doubt, and in such case, if you find defendant guilty, it could not be of a higher grade of offense than murder in the second degree. If from the evidence you believe beyond a reasonable doubt that defendant is guilty of some grade of culpable homicide, but have a reasonable doubt whether the offense, if any, is murder in the second degree or manslaughter, you must give him the benefit of the doubt, and, if you find him guilty, it could not be of a higher grade of offense than manslaughter. If from the evidence you have a reasonable doubt that defendant is guilty of manslaughter, find him not guilty.[62]

The jury are instructed that, if from the evidence you are satisfied beyond a reasonable that the defendant is guilty of murder, but have a reasonable doubt whether it was committed upon express or implied malice, then you must give the defendant the benefit of such doubt, and not find him guilty of a higher grade than murder in the second degree, if from the evidence you believe he is guilty of any offense.[63]

You are instructed that, should you believe that the said pistol was discharged by the defendant, but have a reasonable doubt as to whether the same was discharged accidentally, you will find the defendant not guilty.[64]

§ 3081. Effect of reasonable doubt as to aiding and abetting by defendant

§ 3081(1). Alabama

The court charges the jury that even if you find from the evidence that defendant and his associates acted illegally and maliciously in what they did, with the same end in view, yet, unless you are satisfied from the evidence beyond a reasonable doubt, and to a moral certainty, that their acts were done pursuant to a mutual agreement, you should not convict the defendant, unless you believe from the evidence beyond a reasonable doubt, and to a moral cer-

[61] Hill v. State, 168 S. W. 864, 74 Tex. Cr. R. 481.

[62] Alexander v. State, 138 S. W. 721, 63 Tex. Cr. R. 102.

[63] Mingo v. State, 133 S. W. 882, 61 Tex. Cr. R. 14.

[64] Alvarez v. State (Cr. App.) 55 S. W. 1013.

tainty, that defendant inflicted the fatal wound, or aided and abetted whoever did inflict it; and if you have a reasonable doubt of defendant's guilt, under the rules above stated, you should acquit the defendant.[65]

§ 3081(2). California

The court instructs the jury that, if there exists in your minds a reasonable doubt as to whether the defendant shot and killed the deceased, then you shall find defendant not guilty, unless you are convinced from the evidence to a moral certainty and beyond a reasonable doubt that the defendant aided and abetted, or advised and encouraged another in the commission of the crime. In this connection you are instructed if you believe from the evidence that the deceased was unlawfully killed by ———, and there exists in your minds a reasonable doubt as to whether the defendant aided and abetted, or advised and encouraged the commission of the crime, then your verdict must be not guilty.[66]

K. Form of Verdict and Punishment

§ 3082. Form of verdict

§ 3082(1). United States

In concluding this charge, your attention is directed to the form of verdict which you may return. In cases of this character the law mercifully provides that, "when the accused is found guilty of the crime of murder, the jury may qualify their verdict by adding thereto, 'without capital punishment'; and whenever the jury shall return a verdict qualified as aforesaid, the person convicted shall be sentenced to imprisonment at hard labor for life." Hence, if you find the defendant guilty of murder, and wish to add the qualification mentioned to your verdict, you will return it in the following form: "We, the jury, find the defendant, ———, guilty of murder, as charged in the indictment, without capital punishment." If, however, you do not wish to add the qualifying words, "without capital punishment," your verdict should be simply: "We, the jury, find the defendant, ———, guilty of murder, as charged in the indictment." Under the latter form of verdict, the death penalty necessarily attaches. If you conclude that the defendant is not guilty of murder, but is guilty of manslaughter, your verdict should be as follows: "We, the jury, find the defendant, ———, not guilty of murder, but guilty of manslaughter." And, if you find that he is not guilty of either offense, murder or man-

[65] Liner v. State, 27 So. 438, 124 Ala. 1.

[66] People v. Verduzco, 110 P. 970, 13 Cal. App. 789.

slaughter, you will say: "We, the jury, find the defendant not guilty." [67]

§ 3082(2). Colorado

You are instructed that if you find the defendant guilty, and also find that the homicide was deliberate and premeditated, the form of your verdict will be: "We, the jury, find the defendant guilty in manner and form as he is charged in the indictment, and we find that the killing was deliberate and premeditated." If you find that the defendant is guilty of murder, but do not find or indicate that the killing was committed with deliberation or premeditation, the form of your verdict will be: "We, the jury, find the defendant guilty in manner and form as he is charged in the indictment." [68]

You are instructed that, if you find the defendant guilty of manslaughter, the form of your verdict will be: "We, the jury, find the defendant guilty of manslaughter." If your verdict is in favor of the defendant, its form will be: "We, the jury, find the defendant not guilty." And, in either case, your verdict will be signed by one of your number as foreman.[69]

§ 3082(3). Missouri

The court instructs the jury that, if they find the defendant guilty, their verdict may be in the following form: "We, the jury, find the defendant guilty of murder in the first degree, in manner and form as charged in the indictment." [70]

§ 3082(4). South Carolina

You are instructed that, if you find the defendant guilty as charged, the form of your verdict will be as follows: If you find the defendant guilty of murder, "We find the defendant guilty of murder," and sign your name as foreman. If you find him guilty of murder, and if you find there are extenuating circumstances and wish to recommend him to the mercy of the court, "We find him guilty of murder and recommend him to the mercy of the court." A verdict of "guilty" without recommendation will mean that he is to suffer death by electrocution. With recommendation to the mercy of the court will of itself change the penalty from electrocution to life imprisonment. If you find the killing was felonious, but not a malicious killing, done in sudden heat and passion upon sufficient legal provocation, the form of your verdict will be, "We find the defendant guilty of manslaughter," the punishment for which is from ——— to ——— years in the discretion of the court

[67] United States v. Lewis (C. C. Tex.) 111 F. 630.

[68] May v. People, 6 P. 816, 8 Colo. 210.

[69] May v. People, 6 P. 816, 8 Colo. 210.

[70] State v. Howell, 23 S. W. 263, 117 Mo. 307.

—for not longer than ——— years and not less than ——— years. If you find either that his plea of self-defense is well-founded, that he has established it not beyond a reasonable doubt, but by the greater weight of the evidence, find him not guilty.[71]

§ 3083. Same—Where defense of insanity is set up

You are instructed that, if you find from the evidence that the defendant is not guilty otherwise than on the ground of insanity, the form of the verdict will be: "We, the jury, find the defendant not guilty. ———, Foreman." If you find the defendant not guilty on the ground of insanity or imbecility, and that he is insane at the present time, the form of the verdict will be: "We, the jury, find the defendant not guilty, on the ground of insanity, and we further find that he has not recovered from such insanity. ———, Foreman." If you find the defendant not guilty on the ground of insanity, and that he has recovered from such insanity, the form of the verdict will be: "We, the jury, find the defendant not guilty on the ground of insanity, and we further find that he has recovered from such insanity. ———, Foreman." [72]

The court instructs the jury that if they find the defendant not guilty, on the ground that he was insane at the time of the commission of the homicide charged, they will so state in their verdict, and they will also state whether the defendant has entirely and permanently recovered from such insanity.[73]

§ 3084. Province of jury in determining punishment

§ 3084(1). California

The court instructs you that if the jury in this case should find the defendant guilty of murder in the first degree, and they also shall find the further fact that there is some extenuating fact or circumstance in the case, it is within their discretion to pronounce such a sentence as will relieve the defendant from the extreme penalty of the law. The Penal Code invests a jury in a criminal case for murder with this discretion, but the discretion is not an arbitrary one, and is limited to determining which of two punishments shall be inflicted, and is to be employed only when the jury is satisfied that the lighter penalty should be imposed. If the evidence shows the defendant to be guilty of murder in the first degree, but does not show some extenuating fact or circumstance, it is the duty of the jury to find a simple verdict of murder in the first degree, and leave with the law the responsibility of affixing the punishment.[74]

[71] State v. Hardin, 103 S. E. 557, 114 S. C. 280.

[72] State v. Palmer, 61 S. W. 651, 161 Mo. 152.

[73] State v. Duestrow, 38 S. W. 554, 137 Mo. 44.

[74] People v. Rogers, 126 P. 143, 163 Cal. 476.

The court instructs the jury that, if you believe from the evidence beyond a reasonable doubt that the defendant, in ——— county, and before the finding of the indictment, did willfully, feloniously, and of his malice aforethought, not in his necessary or reasonably apparent necessary self-defense, shoot and kill ———, you should find him guilty of willful murder as charged in the indictment, and fix his punishment at death or at confinement in the state penitentiary for life, in your discretion.[75]

§ 3084(2). Kentucky

You are instructed that, if you find the defendant guilty of willful murder, as charged in the indictment herein, you will fix his punishment at death or confinement in the penitentiary of this state for life, in your discretion according to the proof. If you find the defendant guilty of voluntary manslaughter included in the indictment herein, you will fix his punishment at confinement in the penitentiary of this state for a period of not less than ——— nor more than ——— years, in your discretion according to the proof. If you find the defendant not guilty, you will say so, and no more.[76]

The jury are instructed that, if you find the defendant guilty of willful murder, either under the second or third instructions, you will fix his punishment at death, or at confinement in the state penitentiary for life, in your discretion, according to the proof. If you find the defendant guilty of voluntary manslaughter, under either the second or third instructions, you will fix his punishment at confinement in the state penitentiary for a period of not less than ——— nor more than ——— years, in your discretion, according to the proof. If you find him not guilty, you will say so, and no more.[77]

§ 3084(3). Oklahoma

The court instructs the jury that the punishment fixed by law for the offense of murder is death, or imprisonment in the state prison for life, in the discretion of the jury. The punishment for manslaughter in the first degree is imprisonment in the state prison for any term not less than ——— years.[78]

§ 3085. Specifying degree of offense and assessing punishment

The court instructs the jury that if you find the defendant guilty of murder or of manslaughter in the first degree, you will state in your verdict of which offense you so find him guilty, and you may, if you see fit, assess his punishment therefor, as such punishment

[75] Taylor v. Commonwealth, 188 S. W. 1087, 172 Ky. 136.

[76] Burns v. Commonwealth, 124 S. W. 409, 136 Ky. 468.

[77] Gambrell v. Commonwealth, 113 S. W. 476, 130 Ky. 513.

[78] Brantley v. State, 175 P. 51, 15 Okl. Cr. 6.

is stated in paragraph No. ——— of these instructions. If you find a verdict of guilty of either of said offenses, and fail to agree on the punishment therefor, then simply say by your verdict that you find the defendant guilty, naming the offense, and that you leave the punishment to be fixed by the court, except if you find him guilty of murder, then the jury must fix the punishment.[79]

[79] Brantley v. State, 175 P. 51, 15 Okl. Cr. 6.

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